For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

PETER R. NAJAWICZ, Appellant/Defendant, v. **PEOPLE OF THE VIRGIN ISLANDS,** Appellee/Plaintiff.	**S. Ct. Crim. No. 2019-0098** Re: Super. Ct. Crim. No. 425/2008 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas-St. John
Superior Court Judge: Hon. Michael C. Dunston

Argued: October 12, 2021
Filed: February 24, 2022

Cite as: 2022 VI 4

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **CURTIS V. GOMEZ**, Designated Justice.[1]

APPEARANCES:

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OPINION OF THE COURT

HODGE, Chief Justice.

[1] The Honorable Ive Arlington Swan is recused from this matter. The Honorable Curtis V. Gomez, a former judge of the United States District Court of the Virgin Islands, sits by designation pursuant to title 4, section 24 of the Virgin Islands Code.

¶ 1 Appellant Peter R. Najawicz appeals from the Superior Court's January 9, 2020 judgment and commitment, which adjudicated him guilty of numerous offenses stemming from his employment at the Roy L. Schneider Hospital ("RLSH"). For the reasons that follow, we affirm Najawicz's convictions for violation of the certifying officer statute, 33 V.I.C. § 3404, but reverse all other convictions due to the People's failure to support them with sufficient evidence. This case will be remanded for resentencing.

I. BACKGROUND

¶ 2 In 2002, the St. Thomas-St. John District Governing Board of the Virgin Islands Government Hospitals and Health Facilities Corporation hired Rodney E. Miller, Sr. as the Chief Executive Officer of RLSH. In 2004, the District Governing Board appointed Najawicz as the RLSH's Chief Financial Officer, and he commenced his employment on April 19, 2004. Miller executed an agreement with Najawicz providing him with an annual stipend that exceeded his salary, as well as various other incentives and perquisites, as Miller had done previously with Amos W. Carty, Jr., who served as the RLSH's General Counsel and Chief Operating Officer. Although Miller, Carty, and Najawicz had their salaries processed by the Executive Branch through its Department of Finance, their stipends and bonuses were paid from a separate RLSH account and were not reflected on the Notice of Personnel Action ("NOPA") form maintained by the Executive Branch.

¶ 3 In advance of Miller's employment contract expiring, the District Governing Board—now led by June A. Adams, who succeeded Beverly Chongasing as Chair—established a Compensation Committee and retained a consulting firm to recommend a salary and benefits package. On May 14, 2005, Miller and Adams signed a new two-year contract. However, in a letter dated June 21, 2005, Adams proposed new terms, apparently in response to ongoing negotiations between the

RLSH and Miller, which Miller accepted. In September 2005, Miller and Adams signed another contract, backdated to May 14, 2005, which incorporated the terms of the June 21, 2005 agreement, as well as various other terms. While all three documents were signed by Adams in her capacity as Chair of the Board, the record contains no evidence that the District Governing Board held a formal vote to ratify any of these agreements. Nevertheless, Najawicz, as Chief Financial Officer, disbursed payments purportedly pursuant to those agreements.

¶ 4 Over the next two years, Miller received various payments pursuant to these agreements, which were distributed directly to him by Najawicz from RLSH accounts rather than through payroll processed by the Department of Finance. Moreover, in February 2006, Najawicz received permission from Miller to "write-off" a $10,768 debt Carty owed to RLSH, in the form of an unpaid salary advance.

¶ 5 At an unspecified point between May 17, 2007, and August 13, 2007, Miller and Adams executed another new contract for Miller to remain as Chief Executive Officer. Again, the compensation provided to Miller under this agreement exceeded the salary on his NOPA form, and such excess compensation was paid from RLSH accounts rather than through the payroll process conducted by the Department of Finance. As with the 2005 agreement, the District Governing Board never held a vote to approve the 2007 agreement. Again, Najawicz, as Chief Financial Officer, disbursed payments to Miller purportedly pursuant to that agreement.

¶ 6 Despite signing the 2007 agreement, on September 19, 2007, Miller announced that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. The District Governing Board appointed Carty to succeed him effective November 5, 2007. During this period, Miller received multiple payments to his personal account from RLSH accounts, totaling nearly $1.8 million, purportedly pursuant to his 2005 and 2007 agreements.

¶ 7 During Carty's tenure as Chief Executive Office, the Virgin Islands Office of Inspector General conducted an audit of the RLSH's finances. The Inspector General issued its final report on July 28, 2008, identifying numerous instances where it concluded that payments to Miller, Carty, and Najawicz were made without authorization or were excessive. The District Governing Board terminated Carty as Chief Executive Officer on August 5, 2008, and terminated Najawicz's employment in September 2008.

¶ 8 On October 6, 2008, the People charged Carty, Miller and Najawicz with numerous offenses stemming from their tenure with the RLSH. After more than a decade of proceedings, including a trial that resulted in a mistrial, a six-week jury trial commenced on October 9, 2019, and concluded on November 14, 2019. Ultimately, the jury found all the defendants guilty of all charges, totaling 44 counts between them.

¶ 9 The Superior Court held a forfeiture and sentencing hearing on December 13, 2019. At the conclusion of the hearing, the Superior Court orally sentenced all the defendants. The Superior Court dismissed several convictions pursuant to title 14, section 104 of the Virgin Islands Code, and with respect to the remaining convictions sentenced him to a combined period of one year of incarceration and ordered certain collateral consequences, such as forfeiture of certain funds and disqualification from public office. The Superior Court memorialized its oral decision in a January 2, 2020 special verdict and order of forfeiture and a January 9, 2020 judgment and commitment. Najawicz timely filed a notice of appeal with this Court on December 23, 2020. *See* V.I. R. APP. P. 5(b)(1).

II. DISCUSSION

A. Jurisdiction and Standard of Review

¶ 10 Pursuant to the Revised Organic Act of 1954, this Court has appellate jurisdiction over "all

appeals from the decisions of the courts of the Virgin Islands established by local law[.]" 48 U.S.C. § 1613a(d). Title 4, section 32(a) of the Virgin Islands Code vests this Court with jurisdiction over "all appeals arising from final judgments, final decrees, [and] final orders of the Superior Court." Because the Superior Court's January 9, 2020 judgment and commitment resolved all of the charges presented in the People's seventh amended information, it is a final judgment under section 32(a). *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 578 (V.I. 2012); *see also* 48 U.S.C. § 1613a(d).

¶ 11 This Court exercises plenary review over all questions of law, including the sufficiency of the evidence. *Brathwaite v. People*, 60 V.I. 419, 426 (V.I 2014).

B. Sufficiency of the Evidence

¶ 12 Najawicz challenges the sufficiency of the evidence for all his remaining convictions. Each conviction is addressed in turn. However, given the nature of the charged conduct, we first consider the legal framework that governed the operations of public hospitals during the pertinent period.

1. The Virgin Islands Government Hospitals and Health Facilities Corporation

¶ 13 Between 1986 and 1994, the RLSH, along with other medical facilities, was owned and operated by the Government of the Virgin Islands, through two Government Hospital Facilities Boards, one on St. Croix and one on St. Thomas and St. John, which were established within the Department of Health. *See Governor Juan F. Luis Hosp. & Medical Ctr. v. Titan Medical Group, LLC*, 69 V.I. 873, 880 (V.I. 2018). In 1994, the Legislature, dissatisfied with the separate facilities boards within the Department of Health, *see* 19 V.I.C. § 240(d), enacted Act No. 6012 to dissolve those boards and replace them with the Virgin Islands Government Hospitals and Health Facilities Corporation (hereafter the "Corporation"). Act No. 6012 identified the Corporation as "a body

corporate and politic constituting a public health corporation of the Government of the Virgin Islands," and vested it with "those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 14 Act No. 6012 also set forth the purposes of the Corporation. In addition to providing quality and comprehensive health care, "attain[ing] grater self-sufficiency in health care delivery through enhanced collection of health care costs," "demonstrat[ing] through fiscal responsibility and efficient management its ability to effectively operate the territorial health care delivery system," and "maintain[ing] a partnership with the V.I. government for as long as a significant portion of the cost of health care delivery constitutes uncompensated care" were all identified as express purposes of the Corporation. 19 V.I.C. § 242.

¶ 15 Consistent with the description of its relationship with the Government as a "partnership," Act No. 6012 granted the Corporation significant independence from the Executive Branch. The Corporation was authorized to employ its own legal counsel, *see* 19 V.I.C. § 245(d), and to establish and maintain its own personnel administration system based on merit principles separate from that utilized for the Executive Branch, *see* 19 V.I.C. § 245(e)(1). The Government was directed to "continue to include in its Executive Budget Acts an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation," 19 V.I.C. § 245(b), and the Corporation was prohibited from "commit[ting] unappropriated Government funds," *see* 19 V.I.C. § 247(c). However, the Corporation was expressly authorized to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions," and the Legislature directed that "[r]evenues generated by each hospital and health facility under its jurisdiction shall be deposited in its account(s)." 19 V.I.C. § 261(a). Nevertheless, Act No. 6012

provided that "the Department of Finance shall continue to be responsible for the payrolls of [the hospitals] subject to the appropriation and allotment process," 19 V.I.C. § 261(b), and that "[a]ll deposits and disbursements from the accounts created herein shall comply with the appliable provisions of the Virgin Islands Code regarding the deposit and disbursements of funds from government bank accounts." 19 V.I.C. § 261(c).

¶ 16 At all times pertinent to this appeal,[2] the Corporation was administered by a 15-member Board of Directors, who were empowered to elect a chairman and other officers as it may deem appropriate, and which was required to meet not less than once a quarter. *See* 19 V.I.C. § 242(b), (e)-(f). However, the Corporation also "ha[d] two district governing boards, one for the District of St. Croix and one for the District of St. Thomas-St. John," consisting of nine members representing their respective district. 19 V.I.C. § 243(g).

¶ 17 Under this bifurcated governance system, the Board of Directors had the authority to "formulate and determine hospital policy and planning for health care delivery at the territorial level," including "coordinat[ing] hospital policy, planning and decisions between the two districts to ensure efficient and coordinated hospital policy direction between the districts." 19 V.I.C. § 243(j). The District Governing Boards, however, were given the authority to "formulate and determine hospital policy and planning for health care delivery for their respective districts consistent with the hospital policy and planning established by the Board of Directors for the Territory." *Id.* "In the event of a dispute between the District Boards, or between a District Board

[2] Effective December 30, 2020, the Legislature enacted Act No. 8438, which made several structural changes to the operation of the Corporation, including changing the composition of the Board of Directors and eliminating the district governing boards. Because the conduct at issue in this case all occurred between 2002 and 2008, all quotations and citations are to the version of the statute that was in effect prior to the amendments made by Act No. 8438.

and the Board of Directors, the Board of Directors [would] resolve the dispute by majority vote." *Id.*

¶ 18 Among the enumerated duties of the Corporation is the power to "manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government," 19 V.I.C. § 244(e), and to "make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). However, Act No. 6012 did not contemplate that the Board of Directors or the District Boards would directly manage the Territory's public hospitals. In fact, the Legislature expressly provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities." 19 V.I.C. § 243(j). Rather, the Legislature directed the "[t]he Board of Directors and the District Governing Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." *Id.*

¶ 19 To that end, the Corporation possessed the power to "employ and remove through the District Governing Boards the Chief Executive Officers." 19 V.I.C. § 244(h). Similarly, the Chief Executive Officer, serving "as the head of the hospital to which he is appointed," possessed the statutory duty to "appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board," and to "appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel" subject to various provisions of Virgin Islands law. 19 V.I.C. § 244a(a)-(b).

¶ 20 The Corporation was also given the express power to "adopt, alter, amend or repeal bylaws or rules or regulations for the organization, management, and regulation of its affairs consistent

with [its enabling statute] and all other applicable law." 19 V.I.C. § 244(c). The St. Thomas-St. John District Governing Board adopted such bylaws pursuant to this statutory grant of authority. Pursuant to Article VI, section 8(a) of those bylaws,

> The Chairperson [of the District Governing Board] shall be the official head of the Board and shall have general care, supervision, and direction of its affairs, subject to the authority of the Board. He/she shall be responsible for carrying into effect the policies, programs, and resolutions approved or adopted by the Board, for the conduct and management of the affairs of the Board, for coordinating all phases of its professional and business activities, and for directing the preparation of the annual operating plans and longer term objectives of the Board. Subject to his/her overall executive control, he/she shall delegate operating management functions and medical functions to appropriate officers, appointees, agents and employees of the Hospital.

