

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Colorado Ethics Watch,
Complainant,

v.

Scott E. Gessler,
Respondent.

On June 7, 2013 the Independent Ethics Commission (“IEC” or “Commission”) conducted a hearing as required by Colorado Constitution Article XXIX, section 5(3)(c) regarding Complaint 12-07 filed with the Commission. The IEC heard testimony over 11 hours, heard from eight witnesses, and reviewed and received approximately 66 exhibits into evidence. The parties submitted written closing arguments on June 12, 2013. The Commission met and deliberated on June 13, 2013.

The Commission makes the following findings of facts and conclusions of law, based upon the preponderance of the evidence.

I. Findings of Fact

A. Republican National Lawyers Association Conference

1. On Thursday, August 23, 2012, Secretary Gessler flew to Tampa, Florida to attend a continuing legal education (“CLE”) conference sponsored by the Republican National Lawyer’s Association (“RNLA”). Secretary Gessler was invited to attend the conference and participate as a speaker by the conference sponsors. The conference took place on Friday, August 24 and Saturday, August 25 in Sarasota, Florida. Exhibit N. Secretary Gessler requested and received 12 general CLE credits and 1.2 ethics credits for attending the conference.¹ See Exhibits K and L.
2. The conference was titled “National Election Law Seminar.” During his testimony, Secretary Gessler did not recall details or specifics of the conference, including what he discussed as a scheduled speaker.

¹ Colorado attorneys with an active license to practice law are required to take 45 hours of general credits and 7 hours of ethics credits every three years.

3. According to documents submitted into evidence, RNLA's mission "includes support for Republican Party ideals, platforms and candidates." The conference registration form requires participants to state that they support the RNLA's mission. More than one of the topics at the conference did not pertain to the law in Colorado and were concerned primarily with partisan values and/or politics. One session of the conference was a reception with the Romney for President Campaign, although Secretary Gessler did not recall if he attended that event. See Exhibit C, attachments 4-6, and Exhibit N, Exhibits 14 and 15.
4. Secretary Gessler stayed at the Ritz Carlton hotel on Thursday, Friday and Saturday nights (August 23, 24 and 25, 2012). The conference ended during the day on August 25, and Mr. Gessler stayed an additional night at the State's expense at an increased rate. Exhibit D.
5. The total cost of the airfare to Florida and the lodging for August 23, 24, and 25 was \$1278.90. Secretary Gessler paid the \$1278.90 out of the discretionary funds provided to the Secretary of State pursuant to C.R.S. section 24-5-109.
6. Secretary Gessler testified that he used discretionary funds for this trip, rather than Department travel funds, because he knew that given that the sponsor had the word Republican in its name, the conference could be subject to scrutiny, and he believed that he had more leeway with the use of these funds than with monies from the Department of State's travel budget.
7. On August 26, 2013, Mr. Gessler travelled to the Republican National Convention ("RNC") in Tampa, Florida. He planned to return to Denver on September 1. Costs of lodging and meals associated with his stay at the RNC were paid for out of campaign funds.
8. The Secretary of State in Colorado is not required to be a licensed attorney.
9. Secretary Gessler repaid the \$1278.90 on May 21, 2013, 17 days before the scheduled hearing date. Exhibit XX.

B. Early return from the Republican National Convention

1. On Friday, August 24, while Secretary Gessler was in Florida, the Secretary of State's office ("SOS") received a threatening vulgar email directed against Secretary Gessler's wife and daughter who remained in Colorado.

2. On Tuesday, August 28, Ms. Padron, staff member of the SOS, received a threatening phone call addressed to the Secretary and his family. The staff of the SOS informed the Colorado Bureau of Investigation ("CBI"), and the Denver Police Department. CBI conducted an investigation, and the person responsible was arrested on August 29, 2012. Exhibits E-G., KK.
3. On Thursday, August 30, the SOS Chief of Staff, Gary Zimmerman, in consultation with other staff members, advised the Secretary to return to Colorado early. Secretary Gessler returned to Denver on Friday, August 31, a day earlier than planned. Secretary Gessler incurred additional airfare costs for the change in plans. These additional charges were paid for out of the Secretary of State's General Fund appropriation. Exhibits P-R.
4. The cost of the early return flight appears to have been \$422. Exhibits LL, Q. Testimony at the hearing indicated that a portion of the hotel stay for the RNC may have been reimbursed to the Secretary from the General Fund. However, no additional evidence to support this separate payment is in the record.

C. Discretionary Account Funds

1. On July 5, 2012, Secretary Gessler requested reimbursement of "any remaining discretionary funds." See Exhibit BB. No reimbursement receipts or other information was provided in the request. Other requests for reimbursement from the discretionary fund in evidence contained receipts and/or documentation. Exhibits T-V, X, Y, Z, AA, DD, EE, FF.
2. The Department of State had been advised by the State Controller in November and December 2011 that receipts and other documentation are required for reimbursement from the Discretionary Funds, and that expenses must be in pursuance of state business. See Exhibit 3, also Exhibit BB.
3. Secretary Gessler testified that he knew that without receipts, amounts paid to him from his discretionary account would be viewed as personal income subject to taxation. He did not know if that money was added to his W-2. Secretary Gessler therefore treated and intended to treat the reimbursement of the balance of his discretionary fund as personal income.
4. The amount of this payment was \$117.99.