(J.A. 3267.) In addition, section 8(c) of Article VI authorized the Chairperson to appoint all Standing and Special Committees subject to the approval of the Board, while section 8(d) provided that

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) With respect to such legal instruments, section 10(b) granted the Treasurer of the Board to sell securities and take certain other specified actions in the name of the Board. Article XVI provided further guidance on execution of such instruments, providing that

> In the absence of any action by the Board, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to execute and deliver any and all instruments, except to the extent otherwise required by law in the case of the purchase, sale, mortgage, or lease of real property.

(J.A. 3294.)

¶ 21 Article V, section 5(j)-(l) of the bylaws also addressed the relationship between the Chief Executive Officer and the District Governing Board, including delegating several duties of the

District Governing Board to the Chief Executive Office:

> (j) The Board shall appoint a full-time Chief Executive Officer, who shall be continuously responsible for the management of the Hospital, commensurate with the authority conferred upon him by the Board and consistent with its expressed aims and policies.
>
> (k) The Board shall, through the Chief Executive Officer, take all reasonable steps to conform to all applicable federal and local laws, ordinances, codes and regulations, including but not limited to licensure, fire inspection and other safety measures.
>
> (l) The Board shall, through the Chief Executive Officer, provide for control and use of the physical and financial resources of the Hospital.

(J.A. 3264-65.) And while Article VII, section 10 of the bylaws provides for the Executive Committee of the District Governing Board—whose members include the Chairperson—to "cooperate and consult" with the Chief Executive Officer with respect to matters such as appointments and salary levels, it expressly provides that "[n]o individual member of the Committee shall have any veto power over decisions of Chief Executive Officer." (J.A. 3274.)

¶ 22 Article VIII of the bylaws, titled "Chief Executive Officer," further delineates the duties of the Chief Executive Officer and that position's relationship with the District Governing Board. Section 1 of Article VIII reiterates that the Chief Executive Officer is selected and appointed by the Board, while section 2(a) provides that the Chief Executive Officer shall "receive such compensation, as the Board shall determine." (J.A. 3280.)

2. No Deference to the Jury on Pure Questions of Law

¶ 23 Ordinarily, when reviewing a challenge to the sufficiency of the evidence supporting a conviction, this Court views all issues of credibility in the light most favorable to the People. *Latalladi v. People*, 51 V.I. 137, 145 (V.I. 2009). If "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," this Court will affirm. *DeSilvia v.*

People, 55 V.I. 859, 865 (V.I. 2011) (quoting *Mendoza v. People*, 55 V.I. 660, 667 (V.I. 2011)). The evidence offered in support of a conviction "need not be inconsistent with every conclusion save that of guilt, so long as it establishes a case from which a jury could find the defendant guilty beyond a reasonable doubt." *Mulley v. People*, 51 V.I. 404, 409 (V.I. 2009) (quoting *United States v. Carr*, 25 F.3d 1194, 1201 (3d Cir. 1996)). A defendant seeking to overturn his conviction on this basis thus bears "a very heavy burden." *Latalladi*, 51 V.I. at 145 (quoting *United States v. Losada*, 674 F.2d 167, 173 (2d Cir. 1982)).

¶ 24 This extraordinary deference to the jury when assessing the sufficiency of the evidence is due to the well-established principle in the American criminal justice system that juries decide questions of fact while judges resolve questions of law. *See Sparf v. United States*, 156 U.S. 51, 100-03 (1895); *see also People v. Bruner*, 175 N.E. 400, 403-04 (Ill. 1931) ("The great preponderance of authority in the courts of the several states likewise denies that by the common law jurors in criminal cases are the judgers of law.") (collecting cases). This division of responsibilities between jury and judge is necessary to ensure due process and equal protection, for if juries were permitted to conclusively decide both the law and the facts "the result would be that the enforcement of the law against criminals, and the protection of citizens against unjust and groundless prosecutions, would depend entirely upon juries uncontrolled by any settled, fixed, legal principles," which "would bring confusion and uncertainty in the administration of the criminal law." *Sparf*, 156 U.S. at 101-02.

¶ 25 This necessary separation, however, did not occur in this case. Throughout trial, the jury heard substantial testimony on disputed issues of law, almost exclusively elicited by the People and largely relating to the legal relationship between the Corporation and the Executive Branch and the legal authority of the Chief Executive Officer, the Chief Financial Officer, the District

Governing Board, and the Board Chair. In fact, at one point the prosecution even read portions of the Virgin Islands Code to a lay witness—Kenneth Hermon—and asked him whether that language authorized the defendants to take the specific actions that formed the basis for the charged offenses. (Trial Tr. 10/10/19 at 101). Perhaps most significantly, the Superior Court seemingly believed these purely legal questions were properly before the jury, and during final jury instructions restated, sometimes verbatim, many of the pertinent provisions of Act No. 6012 without providing any instruction on what that language meant – in effect conveying to the jury that it was their responsibility to determine the law and decide for themselves how Act No. 6012 and other statutes and legal doctrines allocated the powers of the District Governing Board, the Board Chair, the Chief Executive Officer, and other employees vis-à-vis each other and the Executive Branch. But this contravenes the well-established principles that lay testimony offering a legal conclusion is generally not helpful to the jury and is thus usually inadmissible as evidence, *e.g.*, *United States v. Noel*, 581 F.3d 490, 496 (7th Cir. 2009), and that it is exclusively the role of the judge to instruct the jury on the applicable principles of law in a case. *United States v. Tartaglione*, 815 Fed. Appx. 648, 650 (3d Cir. 2020) (observing that "the articulation of governing law is within the sole province of the judge"); *Commodores Entm't Corp. v. McClary*, 879 F.3d 1114, 1128 (11th Cir. 2018) (admonishing that "the court must be the jury's only source of law"); *United States v. Milton*, 555 F.2d 1198, 1203 (5th Cir. 1977) (a "witness may not substitute for the court in charging the jury regarding the applicable law"). Accordingly, when assessing the sufficiency of the evidence on appeal in this case, the Court will not exacerbate the Superior Court's error, but instead comports with the proper allocation of authority between judge and jury deciding all questions of law independently without deferring to how the jury may or may not have interpreted the law.

3. Obtaining Money by False Pretenses

¶ 26 Counts 22, 23, and 34 of the seventh amended information charged Najawicz with obtaining money by false pretenses in violation of title 14, section 834(2) of the Virgin Islands Code. That statute provides, in pertinent part, that

> Whoever knowingly and designedly, by false or fraudulent representation or pretenses, defrauds any other person of money or property shall—
>
> . . . .
>
> (1) if such property or money was $100 or more in value, be imprisoned not more than 10 years.

In Counts 22 and 23, the People alleged that Najawicz defrauded the RLSH through, respectively, receipt of bonuses and stipends authorized by Miller which exceeded the salary listed on his NOPA form. In Count 34, the People alleged that Najawicz defrauded the RLSH "by fraudulently arranging the 'write-off' of a $10,000.00 debt owed by Amos Carty, Jr. to RLSH, without authority of law on the false pretenses that this debt was not collectable." (J.A. 1073.) Each act is addressed in turn.

a. Counts 22 and 23: Compensation Exceeding the Salary on the NOPA Form

¶ 27 The People maintain that Najawicz fraudulently obtained bonuses and stipend payments that he was not entitled to receive as compensation. First, the People contend that Miller, as Chief Executive Officer, lacked the authority to set Najawicz's compensation. Furthermore, the People assert that even if Miller could determine Najawicz's compensation, it was illegal for Najawicz to accept these payments from the RLSH account without having that compensation reflected on his NOPA form and paid by the Executive Branch through its payroll process. To determine whether these disbursements were lawful, it is necessary to again examine the structure, powers, and duties of the Corporation, as well as its relationship with the Executive Branch.

i. Authority of the Chief Executive Officer to Set Salaries for Subordinates

¶ 28 Act No. 6012 established the Corporation as a public corporation that possesses a substantial degree of autonomy and independence from the Executive Branch. The Legislature did so intentionally to divest the Department of Health of its direct administration of the territory's public hospitals. 19 V.I.C. § 240(d). In addition to granting the Corporation significant autonomy from the Executive Branch, Act No. 6012 provides each hospital's Chief Executive Officer and staff with considerable independence from both the Corporation's Board of Directors as well as its District Governing Board. While each District Governing Board possesses the statutory authority to "employ and remove" a Chief Executive Officer, *see* 19 V.I.C. § 244(h), the Legislature expressly and unambiguously provided that "[n]o Board member or District Board member shall become involved in the day-to-day management operations of the hospitals or health care facilities" and instead directed the "[t]he Board of Directors and the District Governing Boards [to] delegate management operations to the appropriate staff and hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 29 Title 19, section 244a of the Virgin Islands Code, at the time of all events pertinent to this appeal, read, in its entirety, as follows:

> The Chief Executive Officer shall serve as the head of the hospital to which he is appointed and shall:
>
> (a) appoint and remove the Medical Director, and the Chief Financial Officer with the advice and consent of the respective District Board;
>
> (b) appoint and remove all managerial personnel, health care providers and all other professional and nonprofessional personnel, subject to the provisions of Title 3, chapter 25, section 530 relating to procedures for employee dismissals, demotions and suspensions and 531 relating to the prohibition against discrimination on account of non-merit factors, the rules and regulations of the Corporation promulgated pursuant to section 245(e)(2) of this chapter, any collective bargaining agreements and subject to the V.I. Government's budget constraints and allotment process; and
>
> (c) with the assistance of the Chief Negotiator, negotiate all non-economic provisions of collective bargaining agreements which affect the management and operation of the hospital. The Chief Negotiator, in consultation with the Chief

> Executive Officers, shall negotiate all economic provisions of collective bargaining agreements which obligate the General Fund. All collective bargaining agreements shall be subject to the approval of the Governor. The Chief Executive Officers and the Chief Negotiator shall develop administrative policies and procedures to implement the provisions of this subsection.

At trial and in their appellate brief, the People place extraordinary emphasis on the fact that section 244a does not expressly state that the Chief Executive Officer may set the salaries for hospital employees. According to the People, the failure of the Legislature to enact a statute specifically stating that the Chief Executive Officer may do so means that the Chief Executive Officer lacks that authority. The People base this highly restrictive interpretation on a single sentence in title 19, section 243 of the Virgin Islands Code stating that the Corporation "shall have those powers and duties expressly provided by law and no others." 19 V.I.C. § 243(a).

¶ 30 The People have grossly misinterpreted the pertinent statutory provisions. Section 243(a), by its own terms, limits the power of the Corporation. As explained earlier, the Corporation is a complex organization where various authority is allocated internally—both through statutes and bylaws—between a Board of Directors, two District Governing Boards, and Chief Executive Officers and other managerial staff for each public hospital and health facility. Title 19, section 244 of the Virgin Islands Code, which delineates the powers of the Corporation, expressly provides that

> The V.I. Government Hospitals and Health Facilities Corporation shall have the power to:
>
> . . . .
>
> (d) make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes; [and]
>
> (e) manage, operate, superintend, control, and maintain the hospitals and health facilities of the Government of the Virgin Islands in partnership with the Government[.]

19 V.I.C. § 244(d)-(e). Unquestionably, these provisions vest the Corporation with the power to

determine the compensation of the employees hired to manage a hospital under its jurisdiction.

¶ 31 The question, then, is *who within the Corporation* is authorized to exercise the Corporation's power to set the compensation for hospital employees. While the People place great emphasis on the omission of the power to set salaries from the powers of the Chief Executive Officer delineated in section 244a, there is nothing in section 244a that provides that the Chief Executive Officer may only exercise the powers enumerated in that statute.

¶ 32 On the contrary, section 244a does not even appear to enumerate powers at all. The first sentence of the statute identifies the Chief Executive Officer as "the head of the hospital to which he is appointed." 19 V.I.C. § 244a. However, the enumerated list that follows does not grant powers to the Chief Executive Officer. Subsection (a) provides that the Chief Executive Officer may appoint and remove the Medical Director and Chief Financial Officer only with the advice and consent of the District Governing Board. Subsection (b) provides that the Chief Executive Officer may appoint and remove personnel subject to complying with numerous specific limitations in the Virgin Islands Code, such as the prohibition against discrimination on account of non-merit factors. Subsection (c) permits the Chief Executive Officer to negotiate the non-economic provisions of collective bargaining agreements, but only with the assistance of the Chief Negotiator, and for the Chief Negotiator to negotiate the economic provisions of collective bargaining agreements which obligate the General Fund in consultation with the Chief Executive Officer.[3] In other words, these are all affirmative limitations on powers that would otherwise be inherent to the position of Chief Executive Officer as "head of the hospital." 19 V.I.C. § 244a. As

[3] Notably, that the Chief Executive Officer lacks the power to unilaterally negotiate the economic provisions of collective bargaining agreements which obligate the General Fund would seem to imply that the Chief Executive Officer would have the power to unilaterally negotiate economic provisions in all other instances.

such, section 244a effectively provides that the Chief Executive Officer may exercise the powers stemming from his or her position as head of the RLSH, except for the enumerated situations where that power is restricted in some manner.

¶ 33 This construction of section 244a is also consistent with the overall statutory framework established by Act No. 6012. Since it is a power of the Corporation to enter into contracts for managerial personnel, that power must necessarily be exercised by someone within the Corporation. But Act No. 6012 expressly and unambiguously precludes the Board of Directors, the District Governing Boards, and individual Board members from participating in the day-to-day management operations of the hospitals, and mandates that they delegate such duties to "appropriate staff." 19 V.I.C. § 243(j). Since the Chief Executive Officer serves as "the head of the hospital," 19 V.I.C. § 244a, it stands to reason that this and other managerial functions would be within the purview of the Chief Executive Officer or his or her authorized designees.

¶ 34 Yet to the extent any doubt remains as to the power of the Chief Executive Officer to set employee compensation, it is resolved by the bylaws of the St. Thomas-St. John District Governing Board. Article VII, Section 10 of the bylaws, titled "Personnel Practices and Compensation meetings of the Executive Committee," reads, in its entirety as follows:

> (a) The Personnel Practices and Compensation meetings of the Executive Committee shall cooperate and consult with the Chief Executive Officer/Administrator of the Hospital and other administrative officers in regard to appointments, welfare, and working conditions of employees, labor relations recommendations for establishment and revision from time to time of salary levels, and the maintenance of proper relations between employees and the Board.
> (b) No individual member of the Committee shall have any veto power over decisions of Chief Executive Officer/Medical Director of the Hospital or the Administrative Staff of the Hospital (nor shall any Director make or maintain contact with employees except through the Chief Executive Officer/Medical Director or the Administrative Staff).

(J.A. 3274-75.) The plain language of this bylaws provision clearly contemplates that the District Governing Board, acting through its Executive Committee, would only "consult" and "make recommendations" to the Chief Executive Officer with respect to "salary levels" and other conditions of employment, subject to the District Governing Board's statutory authority to "hold the staff accountable for the execution of hospital policy decisions." 19 V.I.C. § 243(j).

¶ 35 Consequently, as a matter of law, Miller, as Chief Executive Officer of the Schneider Hospital, possessed the legal authority to set compensation for subordinate hospital employees, subject only to the retained authority of the District Governing Board as the policy-making body for the RLSH. To hold otherwise would not only be inconsistent with the plain language of Act No. 6012 and the St. Thomas-St. John District Governing Board bylaws, but effectively render the territory's hospitals unmanageable.[4]

ii. Authority of the Executive Branch With Respect to Hospital Salaries

¶ 36 The People further argue that even if Miller as Chief Executive Officer had the requisite legal authority to determine the compensation of subordinate employees that Najawicz nevertheless obtained money by false pretenses. Specifically, they allege that Najawicz violated section 834(2) by receiving those payments from a hospital account without having the additional compensation reflected on the NOPA form maintained by the Executive Branch.

¶ 37 As a threshold matter, the People are correct that Virgin Islands law required all of Najawicz's compensation to be included on his NOPA form, and not just his salary. Title 3,

[4] It is important to emphasize that the People's interpretation of Act No. 6012 with respect to salaries—that any action taken by the Chief Executive Officer that is not affirmatively vested in that position by statute is illegal and unauthorized until and unless it is approved by a formal vote of the District Governing Board—would appear to apply to *any* situation where Act No. 6012 does not affirmatively delineate authority.

section 452 of the Virgin Islands Code provides that "[t]he Director of Personnel under the general supervision of the Governor . . . shall . . . establish and maintain a roster of all employees in the Government Service, in which there shall be set forth, as to each employee, the class title of the position held; the compensation; any change in pay or status; and any other necessary data, including the enrollment of the employees in the Group Health Insurance Program." 3 V.I.C. § 452(b)(4). As used in section 452, "'Government Service' means the Government of the United States Virgin Islands, including governmental activities administered by boards, commissions, and authorities." 3 V.I.C. § 451 (emphasis added). Therefore, Miller was unquestionably required to inform the Director of Personnel of the total amount of compensation given to Najawicz, including the value of any bonuses or stipends in addition to his salary.

¶ 38 Counts 22 and 23 however, do not charge Najawicz with simply accepting stipends and bonuses that were not reported to the Director of Personnel. Nor could the People have charged Najawicz on this basis, since section 834(2) requires that one "knowingly and designedly, by false or fraudulent representation or pretenses, defraud[] any other person of money or property." 14 V.I.C. § 834(2). Consequently, Count 23 of the Seventh Amended Information charged Najawicz with "fraudulently circumventing the government employee payroll" when receiving these stipends and bonuses. (J.A. 1067.) While Count 22 does not allege that Najawicz fraudulently circumvented the payroll process, it would appear from the act charged—receipt of "several lump sum payments of $10,000.00 or $26,070.00, apart from his authorized (NOPA) salary"—that circumventing the payroll process would necessarily be the factual predicate for that charge, given that, as explained above, Miller possessed the authority to set Najawicz's compensation.

¶ 39 Even though Najawicz received payments that exceeded the salary identified on the NOPA form maintained by the Division of Personnel, the People failed to introduce sufficient evidence

to prove that he circumvented the employee payroll process to receive those payments. Act No. 6012 mandated the Corporation to "establish and maintain separate bank accounts and [to] make direct fiscal disbursement from such accounts to pay all necessary costs and obligations of the health care facilities under its jurisdictions." 19 V.I.C. § 261(a). Moreover, Act No. 6012 provided for "[r]evenues generated by each hospital and health facility under its jurisdiction [to] be deposited in its account(s)." *Id.*

¶ 40 The establishment of separate bank accounts, and for disbursements to be made from such accounts to pay necessary costs and obligations, is consistent with the overall purpose of Act No. 6012, which was to make the public hospital system achieve "financial self-sufficiency" with the goal of having the hospitals funded to the greatest extent possible through patient care revenue rather than the General Fund or other accounts maintained by the Executive Branch. 19 V.I.C. §§ 240, 242. However, because financial self-sufficiency was the ultimate goal rather than the then-existing reality, Act No. 6012 directed the Executive Branch to "continue to include in its Executive Budget an appropriation for the operation of the hospitals and health facilities under the jurisdiction of the corporation." 19 V.I.C. § 245(b). Consequently, the clear intent of this statutory scheme is for the Executive Branch, through the appropriation it receives for the Executive Budget from the General Fund and other funding sources, to fund the costs that the Corporation is unable to pay from its own accounts.

¶ 41 In addition to requiring the Executive Branch to continue to fund the hospitals, Act No. 6012 provides that

> [n]otwithstanding the establishment of separate bank accounts under this section, the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals subject to the appropriation and allotment process[,]

19 V.I.C. § 261(b). The People maintain that this provision requires the Department of Finance to process all payrolls of the hospitals, and that Najawicz therefore circumvented the payroll process by not receiving the additional compensation from the Department of Finance.

¶ 42 Again, the People have misinterpreted these statutory provisions. If section 261(b) simply stated that "the Department of Finance shall continue to be responsible for the payrolls of the Governor Juan F. Luis and Roy L. Schneider Hospitals," the People would likely be correct that all payrolls for both hospitals must be processed by the Department of Finance. But that is not what section 261(b) says – after that language, it contains the additional phrase "subject to the appropriation and allotment process."

¶ 43 Under traditional rules of English grammar, the phrase "subject to" modifies only the noun it immediately follows, and not the entire sentence. In legal parlance, this principle, as it applies in the context of statutory construction, is known as "the rule of the last antecedent." Under this rule, "a limiting clause or phrase [in a sentence within a statute] ... should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Fontaine v. People*, 59 V.I. 1004, 1009 (V.I. 2013) (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)). And while this rule "is not an absolute and can assuredly be overcome by other indicia of meaning," *id.* at 1010 (quoting *United States v. Hayes*, 555 U.S. 415, 425 (2009)), the People have neither argued, nor established, that the phrase "subject to the appropriation and allotment process" in section 261(b) "is applicable as much to the first and other words [in that section] as to the last," *id.* (quoting *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920) and citing *Gov't of the V.I. v. Thomas*, 9 V.I. 17, 24 (V.I. Super. Ct. 1971) (same)), such that the interpretive presumption embodied in the rule does not limit the applicability of the phrase to just the last antecedent. *See, e.g., Payless Shoesource, Inc. v. Travelers Cos., Inc.*, 585 F.3d 1366, 1371 (10th Cir. 2009) (observing that

"th[e] last antecedent principle is . . . an interpretive presumption based on the grammatical rule against misplaced modifiers"). Nor have the People contended that a related rule, the "series-qualifier canon," which applies to a statutory term or phrase at the end of a series "when there is a straightforward, parallel construction that involves all nouns or verbs in a series," should apply to permit the phrase "subject to the appropriation and allotment process" in section 261(b) to act as a modifier that would apply to the entirety of the language in section 261(b), rather than to solely the last antecedent. *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021) (acknowledging this canon) (citing *Paroline v. United States*, 572 U. S. 434, 447 (2014); *Porto Rico Railway, Light & Power Co.*, 253 U. S. at 348; and *United States v. Bass*, 404 U. S. 336, 339-40 (1971)).

¶ 44 Thus, section 261(b) does not make the Department of Finance responsible for all payrolls – rather, it only makes it "responsible for the payrolls . . . subject to the appropriation and allotment process." In other words, section 261(b) mandates that the Department of Finance process the payrolls that are to be paid from the appropriation the Executive Branch receives from the General Fund for the purpose of hospital operations pursuant to section 245(b) but does not mandate that the Department of Finance process any payrolls that are funded from sources other than the General Fund, such as the separate hospital accounts in which patient care revenue is deposited. This construction of section 261(b) is consistent with how this Court and other courts have applied the last antecedent rule. *See, e.g., Fontaine*, 59 V.I. at 1010 (holding that by operation of the rule, "the language in [5 V.I.C. §] 3524 [that the territorial Public Defender] relies on — 'that he considers to be in the interest of justice' — would only modify 'other remedies before or after conviction,' and not 'appeals' or 'every stage of the proceedings against him'"); *Dennis v. Watco Companies, Inc.*, 631 F.3d 1303, 1305-06 (10th Cir. 2011) (holding that in the statutory phrase "any employee of an employer engaged in the operation of a rail carrier subject to part A of subtitle

IV of Title 49," the phrase "subject to part A" modifies "rail carrier" and not "employer"); *Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 831-32 (9th Cir. 1996) (holding that in a statute stating that "all timber sale contracts offered or awarded before that date in any unit of the National Forest System or district of the Bureau of Land Management subject to section 318" the phrase "subject to section 318" modifies "any unit . . . or district," and not "all timber sales contracts").

¶ 45 In this case, the undisputed evidence in the record established that the stipend and bonus payments received by Najawicz which exceeded the salary indicated on his NOPA form did not come from the General Fund or any other account maintained by the Department of Finance or the Executive Branch, but from the separate hospital accounts the Corporation is authorized to maintain and make disbursements from pursuant to section 261(a). Because Miller was authorized by law to set Najawicz's compensation, and the Department of Finance is not responsible for payrolls which are not subject to the appropriation and allotment process, the People failed to introduce sufficient evidence that Najawicz circumvented the payroll process or otherwise fraudulently obtained these funds to himself in violation of law. Consequently, we reverse Najawicz's convictions for Counts 22 and 23.

b. Count 34: Write-Off or Waiver of $10,000 Salary Advance to Carty

¶ 46 Count 34 of the seventh amended information alleges that Najawicz violated section 834(2) by arranging a "write-off" of a $10,000 debt owed by Carty to the RLSH. The $10,000 debt referred to is a $10,768 salary advance payment that Carty received from the RLSH's operating account shortly after he first commenced his employment as General Counsel on October 25, 1999. At the time this salary advance payment was made, a policy had been in place—since rescinded—that precluded government employees from being paid from the General Fund until their NOPA

form has been fully processed. It is undisputed that the purpose of the $10,768 salary advance payment from the RLSH operating account was to allow Carty to get paid while the Executive Branch processed his NOPA form, and that Carty was to repay the $10,768 advance to the RLSH once he began to receive salary payments from the Executive Branch after his NOPA form had been processed.