II. Applicable Law

A. Colorado Constitution Article XXIX, Section 5(1)

Section 5(1) of Article XXIX provides in relevant part:

The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties...on ethics issues arising under this article and any other standards of conduct and reporting requirements as provided by law.

B. C.R.S. §24-18-103(1) Public Trust-Breach of Fiduciary Duty

“...A public officer...shall carry out his duties for the benefit of the people of the state.”

C. C.R.S. §24-9-105(1)(d) Elected State Officials-Discretionary Funds

(1) Beginning with the fiscal year commencing July 1, 1985, and for each fiscal year thereafter, subject to annual appropriation by the general assembly, there is hereby available the following amounts for expenditure in pursuance of official business as each elected official sees fit:

(d) Secretary of State, five thousand dollars.

D. State Fiscal Rule

Although the statute does not define “official business,” the Commission looks to definitions in the State Fiscal Rules as guidance. See, 1 CCR 101. In Chapter 5 (Travel), Rule 3.2.2. states that “travel charged to the State, regardless of the funding source, shall be for the benefit of the State, ...and is only for the time period necessary.” The definitions in that chapter define Political Expenses as expenses “incurred in relation to activities that are primarily designed to further the interests of a candidate, political party, or special interest group.” The list of non-allowable expenses include: “Personal expenses incurred during travel that are primarily for the benefit of the Traveler, and not directly related to State Business (Rule 5-1.7.3), and Political Expenses (Rule 5-1.7.4). Rule 5.11-7 specifically requires an allocation of costs when a trip is partially for State business and partially for personal or political purposes.

III. Conclusions of Law

After reviewing the relevant facts and law, the Commission finds as follows:

1. Secretary Gessler is a “public officer” as defined by Colorado Constitution Article XXIX section 2(6), and was subject to the Commission’s jurisdiction at the time of the events in question.

2. Secretary Gessler spent \$1278.90 of his discretionary account primarily for partisan purposes, and therefore personal purposes, to fly to Florida to attend the RNLA conference and thereafter attend the RNC. As a result, Secretary Gessler violated the ethical standard of conduct contained in C.R.S. section 24-9-105, by using funds from his discretionary account for other than official business. By so doing, Secretary Gessler breached the public trust for private gain in violation of C.R.S. section 24-18-103(1).
3. Secretary Gessler's acceptance of reimbursement of the "balance of the discretionary account" without any documentation or detail of expenses incurred, violated the ethical standard of conduct contained in C.R.S. section 24-9-105 in that such reimbursement was not in pursuance of official business but was personal in nature. By so doing, Secretary Gessler breached the public trust for private gain in violation of C.R.S. section 24-18-103(1).
4. Secretary Gessler's acceptance of reimbursement from state funds for the travel expenses incurred as a result of his early return to Denver in the wake of threats to him and his family does not violate any ethical standards of conduct provided by law. The necessity of the early return was directly related to Mr. Gessler's position as Secretary of State. See Exhibit S. To the extent that such payment was for the hotel stay paid for out of campaign funds, the IEC concludes that any such reimbursement would be for personal purposes and not for official business.

IV. Penalties

The Commission finds that Secretary Gessler breached the public trust for private gain in using public funds for personal and political purposes. As a result, the Commission imposes the following penalties.

1. Secretary Gessler is penalized the amount of \$1278.90, which is doubled pursuant to section 6 of the Colorado Constitution for a total of \$2557.80.
2. Secretary Gessler is penalized the amount of \$117.99, which is doubled pursuant to section 6 of the Colorado Constitution for a total of \$235.98.
3. Secretary Gessler shall be given a credit for the amount he returned to the state in the amount of \$1278.90.

Total penalty amount – \$1514.88

The Independent Ethics Commission

Matt Smith *Chair* (dissenting from the double penalty in Part IV.1.)
Rosemary Marshall, *Vice Chair*
Dan Grossman, *Commissioner*
Sally Hopper, *Commissioner*, (dissenting from Parts I. C., III.3 and IV.)
Bill Pinkham, *Commissioner*

Dated this 19th day of June, 2013

CERTIFICATE OF MAILING

This is to certify that on the 19th day of June, 2013, I emailed copies of the foregoing **FINDINGS OF FACT AND CONCLUSIONS OF LAW** addressed as follows:

Luis Toro
Peg Perl
Colorado Ethics Watch
1630 Welton Street, Suite 415
Denver, CO 80202

ltoro@coloradoforethics.org
pperl@coloradoforethics.org

David A. Lane
Killmer, Lane, & Newman, LLP
1543 Champa Street, Suite 400
Denver, Colorado 80202
dlane@kln-law.com

Robert J. Bruce
Lawlis & Bruce, LLC
1875 Lawrence Street, Suite 750
Denver, Colorado 80202
bobbruce@lawlisbruce.com

Michael R. Davis
Law Office of Michael R. Davis, LLC
3301 West Clyde Place
Denver, Colorado 80211
mrd@mrdavislaw.com