¶ 47 The People failed to introduce sufficient evidence to sustain this conviction. The Bylaws of the District Board granted the Chief Financial Officer the power to write-off a debt in accordance with policies of the Board and the approval of the Chief Executive Officer. (J.A. 1261.) The uncontradicted evidence at trial established that Carty's $10,768 debt had not been waived but only written-off as provided for in the Bylaws and accompanying policies. In the emails Miller and Najawicz exchanged with each other on February 6, 2006, Najawicz had requested that the RLSH "write-off" ten employee receivables, including Carty's $10,768 debt, to which Miller replied, "You may proceed in writing off these accounts." (J.A. 2771.) At trial, every witness—including prosecution witnesses—asked about the effect of a "write-off" testified that it is a term of art in accounting which does not forgive, waive, or otherwise extinguish a debt, but only designates it as unlikely to be collected, so that it does not appear as an active account receivable. Moreover, Carty himself testified that the $10,768 debt had not been forgiven and was still owed by him to the RLSH, and that he had not repaid it because he believed the RLSH owed him a greater amount of money. This is supported by a May 24, 2001 resolution passed by the St. Thomas-St. John District Governing Board, which states that it is "customary to remove inactive and uncollected account balances periodically," that "on average, industry standards for active account receivables do not exceed two (2) years," that "old account receivables inflate the gross account balance of the Hospital's assets" which "result[s] in a distorted balance sheet," and

therefore "authorize[d] the Hospital Administration to establish a write-off policy, for accounting purposes only, for all outstanding account receivables that exceed two (2) years in age." (J.A. 247-48.)

¶ 48 In fact, the only evidence—that term being used loosely—the People cite in their appellate brief to support the idea that the $10,768 debt had been forgiven is a February 23, 2006 email exchange between Carty and Najawicz in which Najawicz states that he wishes to "forgive" a $45,500 housing allowance to Miller to get it "off the books" and asks Carty for language to effectuate that intent, to which Carty suggested language that the housing advance be "waived." (Appellee's Br. 26.) Not only is this not evidence that the $10,768 salary advance debt had been waived, but it supports the opposite proposition, in that Carty, when asked for language to provide language to "forgive" Miller's debt, chose the word "waived" rather than "written-off," further emphasizing that these are different concepts. Accordingly, we reverse Najawicz's conviction on Count 34.

4. Embezzlement by Fiduciaries

¶ 49 Counts 21, 29, and 35 of the seventh amended information charged Najawicz with embezzlement by fiduciaries in violation of title 14, section 1091 of the Virgin Islands Code. That statute, provides, in its entirety, that

> Whoever, being a trustee, banker, merchant, broker, attorney, agent, assignee in trust, executor, administrator, or collector, or person otherwise intrusted with or having in his control property for the use of any other person, fraudulently appropriates it to any use or purpose not in the due and lawful execution of his trust, or secretes it with a fraudulent intent to appropriate it to such use or purpose, is guilty of embezzlement.

Each charge is addressed in turn.

a. Count 21: Payments to Miller Between August 3, 2005, and June 30, 2006

¶ 50 The People charged Najawicz with, while serving as the RLSH's Chief Financial Officer, "fraudulently mak[ing] several electronic transfers totaling over $400,000 in RLSH funds from a RLSH bank account to Rodney E. Miller, Sr., through the false and fraudulent premise of a 'June 21, 2005 employment agreement' not known to exist." (J.A. 1066.) In both their trial presentation and their appellate brief, the People appear to alternate between two different theories of guilt: (1) that the June 21, 2005 agreement was a complete fabrication; and (2) that the June 21, 2005 agreement, even if it existed, was not authorized by law. Regardless of which theory the jury relied upon in convicting Najawicz on this charge, the People failed to introduce sufficient evidence to sustain the conviction.

i. Existence of June 21, 2005 Agreement

¶ 51 Like at trial, in their appellate brief the People imply that the June 21, 2005 agreement did not exist because Carty, in response to a June 13, 2008 subpoena, stated that he "found no June 21, 2005 agreement between [RLSH] and Rodney Miller Sr." and that "[i]t is [his] belief that the reference to a June 21, 2005, agreement [in other documents] [is] erroneous," J.A. 3247-50, with Najawicz similarly responding that he "found no June 21, 2005, employment agreement between Schneider Regional Medical Center and Rodney E. Miller, Sr." (J.A. 3251-57.) But the fact that Carty and Najawicz said in a pretrial subpoena response that the agreement could not be "found" and that Carty had a "belief" that references to that agreement in other documents may be erroneous is not evidence that the agreement never existed. *Accord, State v. McFall*, 439 P.2d 805, 807 (Ariz. 1968).

¶ 52 Of course, if a June 21, 2005 agreement had never been produced, a jury certainly could reasonably infer that Najawicz's response to the June 13, 2008 subpoena was not truthful and was instead calculated to cover up that he knew such a document never existed in the first place. After

all, a jury possesses the right to disbelieve a witness's statement in whole or in part. *See Ostalaza v. People*, 58 V.I. 531, 556 (V.I. 2013). However, "neither the court nor the jury should be permitted to stubbornly ignore and refuse to be guided by competent, credible and uncontradicted evidence." *Arnold Machinery Co. v. Intrusion Prepakt, Inc.*, 357 P.2d 496, 497 (Utah 1960). Indeed, "although a trier of fact must determine the weight of the testimony and the credibility of witnesses, it may not arbitrarily disregard uncontradicted evidence of unimpeached witnesses which is not inherently incredible and not inconsistent with facts in the record, *even though such witnesses are interested in the outcome of the case*." *Bradner v. Mitchell*, 362 S.E.2d 718, 723 (Va. 1987) (emphasis added); *Cheatham v. Gregory*, 313 S.E.2d 368, 370 (Va. 1984) (same) (citing cases). As the Supreme Court of the United States has explained,

> A jury cannot arbitrarily discredit a witness and disregard his testimony in the absence of any equivocation, confusion, or aberration in it. It is not proper to submit uncontradicted testimony to a jury for the sole purpose of giving the jury an opportunity to nullify it by discrediting the witness, when nothing more than mere interest in the case exists upon which to discredit such witness. [Rather, t]he testimony must inherently contain some element of confusion or contrariety, or must be attended by some circumstance which would render a total disregard of it by a jury reasonable rather than capricious.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U.S. 209, 219-20 (1931). In other words, a jury is not permitted "to reach [a] conclusion [that] is entirely too tenuous" given the evidence actually presented "and goes beyond reasonable inferences to mere speculation." *People v. Clarke*, 55 V.I. 473, 478 (V.I. 2011).

¶ 53 Here, the June 21, 2005 agreement was actually introduced into evidence by the People at trial. Although taking the form of an offer letter from Adams to Miller, the document is dated June 21, 2005, sets forth numerous terms and conditions of employment, including bonuses, incentive payments, and cost of living increases on top of base salary. The letter states that the offer is being

made by the Board, is signed by Adams in her capacity as Chair of the District Governing Board and contains a signature by Miller under the text "Please signify your acceptance of the terms outlined herein by signing below." (J.A. 1740.) It is clear, therefore, that a June 21, 2005 agreement did in fact exist. As such, a rational jury could not convict Najawicz of embezzlement on a theory that this agreement never existed.

ii. Legality of June 21, 2005 Agreement

¶ 54 The People also failed to introduce sufficient evidence to prove that the June 21, 2005 agreement was invalid as a matter of law. The June 21, 2005 agreement was signed by Adams in her capacity as Chair, issued on hospital letterhead, expressly states that it is an official offer from the Board, repeatedly uses the pronoun "we" when explaining its terms, and is signed by Miller under a sentence stating that his signature signifies his acceptance. Nevertheless, the People maintain that the June 21, 2005 agreement was not legally valid because it had never been approved by the St. Thomas-St. John District Governing Board.

¶ 55 We disagree. It is well-established that "contract construction, that is, the legal operation of the contract, is a question of law" reserved for the court, and not the jury. *See Phillip v. Marsh-Monsanto*, 66 V.I. 612, 624 (V.I. 2017); *see also Gaede v. SK Invs., Inc.*, 38 S.W.3d 753, 757 (Tex. App. 2001). This principle, while typically arising in civil suits for breach of contract, remains applicable even in criminal cases. *See, e.g., Smith v. State*, 68 N.E.2d 549, 436-37 (Ind. 1946) (rejecting testimony that the defendant had "sold" a controlled substance since it "was a legal conclusion of no evidentiary value as to the nature of the transaction," and instead analyzing the sufficiency of the evidence by determining whether the facts, when viewed in the light most favorable to the prosecution, met the legal definition of a "sale"). Therefore, this Court is not required to give any credit or deference whatsoever to the legal interpretations and conclusions

that various prosecution witnesses testified to at trial.

¶ 56 As outlined earlier, Act No. 6012 granted each District Governing Board the statutory authority to "employ and remove" the Chief Executive Officer. 19 V.I.C. § 244(h), and the bylaws of the St. Thomas-St. John District Governing Board gave it the power to set the Chief Executive Officer's compensation. (J.A. 3280.) But while there is no direct evidence that the District Governing Board formally approved, by an official vote at a duly noticed meeting, the terms of the June 21, 2005 agreement, neither Act No. 6012 nor any other provision of Virgin Islands law required the District Governing Board to affirmatively approve, by formal vote, the salary or other conditions of employment of the Chief Executive Officer. However, the June 21, 2005 agreement is signed by Adams in her capacity as Board Chair, and says that "we are pleased to officially offer you the following terms." (J.A. 1739.) The question, then, is whether this was sufficient to constitute a legally binding contract between Miller and the District Governing Board.

¶ 57 In addition to granting the District Governing Board the authority to employ and remove the Chief Executive Officer, Act No. 6012 authorizes the Boards to "make and execute contracts and leases and all other agreements or instruments necessary or convenient for the exercise of its powers and the fulfillment of its corporate purposes." 19 V.I.C. § 244(d). But Act No. 6012 does not set forth a procedure for how the District Governing Boards may exercise this power to create contracts. Nevertheless, the bylaws of the St. Thomas-St. John District Governing Board expressly and unambiguously grant this authority to the Chairperson:

> Whenever the execution of deeds or other legal instruments is directed by the Board, or becomes necessary and proper in carrying out the business of the Board, the Chairperson is authorized and empowered, in the name of the Board, to execute the same and to have the Board's seal affixed thereto.

(J.A. 3268.) Certainly, entering into an employment agreement with the individual selected by the

Board to serve as Chief Executive Officer is "necessary and proper in carrying out the business of the Board." But even if this were not the case, section 1 of Article XVI expressly provides that

> In the absence of any action by the Board, or unless otherwise determined by the Board, the Chairperson and the Treasure[r] of the Board shall have the power, in the name and on behalf of the Board, to execute and deliver any and all instruments, except to the extent otherwise required by law in the case of the purchase, sale, mortgage, or lease of real property.

(J.A. 3294 (emphasis added).) In these provisions, the bylaws establish a default rule where the Chairperson (or the Treasurer, in the case of securities and other legal instruments which the bylaws permit the Treasurer to buy, sell, or otherwise dispose of) may exercise his or her authority to execute a contract in the name of the Board when the Board has not taken a contrary action.[5]

¶ 58 The uncontradicted evidence in the record established that the District Governing Board had established a Compensation Committee as a special committee pursuant to Article VII of the

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[5] None of the parties have challenged as part of this appeal the authority of the District Governing Board to enact bylaws which delegate these duties to individual members such as the Chair. However, it is well-established that "[w]hen a statute delegates authority to a [public] officer or agency, subdelegation to a subordinate [public] officer or agency is presumptively permissible absent affirmative evidence of a contrary [legislative] intent." *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (collecting cases). Such subdelegation is permissible "even in the absence of explicit statutory authorization permitting delegation of a particular function" due to "the impossibility of personal performance of every statutory duty." *People v. Murrell*, 56 V.I. 796, 803-04 (V.I. 2012) (collecting cases).

Certainly, the authority to delegate is not without limits; most significantly, a delegation cannot "constitute[] divesting or transferring a fundamental responsibility of the office." *Murrell*, 56 V.I. at 804. Here, no such divestment or transfer occurred since the District Governing Board delegated certain powers internally to individual board members and subcommittees, which is a practice consistent with well-established law in the Virgin Islands and elsewhere governing corporations and boards. *See* 13 V.I.C. § 32(5); *Schoonejongen v. Curtiss-Wright Corp.*, 143 F.3d 120, 127 (3d Cir. 1998); *San Antonio Joint Stock Land Bank v. Taylor*, 105 S.W.2d 650, 654 (Tex. 1937); *see also* 2 JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS § 9:17 (3d ed. 2010). The Legislature was therefore certainly aware that in choosing such a governance structure, a District Governing Board would have the authority to enact bylaws that further delegate certain powers to one of its officers or committees.

bylaws, and delegated to it various duties, including approval of executive compensation contracts, and that the Compensation Committee would routinely exercise this authority to approve contracts without presenting those contracts to the entire Board for approval. Importantly, Adams testified that the June 21, 2005 agreement "reflects what the Compensation Committee recommended." Moreover, the bylaws do not require that the entire District Governing Board approve each contract or other legal instrument signed by the Chairperson or approved by the Compensation Committee or other standing or special committee pursuant to this bylaws provision. Under these provisions, testimony by Chongasing and other Board members that they had not seen the June 21, 2005 agreement, even if credited by the jury, is not relevant to the question of whether that agreement was authorized by law.

¶ 59 The record further contains absolutely no indication that Adams or anyone else concealed the existence of the June 21, 2005 agreement from the District Governing Board so as to prevent it from disavowing the agreement. On the contrary, the uncontradicted evidence—elicited by the People during their direct examination of Chongasing—established the opposite. Chongasing testified that the Compensation Committee advised the full Board at its June 15, 2005 session that it was negotiating with Miller. She further testified that the District Governing Board had been informed of the agreement and had the opportunity to discuss it, testifying that at an executive session held on July 20, 2005, "we were given an update as to what it was," with her even stating, "I remember voicing my opinion that I thought it was wrong."

¶ 60 That the District Governing Board apparently took no formal vote on the June 21, 2005 agreement at the July 20, 2005 executive session is of no legal significance, since Article XVI, section 1 of the bylaws permits the Chairperson to execute a contract in the absence of any action by the Board. Moreover, it is well-established that "a formal resolution need not be passed, nor a

formal vote taken in order to validate acts done at the meeting, unless so required by statute, the articles of incorporation, or the bylaws," and "[t]he ratification or adoption of a contract by a corporation through its board of directors may be implied," including "by conversation, without formal votes." 2 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF CORPORATIONS § 418 (Perm. Ed. 1990) (collecting cases); *see also CDB Software, Inc. v. Kroll*, 902 S.W.2d 31, 39 (Tex. App. 1998) ("The ratification or adoption of a contract by a corporation through its board of directors may be implied."). As such, the failure of the Board to formally vote on the June 21, 2005 agreement did not render the agreement invalid – on the contrary, the Board's failure to take action is precisely what authorized Adams to sign the contract pursuant to her powers under Article XVI of the bylaws. Therefore, we reverse Najawicz's conviction on Count 21.

b. Count 29: Automobile Allowance

¶ 61 Count 29 of the seventh amended information charged Najawicz with embezzlement by authorizing and accepting monthly payments of $400 from an RLSH account as an "automobile allowance" that he had "fraudulently arranged with Rodney Miller, Sr. without authority of law." (J.A. 1070.) The record reflects that this automobile allowance for Najawicz had been authorized by Miller in an August 24, 2004 letter, retroactive to July 15, 2004. (J.A. 213.) As explained earlier in the context of the stipends and bonuses awarded to Najawicz, Miller, as Chief Executive Officer, possessed the authority to set the compensation for Najawicz and other subordinate employees. Because the entire basis of Count 29 is the erroneous premise that Miller lacked the legal authority to determine Najawicz's compensation, we reverse Count 29 for the same reasons we reverse Counts 22 and 23.

c. Count 35: Payments to Miller Between May 17, 2007, and September 30, 2007

¶ 62 In Count 35, the seventh amended information charged Najawicz with embezzlement by

fraudulently transferring approximately $1.5 million to Miller from RLSH accounts from May 17, 2007, through September 30, 2007. Although not specifically identified, it appears that the transfers referred to in the seventh amended information are transfers to Miller of (1) $966,456.45 on May 17, 2007; (2) $111,759.62 on August 13, 2007, as well as bi-weekly payments of $6,153.84 effective the pay period ending August 18, 2007, and monthly payments of $3,333.33 beginning on September 1, 2007; and (3) $789,660 on October 24. 2007. Each transfer is addressed in turn.

i. May 17, 2007 Transfer

¶ 63 The record reflects that on May 16, 2007, Adams signed a letter directing Najawicz to pay all outstanding monies due to Miller pursuant to his 2005 contract. Although Adams did not specify a specific amount in her May 16, 2007 letter, Miller directed Najawicz in a May 17, 2007 letter to transfer $966,456.45 to him, which he represented as the outstanding amount owed. While the People maintain that the 2005 agreement was unauthorized by law, the contract was in fact authorized, for the reasons given earlier. Therefore, to determine if the People introduced sufficient evidence to prove embezzlement, we must first ascertain whether this $966,456.45 was in fact authorized by the 2005 agreement.

¶ 64 Miller's May 17, 2007 letter did not explain how he arrived at the $966,456.45 figure. However, the evidence introduced at trial established that it represented a $55,650 retention incentive, a $83,475 annual incentive, a $13,250 cost of living increase, a $41,660 one-time retirement plan contribution for December 2005; a $22,260 retirement plan contribution for 2005; a $23,373 retirement plan contribution for 2006; $20,384.61 representing the value of unused vacation in 2005; $21,403.07 representing the value of unused vacation in 2006; a $30,000 contribution to his 403(b) plan for 2005; a $30,000 contribution to his 403(b) plan for 2006; and

$625,000 representing five years of annual $125,000 payments to a so-called Rabbi Trust.[6]

¶ 65 While it appears that many of these payments were in fact authorized by the 2005 contact, several were not. Although the 2005 agreement provided Miller with the opportunity to earn an annual incentive of up to 30% of annual base salary, the payment of the annual incentive was to be "determined by the Compensation Committee." (J.A. 17434.) The record contains no evidence that the Compensation Committee ever determined that Miller was entitled to receive any incentive, let alone the full 30% incentive provided for in the agreement. And while Adams, as Chair of the Board, possessed the authority to act on the Board's behalf, her May 16, 2007 letter to Najawicz did not state that the Compensation Committee approved an incentive or that Miller should receive the incentive provided for in the agreement, but only that Miller be paid "all outstanding amounts due." (J.A. 1784.) Consequently, Miller was not authorized to receive the $83,475 annual incentive.

¶ 66 Likewise, Miller was not entitled to receive $625,000 representing payments that purportedly should have been made to the Rabbi Trust. The 2005 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Miller's named beneficiaries) for the next five years." (J.A. 1757.) However, at the time Najawicz made the May 17, 2007 transfer, Miller had only been employed under the 2005 contract for two years. Moreover, the agreement required that the contributions be made to the trust, rather than to Miller directly. For similar reasons, Miller was not entitled to have the $60,000 in 403(b) plan contributions deposited into his personal bank account, for the agreement expressly directed

[6] "A rabbi trust, so called because its tax treatment was first addressed in an IRS letter ruling on a trust for the benefit of a rabbi, is a trust created by a corporation or other institution for the benefit of one or more of its executives (the rabbi, in the IRS's original ruling)." *Bank of America, N.A., v. Moglia*, 330 F.3d 942, 944 (7th Cir. 2003) (internal citations omitted).

that the contributions be made "to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1757.)

ii. Transfers Based on August 13, 2007 Letter

¶ 67 The record reflects that on August 13, 2007, Miller submitted a letter to Najawicz directing him to transfer $111,759.62 to him from the appropriate RLSH bank account, to transfer $6,153.84 to him bi-weekly beginning with the conclusion of the August 18, 2007 pay period, and to transfer $3,333.33 to him on a monthly basis beginning on September 1, 2007. In that letter, Miller stated that these payments were "[i]n accordance with the May 14, 2007 employment agreement" between him and the RLSH. (J.A. 1786.) While the People maintain that the 2007 agreement was unauthorized by law, the contract was in fact authorized, for the reasons discussed earlier in this opinion. Therefore, to determine whether the People introduced sufficient evidence to prove embezzlement, this Court must first ascertain whether these transfers were authorized by the 2007 agreement.

¶ 68 Miller did not indicate in the letter what any of these payments represented. However, the uncontradicted evidence at trial established that monthly $3,333.33 payment represented a housing allowance of "$40,000 annually, payable in equal monthly installments," J.A. 1782, while the biweekly payments of $6,153.84 represented the portion of his $310,000 annual salary—$160,000—that was paid from RLSH accounts rather than processed through the Department of Finance. Because this compensation was expressly provided for in the 2007 agreement, Miller was authorized to receive these funds.

¶ 69 As with the earlier request for $966,456.45, Miller did not explain in his letter what the $111,759.62 payment represented. However, at trial, it was established that it represented a $77,500 signing bonus, a $10,000 education allowance, a $10,000 spousal travel allowance, a

$3,875 cost of living adjustment, and $10,384.62 in retroactive pay. The signing bonus and cost of living adjustment were expressly provided for in the 2007 agreement, and $10,384.62 properly represents retroactive payment of his increased salary under the agreement retroactive to its May 14, 2007, effective date. Consequently, these payments were authorized by law.

¶ 70 The same cannot be said, however, for the $10,000 educational allowance and $10,000 spousal travel allowance. While the 2007 agreement provided for a $10,000 educational allowance, it also provided that the allowance was "[s]ubject to Compensation Committee approval." (J.A. 1770.) Moreover, the 2007 agreement did not provide Miller with a $10,000 spousal travel allowance, but instead stated that "Miller shall receive a spouse travel allowance of up to $10,000 annually." (J.A. 1782 (emphasis added).) Importantly, the 2007 agreement expressly mandated that "Miller shall submit to Schneider Regional such vouchers or expense statements that satisfactorily and reasonably evidence such expense in accordance with Schneider Regional's travel and expense reimbursement policy." (J.A. 1770.) Here, the record contains no evidence indicating that the Compensation Committee approved the $10,000 educational allowance, or that Miller submitted vouchers or expense statements to support that he had already incurred the maximum educational and spousal travel expenses by August 13, 2007. Consequently, these $20,000 payments were not authorized by law.

iii. October 24, 2007 Transfer

¶ 71 The record reflects that on October 24, 2007, Miller submitted a letter to Najawicz directing him to transfer $789,660 to him from the appropriate RLSH bank account "[i]n accordance with the May 14, 2007 employment agreement." (J.A. 1787.) As with the May 17, 2007 and August 13, 2007 letters, the October 24, 2007 letter did not explain what the $789,660 represented. However, at trial, it was established that it represented a $625,000 payment to the Rabbi Trust; a

$30,000 contribution to his 403(b) plan; $93,000 in annual incentive pay; and a $41,660 retirement plan contribution.

¶ 72 The evidence, when viewed in the light most favorable to the People, established that none of these payments were authorized by the 2007 agreement. Like the 2005 agreement, the 2007 agreement provided for "[a]nnual contributions of $125,000.00 to an Irrevocable Rabbi Trust in the name of Mr. Miller (with Mr. Miller's named beneficiaries) for the next five years," and for "[a]nnual contributions of $30,000 to a 403(b)(7) individual retirement account in the name of Mr. Miller." (J.A. 1781.) In addition to these provisions requiring that payments be made, respectively, to the trust and to the retirement account rather than to Miller personally, at the time of the October 24, 2007 letter, Miller had only been employed under the terms of the 2007 agreement for approximately five months. Moreover, the 2007 agreement specified that Miller would receive "[c]ontributions equal to $41,660 in December 2007." (J.A. 1781 (emphasis added.). Not only had the obligation to pay the $41,660 not yet been triggered, but it would not trigger, since Miller had already announced on September 19, 2007, that he would resign as Chief Executive Officer effective November 3, 2007, to take a position at another hospital. And like the 2005 agreement, the 2007 agreement did not make payment of his 30% annual incentive award a matter of right, but only to be "determined by the Compensation Committee." (J.A. 1769.) Not only did the record lack any evidence that the Compensation Committee authorized an annual incentive award, but it is also not clear how it even could have, given that Miller had only been employed under the 2007 agreement for five months at the time of the October 24, 2007 letter. In fact, the 2007 agreement expressly provided that "[n]o Incentive Compensation will be paid to Miller following the date of a Voluntary Resignation other than Incentive Compensation earned but not paid." (J.A. 1774.)

iv. Fraudulent Intent

¶ 73 It is not enough, however, that the People prove that Najawicz disbursed monies to Miller that Miller was not entitled to receive. Section 1091, by its own terms, requires that one "fraudulently appropriate[]" property "with a fraudulent intent." Therefore, to sustain a conviction for embezzlement, the People were also required to prove that Najawicz made these transfers with the intent to defraud the RLSH.

¶ 74 It is often extraordinarily rare to obtain direct evidence that an individual acted with fraudulent intent. *See Redemption Holdings, Inc. v. Gov't of the V.I.*, 65 V.I. 243, 254 (V.I. 2016). Thus, "the People are not required to submit direct evidence of fraudulent intent to sustain a conviction," but may rely on circumstantial evidence from which a jury could infer the requisite intent. *Todmann v. People*, 59 V.I. 926, 944 (V.I. 2013). Such circumstantial evidence may come by providing evidence consistent with commonly recognized badges of fraud. *Redemption Holdings*, 65 V.I. at 254; *see also United States v. Voorhies*, 658 F.2d 710, 715 (9th Cir. 1981) (determining intent in a criminal case by considering "the so-called badges of fraud" which may be probative of the defendant's state of mind). These badges of fraud include, but are not limited to, considerations such as "suspicious timing," "the general chronology of the events and transactions under inquiry," and "the secrecy, haste, or unusualness of the transaction." *Redemption Holdings*, 65 V.I. at 254 (quoting *In re Vivaro Corp.*, 524 B.R. 536, 556 (Bankr. S.D.N.Y. 2015)).

¶ 75 Here, the People failed to introduce sufficient evidence from which the jury could properly infer that Najawicz acted with a fraudulent intent. The People emphasize the general chronology of events: Najawicz transferring large sums of money to Miller after receiving a request from him, without any itemization or explanation of what the money was for, and without making any sort

of independent inquiry whatsoever. However, mere negligence or the failure to use reasonable care is insufficient to establish that one acted with fraudulent intent. *See Florenzano v. Olson*, 387 N.W.2d 168, 173 (Minn. 1986). While Najawicz failed in his duties as Chief Financial Officer in approving these transfers to Miller without reviewing Miller's contracts or conducting any other inquiry, "[t]hese actions are just as likely to be due to incompetence and poor record-keeping as to fraudulent intent." *In re Cohn*, 561 B.R. 476, 488 (Bankr. N.D. Ill. 2016).

¶ 76 In addition to this general chronology, the People point to the fact that Adams testified that Najawicz had given her the May 16, 2007 letter to sign at a District Board meeting. Had Najawicz surreptitiously given Adams this letter and asked for her signature without any context, it certainly could provide evidence of fraudulent intent. But that is not what occurred here. While Adams testified that Najawicz gave her the letter to sign, she also testified that he presented her with the letter only after the Board had discussed the issue of paying whatever monies it owed to Miller, with Adams testifying that "the general consensus of the Board was we owed him, let's pay him," and that Najawicz presented the letter to her "after the Board had authorized the payment to Mr. Miller." And while the May 16, 2007 letter did not specify a specific amount of monies owed, Adams testified that the Board had not spoken about how much money Miller was owed, and that it did not occur to her to ask for a specific figure. In other words, Najawicz submitting this letter to Adams appears to have simply been Najawicz attempting to comply with the will of the District Board.

¶ 77 Finally, the People note that on May 18, 2007, Miller approved Najawicz's annual incentive bonus of $26,070, which was ordinarily supposed to be due on August 1. As noted earlier, suspicious timing may constitute circumstantial evidence of fraudulent intent, particularly with respect to a potential *quid pro quo* arrangement. But the People introduced no evidence that

Najawicz was not entitled to receive a $26,070 bonus under his employment agreement or that the amount of the bonus was in Miller's discretion. And while the bonus had not been due until August 1, the People had also introduced testimony that it had not been consistently paid on that date, with Najawicz not receiving his bonus for the prior year until October 26, 2006. Perhaps most significantly, a *quid pro quo* by its very nature requires an exchange – that is, one party receives something of value in exchange for doing or omitting some act that they would not have done anyway. *See United States v. Hawkins*, 777 F.3d 880, 883 (7th Cir. 2015) (citing *Skilling v. United States*, 561 U.S. 358 (2010)). As noted above, the District Board had determined that Miller was to be paid whatever funds were outstanding under his 2005 employment agreement, and thus Najawicz would have been required to make some disbursement to Miller. And while Najawicz paid Miller an amount greater than he was entitled to receive, the People fail to explain how the jury could infer that receipt of a bonus that Najawicz was already entitled to receive constituted sufficient motivation for him to fraudulently transfer hundreds of thousands of dollars to Miller. Therefore, we reverse Najawicz's conviction on Count 35.

5. Certifying Officer Statute

¶ 78 Counts 31 and 33 of the seventh amended information charged Najawicz with violating the certifying officer accountability statute codified at title 33, section 3204 of the Virgin Islands Code. That statute reads, in its entirety, as follows:

> (a) The officer or employee certifying a voucher shall:
> (1) be held responsible for the existence and correctness of the facts recited on the certificate or otherwise stated on the voucher or its supporting papers and for the legality of the proposed payments under the appropriation or fund involved; and
> (2) be required to give bond in favor of the Government of the Virgin Islands pursuant to the provisions of chapter 31 of Title 3.
> (b) An officer or employee who certifies a voucher knowing that such certification may result in an illegal, improper, or incorrect payment shall:
> (1) for the first offense, be fined an amount equal to the amount of the

> illegal, improper, or incorrect payment and shall be suspended without pay for thirty (30) days; and
>
> (2) for a second or subsequent offense, be fined an amount of the illegal, improper, or incorrect payment and shall be imprisoned for at least thirty (30) days but not more than one (1) year.
>
> (c) An officer or employee convicted under subsection (b)(2) of this section shall be immediately discharged from his employment with the Government of the United States Virgin Islands.
>
> (d) An officer or employee shall not be in violation of this section if:
>
> (1) the certification was based on official records and he did not know, and by reasonable diligence and inquiry could not have ascertained the actual facts; or
>
> (2) the certification was based upon and consistent with acts of the Legislature, executive orders of the Governor, or in accordance with a written opinion of the Attorney General.

Thus, unlike the embezzlement statute, to obtain a conviction under section 3204, the People are not required to prove fraudulent intent, but only that the certifying officer knew that "certification *may* result in an illegal, improper, or incorrect payment." 33 V.I.C. § 3204(b) (emphasis added).

¶ 79 In Count 31, the People charged Najawicz with violating section 3204 by "certify[ing] vouchers knowing that such certifications may result in an illegal, improper, or incorrect payments of 'housing allowances' to Rodney Miller, Sr., in that [Najawicz] certified and approved an excessive housing allowance payments, including an 'advance' of $45,500.00, as well as several subsequent housing allowance quarterly payments following the 'advance', without regard to the legality of correctness of said transaction, resulting in unlawful payments to Miller in excess of $60,000.00." (J.A. 1071-72.) Count 33 charges Najawicz with identical conduct with respect to his certification of vouchers for Miller's educational reimbursements, which was allegedly done "without any supporting documentation or substantiation and without any lawful authority." (J.A. 1072.) Each charge is addressed in turn.

a. Count 31: Housing Allowance Payments to Miller

¶ 80 The People introduced sufficient evidence to sustain Najawicz's conviction on Count 31.

Section 3 of Miller's April 17, 2002 employment agreement provided, in addition to other compensation, that he would receive temporary housing upon arrival in St. Thomas for a period not to exceed three months, and thereafter would "receive an annual housing allowance of $20,000 which shall be payable in monthly installments to commence upon the termination of the temporary housing period." (J.A. 1709.) Prior to October 1, 2004, Miller had received $29,999.97 in housing allowance payments under that agreement.

¶ 81 On October 1, 2004, Adams authorized a payment to Miller in "the amount of $45,000 from his housing allowance," noting on the check request voucher that this was authorized pursuant to section 3 of Miller's April 17, 2002 employment agreement. (J.A. 1840-43.) Najawicz certified the voucher on October 13, 2004, and signed the check that would issue to Miller on October 14, 2004. Because Miller's contract was for a three-year term, he would have been entitled to collect a combined total of $60,000.00 in housing advance payments over the term of the contract. Yet the $45,000.00 advance, when combined with the $29,999.97 in housing allowance payments already received, resulted in Miller receiving nearly $15,000 more in housing allowance payments than he was entitled to under that agreement.

¶ 82 Nevertheless, despite receiving this advance and already receiving more housing allowance compensation than he was entitled to, Adams continued to authorize additional housing allowance payments to Miller between November 18, 2004, and July 21, 2005, for a combined amount of $37,500. Najawicz certified each and every one of these vouchers and signed each of these checks issued to Miller. As a result, Miller received a combined total of nearly $120,000 in housing allowance payments over the life of the 2002 employment agreement, more than double the

$60,000 he had been entitled to receive.[7]

¶ 83 Najawicz does not dispute that he was a certifying officer for the RLSH, that he certified these payments to Miller, or that Miller was not entitled to receive nearly $120,000 in housing allowance payments when his three-year contract only authorized $60,000. Nor does he allege that any of the defenses provided for in section 3204(d) applied to this conduct. In fact, Najawicz concedes in his own appellate brief that the overwhelming evidence at trial demonstrated that he had never seen any of Miller's employment agreements and therefore "could not be expected to police the contract." (Appellant's Br. 24.) Rather, Najawicz merely states—without citing to any legal authority—that his conduct did not constitute a crime under section 3204 because "[t]he record is devoid of facts that support the requirement that a voucher be submitted to a disbursing officer within the Department of Finance." (Appellant's Br. 20.)

¶ 84 It is not clear what precisely Najawicz is attempting to argue in making this statement. To the extent he is asserting that vouchers certified for payment from the separate accounts maintained by the RLSH need not be submitted to the Department of Finance for approval and disbursement, that is certainly correct, for the reasons explained earlier in the context of his convictions for obtaining money by false pretenses. But Count 31 does not charge Najawicz with failing to submit the vouchers he certified to the Department of Finance – rather, it expressly charges him with certifying those vouchers in the first place, without making any attempt to determine whether the payments he was certifying were illegal, improper, or incorrect.

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[7] It is worth noting that the 2002 employment agreement had given the District Governing Board the option to retain Miller for an additional two-years after the expiration of his three-year term. However, even if these optional two-years were included, Miller still received approximately $120,000 in housing allowances when he would only have been entitled to receive $100,000 over a five-year period.

¶ 85 It also appears that Najawicz is attempting to argue that section 3204 only applies to certifying officers within the Executive Branch because a related statute in the same chapter of the Virgin Islands Code authorizes the Commissioner of Finance to designate employees in the Department of Finance as disbursing officers. *See* 33 V.I.C. § 3202. However, the Legislature has decreed that "[t]he classification and organization of the titles, parts, chapters, subchapters, and sections of this Code, and the headings thereto, are made for the purpose of convenient reference and orderly arrangement, and no implication, inference, or presumption of a legislative construction shall be drawn therefrom." 1 V.I.C. § 44. Importantly, section 3202 grants the Commissioner of Finance the authority to designate disbursing officers within the Department of Finance, while section 3204 governs the conduct of certifying officers. Significantly, nothing in section 3204 or any other provision of law even remotely gives the indication that the criminal accountability provisions codified in section 3204(b) only extend to certifying officers employed by the Department of Finance. Accordingly, we reject Najawicz's argument and affirm his conviction on Count 31.

b. Count 33: Educational Payments to Miller

¶ 86 Whether the People introduced sufficient evidence to sustain Najawicz's conviction on Count 33 represents a more difficult question. The record reflects that Miller received $78,772 in educational payments between August 9, 2004, and October 11, 2007. While the People maintain that all of these payments were unauthorized, Count 33 only charged Najawicz with certifying vouchers between January 13, 2005, through October 11, 2007, which in the aggregate would represent $69,084 in payments. It is not surprising that the People did not charge Najawicz with the payments made prior to January 13, 2005, in that his signature does not appear on those voucher certifications. Moreover, although seven vouchers for educational payments had been filed by

Miller between January 13, 2005, and October 11, 2007, only three of those vouchers—ones issued on January 13, 2005, July 24, 2006, and October 11, 2007—were certified by Najawicz. Since section 3204 criminalizes the "certifi[cation] [of] a voucher knowing that such certification may result in an illegal, improper, or incorrect payment," 33 V.I.C. § 3204(b), this Court may only sustain a conviction on Count 33 if the People introduced sufficient evidence to support a finding by the jury that Najawicz violated section 3204 when he certified one or more of those three vouchers.

¶ 87 Upon review, the evidence establishes that Najawicz violated section 3204 with respect to all these vouchers. Miller's initial 2002 employment agreement, which governed his employment through May 13, 2005, provided that he "shall be entitled to administrative leave to attend two (2) professional conferences each year, for which the Hospital shall pay all expenses, not exceeding $2,500 per conference," but did not provide for educational reimbursements. (J.A. 1709.) The January 13, 2005 voucher submitted by Miller and certified by Najawicz, however, states that it is reimbursement for "tuition expenses," J.A. 1977, and testimony at trial established that Miller had attended an academic course at the Medical University of South Carolina.

¶ 88 Unlike the 2002 employment agreement, Miller's 2005 and 2007 agreements provided for educational reimbursements. However, the 2005 and 2007 agreements only provided that "Miller shall be entitled to receive an educational allowance of $10,000 annually," and, even then, only "[s]ubject to Compensation Committee approval." (J.A. 1744; 1770.) Nevertheless, the voucher Najawicz certified on July 24, 2006, paid $10,069 to Miller as "Reimbursement for Tuition Expenses." (J.A. 1989.) Not only was this reimbursement itself for an amount greater than the $10,000 provided for in the 2005 agreement, but it was in addition to an earlier tuition reimbursement—not certified by Najawicz—for $9,969 made on January 27, 2006. Similarly, the

voucher Najawicz certified on October 11, 2007, was for $10,055, an amount that again on its face exceeded Miller's $10,000 annual educational allowance and was paid in addition to an earlier $10,054 educational reimbursement made on February 28, 2007.

¶ 89 As noted above, Najawicz does not dispute that he was a certifying officer for the RLSH, that he certified these payments to Miller, or that Miller was not entitled to receive the educational reimbursements he certified. Nor does he allege that any of the defenses provided for in section 3204(d) applied to this conduct. In fact, Najawicz concedes in his own appellate brief that the overwhelming evidence at trial demonstrated that he had never seen any of Miller's employment agreements and therefore "could not be expected to police the contract." (Appellant's Br. 24.) Accordingly, we affirm Najawicz's conviction on Count 33.

c. Effect of Purported Board Ratification

¶ 90 Although not directly asserted with respect to his convictions for Counts 31 and 33, throughout his brief, Najawicz maintains that at a January 7, 2008 meeting, the District Board purportedly passed[8] a resolution that contained the following language:

> The Board hereby ratifies and approves all past actions of the Chief Executive Officer in executing all past minimum value contracts, medical equipment and supply contracts, and personal services contracts.

(J.A. 536.) Najawicz maintains that this resolution served to ratify all the financial transactions at

[8] The evidence introduced at trial reflects that whether the District Board actually adopted the January 7, 2008 resolution remains in serious dispute. At trial, the parties elicited testimony that the resolution had not been attached to the minutes of the January 7, 2008 meeting—as was the practice of the District Board with respect to enacted resolutions—and the minutes themselves contain no mention that such a resolution had been introduced or discussed, let alone passed. Moreover, the document itself is signed only by Adams, and does not appear to bear the Seal of the Board, of which the Secretary is the custodian. (J.A. 1248.) We need not determine the validity of the resolution, however, for as we explain below, the resolution, even if properly enacted, did not ratify any of the actions that form the basis for Najawicz's surviving convictions.

issue in this prosecution. The People, however, argue in their appellate brief that this vote "was *void ab initio* because it is axiomatic that the Board could not ratify Appellants' illegal acts." (Appellee's Br. 78.)

¶ 91 We conclude that the District Board had the authority to retroactively ratify Miller's actions. It is well-established that unauthorized acts by employees or agents of a corporation can be retroactively ratified by its board, and that such ratification has the same effect as if the act had been originally authorized. *See, e.g.*, *Yaeger v. Giguerre*, 23 N.W.2d 22, 23 (Minn. 1946); *Appel v. State ex rel. Shutter-Cottrell*, 61 P. 1015, 1019 (Wyo. 1900); *see also* RESTATEMENT (THIRD) OF AGENCY § 4.01. Although the People are correct that illegal acts may not be ratified, the very authorities the People cite in support reflect that the illegal act must be something other than the act not being duly authorized. *See, e.g., McConnico v. Third Nat'l Bank in Nashville*, 499 S.W.2d 874, 886 (Tenn. 1973) ("A corporation may ratify only unauthorized acts of its officer which are within the scope of the corporate powers and which might have previously been authorized. However, it cannot ratify an act which it does not have the power to legally do. It is clear that it is not within the corporate power to forge an endorsement . . . ."). Because the District Board had the authority to order the Chief Executive Officer to "execut[e] all past minimum value contracts, medical equipment and supply contracts, and personal services contracts," it certainly possessed the authority to ratify them retroactively.

¶ 92 That the District Board possessed this authority, however, has no impact on Najawicz's convictions for violating the certifying officer statute. As a threshold matter, the resolution, by its own terms, only ratifies and approves actions of the Chief Executive Officer and makes no mention of ratifying or approving any actions by the Chief Financial Officer or any other employee. But even if the resolution could somehow be read in the manner proposed by Najawicz, it has no

bearing on whether he violated the certifying officer statute. Unlike the embezzlement statute, to obtain a conviction under section 3204, the People are not required to prove that an illegal, improper, or incorrect payment occurred – only that the certifying officer knew that "certification *may* result in an illegal, improper, or incorrect payment." 33 V.I.C. § 3204(b) (emphasis added). As noted earlier, Najawicz concedes that he did not review Miller's contracts before issuing substantial payments pursuant to those contracts, even though as a certifying officer he was "responsible for the existence and correctness of the facts recited on the certificate or otherwise stated on the voucher or its supporting papers and for the legality of the proposed payments under the appropriation or fund involved." 33 V.I.C. § 3204(a). Given this, ratification of the underlying transactions—even if it did occur[9]—does not change the fact that Najawicz certified payments to Miller that he knew or should have known "may result in an illegal, improper, or incorrect payment," 33 V.I.C. § 3204(b), due to his complete failure to determine whether Miller was entitled to those funds. Accordingly, the January 7, 2008 District Board resolution has no effect upon the validity of the convictions of Najawicz.

6. Criminally Influenced and Corrupt Organizations Act

¶ 93 In Count 20, the People charged Najawicz with violating title 14, section 605(a) of the Virgin Islands Code, the Criminally Influenced and Corrupt Organizations Act ("CICO"). "Pursuant to CICO, '[i]t is unlawful for any person employed by, or associated with, any enterprise . . . to conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of criminal activity.'" *Gumbs v. People*, 59 V.I. 784, 788 (V.I. 2013) (quoting 14 V.I.C. § 605(a)).

[9] As we explain in *Miller v. People*, 2022 VI 3, we conclude that the January 7, 2008 resolution did not retroactively ratify Miller's unauthorized excess housing allowance or educational reimbursement payments.

CICO defines "criminal activity" as

> engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in the crimes, offenses, violations or the prohibited conduct as variously described in the laws governing this jurisdiction including any Federal criminal law, the violation of which is a felony and, in addition, those crimes, offenses, violations or prohibited conduct as found in the Virgin Islands Code as follows:
>
> . . . .
>
> (16) Title 14, chapter 41, Virgin Islands Code, relating to fraud and false statements;
>
> . . . .
>
> (19) Title 14, chapter 55, Virgin Islands Code, relating to larceny and embezzlement;
>
> . . . .
>
> (38) Any conspiracy to commit any violation of the laws of this Territory relating to the crimes specifically enumerated above.

14 V.I.C. § 604(e). "And CICO further defines a 'pattern of criminal activity' as 'two or more occasions of conduct (1) that (A) constitute criminal activity; (B) are related to the affairs of the enterprise; and (C) are not isolated; and (2) where . . . at least one of the occasions of conduct constituted a felony under the Virgin Islands Code. . . .'" *Gumbs*, 59 V.I. at 788 (quoting 14 V.I.C. § 604(j)).

¶ 94 In this case, the seventh amended information identified the RLSH as the enterprise, and Najawicz does not dispute that characterization. Rather, he maintains that the People failed to introduce sufficient evidence to prove that he engaged in a pattern of criminal activity. The seventh amended information alleged that the following acts constituted the pattern of criminal activity Najawicz engaged in:

> a. Defendant having in control money for the use of RLSH secreted RLSH money to himself making numerous wire transfers from the Scotia Bank RLSH account over which he controlled, directly to his personal bank accounts, on the pretext of employee compensation payments, salaries or so called "stipends" which were in gross and made while circumventing the government employee payroll process, without authority of law and not in the due and lawful execution of his trust to RLSH; or

> b. Defendant purposefully circumvented the government employee payroll process and repeatedly made electronic transfers of money in gross payments of over $100 each, from the RLSH bank account to his own personal bank account and to the personal bank accounts of Defendant Rodney Miller Sr., and/or Defendant Amos Carty under the guise of compensation or so called "stipends", salaries or "bonuses", or other employment perks, without legal authority, without any substantiation or regard to the legality or correctness of said payments, and contrary to the due and lawful execution of his trust to RLSH; or
>
> c. Between August 3, 2005 through May 24, 2006 Defendant approved and made four wire transfers of money from the RLSH hospital Scotia Bank account to the personal account of Rodney Miller, Sr., each of which were gross lump sum payments in excess of $100, totaling $409,788.46, under the false pretense of a "June 21, 2005 employment agreement", which did not exist or without any supporting documentation justifying said payment of RLSH funds or without regard to its legality and correctness, and contrary to the due and lawful execution of his trust to RLSH; or
>
> d. Defendant fraudulently appropriated to Defendant Rodney Miller, Sr., in excess of a hundred thousand dollars from RLSH bank accounts, by fraudulently making numerous electronic transfers and disbursements of money from RLSH bank accounts directly to Miller's personal accounts, and fraudulently approving vouchers and unauthorized payments to Miller for housing allowances and educational reimbursements without any substantiation or regard to the legality or correctness of said payments, and contrary to the due and lawful execution of his trust to RLSH; or
>
> e. Over a seven month period between May 16, 2007 and November 30, 2007, Defendant paid to Rodney Miller, Sr., a total of over 1.5 million dollars, to which he was not lawfully entitled, in several wire transfers, each in excess of $100,000.00, from the RLSH Bank of Nova Scotia account to Rodney Miller, Sr.'s personal bank account, on the false pretense of monies owed, without any substantiation, justification or regard as to its legality or accuracy, without authority of law, without the knowledge approval or consent of the Board of Directors.

(J.A. 1064-66.)

¶ 95 Before proceeding to the merits, we note that it is impossible to determine what acts the jury found constituted the pattern of criminal activity required under the CICO statute. During final jury instructions on the CICO charge, the Superior Court did not provide the jury with the elements of the predicate offenses. This, standing alone, is permissible, for "a trial court may

'charge a predicate [CICO] offense by a generic description rather than giving the jury the elements in full,' even though fully setting forth the elements 'is the best practice.'" *Gumbs*, 59 V.I. at 790 n.2 (quoting *United States v. Carrillo*, 229 F.3d 177 (2d Cir. 2000)). But in this case the seventh amended information never expressly stated which provisions of federal or Virgin Islands law were violated, and the Superior Court did not even provide a generic description of the elements of the predicate offenses. Rather, the Superior Court simply read the language from the seventh amended information nearly verbatim. This is problematic since many of the acts identified could potentially violate more than one of the laws identified in the CICO statute.

¶ 96 More significant, however, is that we do not know which of the numerous acts set forth in Count 36 the jury determined constituted a pattern of criminal activity. Although the Superior Court stated in its preliminary jury instructions at the start of trial on October 9, 2019, that a pattern of criminal activity is two or more occasions of conduct that constitutes criminal activity under the CICO statute, it failed to include this instruction in its final instructions to the jury on November 13, 2019. But even if we were to make the highly unlikely assumption that the jury remembered the definition of pattern of criminal activity more than a month later and applied it despite its omission from the final jury instructions, the jury was not required to list in its verdict form which of the conduct charged in the seventh amended information constituted criminal activity and which—if any—did not. Because "the [information] was sufficiently broad and the evidence sufficiently complex as to create a risk that different jurors voted to convict on the basis of different facts establishing different offenses," the failure of the Superior Court to properly instruct the jury and direct them to identify the underlying acts that constituted the pattern of criminal activity " creates an extraordinarily high likelihood that the jury did not issue a unanimous verdict on this charge. *United States v. Lapier*, 796 F.3d 1090, 1097 (9th Cir. 2015).

¶ 97 Nevertheless, it is not necessary for us to divine whether the jury unanimously agreed on the pattern of criminal activity element because the core premise of most of the acts—that RLSH funds were distributed without authority of law—is incorrect as a matter of law. While Counts 20(a) and (b) allege that Najawicz was without authority to obtain stipends or bonuses more than his NOPA salary, such payments were authorized, for the reasons set forth above in the discussion of Counts 22 and 23. Although Count 20(c) alleges that payments made to Miller were illegal because the June 21, 2005 employment agreement did not exist, the evidence established that such an agreement did in fact exist and was authorized by law, for the reasons set forth in the discussion of Count 21. And while Count 20(d) and (e) alleges that payments to Miller were fraudulently made without authority of law, for the reasons explained in the context of Count 35, the People failed to prove that Najawicz acted with fraudulent intent in making these transfers. Consequently, the People failed to introduce sufficient evidence that Najawicz engaged in a pattern of criminal activity in violation of CICO. Accordingly, we reverse his conviction on Count 20.

7. Conspiracy

¶ 98 In Count 2, the People charged Najawicz with conspiracy in violation of title 14, section 551(1) of the Virgin Islands Code. Specifically, Count 2 alleged that Najawicz conspired with Miller and Carty

> to commit crimes of embezzlement by conspiring to appropriate thousands of dollars from RLSH bank accounts to their own use and benefit, without authority of law or not in the due and lawful execution of their trust. To wit: through agreements, arrangements and authorizations made with one another, without authority of law, Defendants circumvented the government employee payroll process and disbursed thousands of dollars of RLSH money in gross payments to themselves or to one another from RLSH bank accounts to their personal bank accounts, apart from their authorized (NOPA) compensation, without authority of law or without regard to their legality or correctness of payments, and contrary to the due and lawful execution of their trust to RLSH.

(J.A. 1053.)

¶ 99 "[T]he essential elements for a section 551 conspiracy are an agreement and an overt act done in furtherance of the conspiracy." *Francis v. People*, 52 V.I. 381, 389 (V.I. 2009). While the People may use circumstantial evidence to satisfy these elements, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Id.* (internal citations and quotation marks omitted). And while not binding on this Court, the Supreme Court of the United States, in construing a federal conspiracy statute containing similar language, persuasively held that "[t]he overt act . . . may be that of only a single one of the conspirators and need not be itself a crime." *Braverman v. United States*, 317 U.S. 49, 52 (1942). Because the overt act is an element of the offense and need not be a criminal act, we agree that an information which charges a violation of section 551 must specify both the crime and the overt act, so as to meaningfully apprise the defendant of the factual predicate of the offense. *Bigby v. Gov't of the V.I.*, 125 F.Supp.2d 709, 712-13, 716-17 (D.V.I. App. Div. 2000). *See also* V.I. R. CRIM. P. 3(a)-(b).

¶ 100 As a threshold matter, we again note the extraordinarily high risk that the jury rendered a non-unanimous verdict on this charge. The crime that is the subject of the conspiracy is only referred to as "embezzlement" despite the three defendants having been charged with embezzlement under different statutes. And while Count 2 appears to identify "circumvent[ing] the government employee payroll process" as the overt act, J.A. 1053, the theory of the case presented by the People had been that this had occurred in different ways by the conduct of different defendants over the course of approximately six years. While it is certainly permissible for the People to charge the defendants in such a manner, the Superior Court only instructed the

jury that "[y]our verdict must represent the collective judgment of the jury, and in order to return a verdict, each juror must agree," and that "your verdict must be unanimous." Such an instruction, however, is insufficient in a case where the People present multiple theories of liability to support the same charge, in that it gives no indication to the jury that they were required to unanimously agree on the facts that support its verdict, as opposed to only unanimously agreeing only on the verdict. *United States v. Holley*, 942 F.2d 916, 926 (5th Cir. 1991). And while the Superior Court did instruct the jury, in the context of the conspiracy charge, that "[y]ou must unanimously agree on the overt act that was committed," it failed to extend that instruction to cover all the elements of conspiracy and did not give such an instruction for any other charge. This makes it effectively impossible for this Court to review the sufficiency of the evidence with respect to those elements since there is no way to determine what the jury actually found. *See, e.g., United States v. Gaddy*, 174 Fed.Appx. 123, 125 (3d Cir. 2006); *United States v. Sayan*, 968 F.2d 55, 65 (D.C. Cir. 1992); *United States v. Sanderson*, 966 F.2d 184, 187 (6th Cir. 1992); *United States v. Gilley*, 836 F.2d 1206, 1211 (9th Cir. 1988).

¶ 101 Despite the inability of this Court to meaningfully review the sufficiency of the evidence on those elements, we nevertheless reverse the conspiracy conviction. As explained earlier, it is not illegal for a RLSH employee to receive compensation that exceeds that listed on the NOPA form maintained by the Executive Branch. Rather, Virgin Islands law permits employees of the RLSH and other hospitals under the control of the Corporation to receive compensation—including compensation in the form of stipends and bonuses—from accounts maintained by the Corporation, regardless of whether such compensation exceeds the salary listed on the NOPA form. Thus, virtually all of the conduct alleged in Count 2 does not constitute a crime at all, whether by Najawicz, Miller, or Carty.

¶ 102 We recognize, however, there were at least a few transactions which did constitute a crime. For the reasons explained earlier in this opinion, Miller was not entitled to receive many of the payments that were made to him by Najawicz between May 17, 2007, and November 30, 2007. But as we explain in *Carty v. People*, 2022 VI 2, there is no evidence that Carty was a part of that conspiracy. This is significant because the seventh amended information charged an all-encompassing large conspiracy involving all three defendants. Both this Court and the federal courts have recognized that proof of smaller conspiracies involving some, but not all, of the same actors is not sufficient to establish a single, large conspiracy between all the actors when the defendants had been charged only with the latter and not the former. *See Duggins v. People*, 56 V.I. 295, 309-10 (V.I. 2012); *Kotteakos v. United States*, 328 U.S. 750, 765 (1946); *United States v. Perez*, 28 F.3d 318, 345 (3d Cir.2002). As the United States Supreme Court eloquently explained,

> Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal, even as respects conspiracies. It is not a matter of mass application. There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. True, this may be inconvenient for prosecution. But our Government is not one of mere convenience or efficiency. It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

Kotteakos, 328 U.S. at 773.

¶ 103 But even if this Court were inclined to hold that evidence of a smaller conspiracy between Miller and Najawicz could sustain a conspiracy conviction for Najawicz, we hold that the People failed to meet their burden in proving such a conspiracy. The evidence the People rely on to support the existence of such a conspiracy is circumstantial, and largely identical to the circumstantial evidence it pointed to in its attempt to establish fraudulent intent: that Najawicz gave Adams the unsigned May 16, 2007 letter and asked her to sign it; that Miller drafted and signed letters to Najawicz requesting payments; that Najawicz disbursed the funds; and that Miller awarded Najawicz a bonus a month and a half before it was due. But while the People may use circumstantial evidence to satisfy the elements of a conspiracy, "[t]his circumstantial evidence must be sufficient to create a reasonable and logical inference that the activities of the participants could not have been carried on except as the result of a preconceived scheme or common understanding." *Francis*, 52 V.I. at 389. For the same reasons that the above evidence is not sufficient to establish fraudulent intent, it is not sufficient to prove the existence of a preconceived scheme or common understanding. Therefore, we reverse Najawicz's conviction on Count 2.[10]

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[10] As noted earlier, the Superior Court dismissed several of Najawicz's other convictions pursuant to title 14, section 104 of the Virgin Islands Code. The People did not cross-appeal from the dismissal of those convictions, Najawicz does not challenge the sufficiency of the dismissed convictions in his appellate brief, and neither the People nor Najawicz discuss how this Court should proceed in the event it reverses some, but not all, of Najawicz's convictions. However, for the reasons set forth in *Carty v. People*, 2022 VI 2, issued of even date herewith, we decline to reinstate any of the dismissed convictions, in that they suffer from the same infirmity as Najawicz's other convictions.

We also note that Najawicz's co-defendants, Miller and Carty, raised other issues in their respective appeals which we have held warrant a new trial in the case of Miller. *See Miller v. People*, 2022 VI 3. However, due to our decision to reverse, on sufficiency of the evidence grounds, all of Najawicz's convictions other than those for Counts 31 and 33, we decline to remand for a new trial under the rule announced in *Boston v. People*, 56 V.I. 634, 644-45 (V.I. 2012), because those errors have no bearing on these two convictions but are relevant only to convictions that have already been reversed.

C. Sentence

¶ 104 Although not raised by any of the parties, we note that the Superior Court imposed an illegal sentence on Counts 31 and 33, the only convictions we affirm. Counts 31 and 33 both entailed violations of the certifying officer statute, which provides, in pertinent part, that

> (b) An officer or employee who certifies a voucher knowing that such certification may result in an illegal, improper, or incorrect payment shall:
>
> (1) for the first offense, be fined an amount equal to the amount of the illegal, improper, or incorrect payment and shall be suspended without pay for thirty (30) days; and
>
> (2) for a second or subsequent offense, be fined an amount of the illegal, improper, or incorrect payment and shall be imprisoned for at least thirty (30) days but not more than one (1) year.
>
> (c) An officer or employee convicted under subsection (b)(2) of this section shall be immediately discharged from his employment with the Government of the United States Virgin Islands.

33 V.I.C. § 3404(b)-(c). In its January 9, 2020 judgment and commitment, the Superior Court ordered

> That Defendant Najawicz is sentenced to concurrent one year terms of imprisonment on Counts Two, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-nine, Thirty-three, Thirty-four, and Thirty-five, is fined $50,000 on Count Twenty, is suspended without pay on Count Thirty-one, which the Court finds to be moot, and is terminated on Count Thirty-three, which the Court also finds to be moot.

(J.A. 963.) However, at the December 19, 2020 sentencing hearing, the Superior Court announced the following sentences:

> Regarding Count Thirty-one, certification of illegal payments to Mr. Miller's housing allowance, I sentence Mr. Najawicz to one year in the Bureau of Corrections concurrent with Count Two.
>
> . . . .
>
> Count Thirty-three related to that certification of an illegal payment related to Mr. Miller's education expenses, I sentence Mr. Najawicz to one year in the Bureau of Corrections concurrent with the sentenced imposed in . . . Count Two.

(J.A. 1495-96.))

¶ 105 Thus, the January 9, 2020 judgment and commitment differs from the oral sentence in that

the one-year sentence for Count 31 has been removed. This is consistent with section 3404(b), which provides for no incarcerative sentence for a "first offense" under that statute. However, by retaining a one-year sentence for Count 33, it appears the Superior Court has interpreted Najawicz's conviction under Count 31 as a "first offense" under section 3404(b)(1) and his conviction under Count 33 as a "second or subsequent offense" under section 3404(b)(2), even though both convictions were obtained as part of the same proceeding.

¶ 106 The Superior Court's treatment of Count 33 as a "second or subsequent offense" is not supported by law. Because section 3404 does not define the phrase "second or subsequent offense," we construe it "according to the common and approved usage of the English language." 1 V.I.C. § 42. However, because section 3404 is a criminal statute, the rule of lenity requires that any ambiguity be resolved in favor of the defendant. *Gilbert v. People*, 52 V.I. 350, 356 (V.I. 2009).

¶ 107 We conclude that Najawicz's conviction under Count 33 is not a "second or subsequent offense," but rather is also a "first offense" like his conviction for Count 31. "[T]he uniform rule has long been that the term 'offense' assumes a prior conviction." *In re Torres*, 861 A.2d 1055, 1059 (Vt. 2004); *see also Deal v. United States*, 508 U.S. 129, 135 (1993) ("It cannot legally be known that an offense has been committed until there has been a conviction. A second offense, as used in the criminal statutes, is one that has been committed after conviction for a first offense.") (quoting *Gonzalez v. United States*, 224 F.2d 431 (1st Cir. 1955)). Although the acts alleged in Count 33 occurred after those charged in Count 31, they were charged in the same information, tried as part of a single proceeding, and the convictions were entered as part of the same judgment and commitment. Consequently, the Superior Court erred by sentencing Najawicz to one year of incarceration on Count 33. *See Commonwealth v. Jarowecki*, 985 A.2d 955, 968-69 (Pa. 2009)

(holding that sentence enhancement for committing a "second or subsequent offense" of possession of child pornography did not apply to defendant with no prior convictions who was convicted of eight separate counts of possessing child pornography as part of a single proceeding).

III. CONCLUSION

¶ 108 The People failed to introduce sufficient evidence to sustain Najawicz's convictions for obtaining money by false pretenses, embezzlement of fiduciaries, violation of CICO, or conspiracy. However, the People introduced sufficient evidence to sustain his convictions under the certifying officer statute. Accordingly, we reverse Najawicz's convictions for Counts 2, 20, 21, 22, 23, 29, 34, and 35, but affirm his convictions on Counts 31 and 33. However, because the Superior Court illegally sentenced Najawicz to one year of incarceration on Count 33, we vacate that portion of his sentence and remand the case for resentencing in a manner consistent with the certifying officer statute.

Dated this 24th day of February, 2022.

BY THE COURT:

/s/ Rhys S. Hodge
RHYS S. HODGE
Chief Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court

By: _____
Deputy Clerk

Dated: 2/24/2022