

DISTRICT COURT, DENVER, COLORADO  
1437 Bannock St.  
Denver, CO 80202

DATE FILED: March 12, 2014  
CASE NUMBER: 2013CV30421

**Appellant,**

**SCOTT E. GESSLER,**

v.

**Appellees,**

**DAN GROSSMAN, SALLY H. HOPPER, BILL PINKHAM,  
MATT SMITH, and ROSEMARY MARSHALL** in their  
official capacities as members of the Independent Ethics  
Commission and the **INDEPENDENT ETHICS  
COMMISSION.**

**COURT USE ONLY**

Case Number(s): 13CV030421

Courtroom: 376

**COURT'S ORDER RE: APPEAL**

This matter is before the Court on Appellant Scott E. Gessler's ("Gessler") appeal of Colorado Independent Ethics Commission's Findings of Fact and Conclusions of Law on Complaint No. 12-07 ("IEC's Order"), pursuant to C.R.S. § 24-18.5-101(9) and the Colorado Administrative Procedure Act.

The Colorado Independent Ethics Commission ("IEC") issued its Findings of Fact and Conclusions of Law ("IEC's Order") on June 13, 2013 and found that Gessler had committed ethical infractions by violating the State Fiscal Rules, C.R.S. § 24-9-105, and C.R.S. § 24-18-103(1).

The Court having considered applicable law, having reviewed the pleadings, and being fully advised, hereby enters the following findings and order:

**I. Statement of Facts**

On Thursday, August 23, 2012, Gessler flew to Tampa, Florida to attend a continuing legal education ("CLE") conference sponsored by the Republican National Lawyer's Association ("RNLA") in Sarasota. Gessler attended the National Election Law Seminar as a participant and as a speaker.

While in Sarasota, Gessler stayed at the Ritz Carlton at the conference's room rate for the two nights of the conference and for one additional night at an increased rate. Gessler paid \$1,278.90 out of his office's discretionary fund for his airfare and stay at the Ritz Carlton.

On August 26, 2013, Gessler travelled to the Republican National Convention ("RNC") in Tampa, Florida. Gessler paid for lodging and meals out of his campaign funds.

Gessler planned to stay in Florida until September 1, 2013, however, because the Secretary of State's office received threats against Gessler's wife and daughter, Chief of Staff Gary Zimmerman advised Gessler to return to Colorado early. Accordingly, Gessler returned early, and this change to his airline reservation cost the State an additional \$422. The IEC did not find any ethical violations in Gessler's reimbursement of the \$422 for his early return to Colorado after his family was threatened, because that expense was directly related to his work as Secretary of State.

On July 5, 2012, Gessler requested reimbursement of "any remaining discretionary funds." Gessler did not include any documentation, such as receipts, along with his request. The amount reimbursed was \$117.99.

Gessler repaid the \$1,278.90 on May 21, 2013, seventeen days before his hearing with the IEC.

## **II. Statement of the Case**

On October 15, 2012, the CEW filed a complaint, along with supporting documentation, against Gessler with the IEC. In Gessler's response to the CEW Complaint, he did not dispute the CEW's factual allegations.

The IEC determined that the CEW Complaint was non-frivolous and appointed an independent investigator. After the investigation, the IEC held an eleven-hour hearing at which Gessler and the CEW appeared through counsel on June 7, 2013. After the hearing, the parties submitted written closings to the IEC on June 12, 2013.

On June 19, 2013, the IEC issued the IEC's Order, finding that Gessler spent \$1,278.90 of his discretionary account primarily for partisan purposes, and therefore personal purposes, to fly to Florida to attend the RNLA conference and then the RNC. This conduct violated the ethical standard of conduct described in C.R.S. § 24-9-105, because Gessler used the discretionary funds for other than "official business." The IEC also found that this conduct breached the public trust for private gain in violation of C.R.S. § 24-18-103(1).

The IEC found that Gessler's acceptance of the balance of the discretionary account, \$117.99, without documentation or itemization, violated C.R.S. § 24-9-105, because the reimbursement was not in pursuance of official business but was personal in nature. Thus the acceptance of the balance violated C.R.S. §24-18-103(1) by breaching the public trust for private gain.

The IEC imposed the following penalties:

- 1) Gessler was penalized for the \$1,278.90, which was doubled pursuant to Colorado Constitution §6 for a total of \$2,557.80,
- 2) Gessler was penalized for \$117.99, which was also doubled for a total of \$235.98,
- 3) and, Gessler was given credit for \$1,278.90, the amount he returned to the state, prior to the hearing.

After the credit, the IEC found that Gessler owed a penalty of \$1,514.88.

Gessler is appealing on the following grounds: (1) the IEC exceeded its jurisdiction; (2) the IEC's findings of fact were arbitrary and capricious; (3) the IEC violated Gessler's due process rights; and, (4) the IEC violated Gessler's right to free speech and assembly.

### **III. Standard of Review**

C.R.S. § 24-4-106 of the Administrative Practice Act ("APA") governs and provides the standard of judicial review of agency actions. *In re Application for Water Rights of Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist.*, 221 P.3d 399, 417 (Colo. 2009). Pursuant to the statute and Colorado case law, reviewing courts accord deference to the IEC. *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009); *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008). The reviewing court will uphold the agency's decision unless that decision is, among other factors: arbitrary and capricious; an abuse or clearly unwarranted exercise of discretion; based upon findings of fact that are clearly erroneous on the whole record; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law. C.R.S. §24-4-106(7). Reviewing courts will uphold an agency's actions unless a "reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion." *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009).

### **IV. Analysis of Claims on Appeal**

#### **A. Whether the IEC's enabling statute is unconstitutionally vague.**

Gessler argues that the phrase "other standards of conduct" is so vague that elected officials cannot determine what type of conduct would invite prosecution by the IEC. (Gessler's Opening Brief at 30-31). The Court is unconvinced. The IEC's enabling statute is not unconstitutionally vague simply because it directs the agency to investigate ethics issues arising under published legal standards and reporting requirements applicable to the public official in question.

Constitutional provisions and statutes are presumed to be constitutional. *Table Servs., LTD v. Hickenlooper*, 257 P.3d 1210, 1214-15 (Colo. App. 2011). A provision satisfies the requirements of due process when it provides fair notice of unlawful conduct. *Charnes*, 728 P.2d 1287 at 1290. "A statute that forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning" is unconstitutionally vague. *Smith v. Charnes*, 728 P.2d 1287, 1290 (Colo. 1986). Statutes are often worded broadly so that they apply to a variety of circumstances, but "generality is not the equivalent of vagueness, and statutory terms used need not be defined with mathematical precision in order to withstand a vagueness challenge." *Stamm v. City & Cnty. of Denver*, 856 P.2d 54, 56 (Colo. App. 1993). The publication of enacted laws is considered sufficient notice to satisfy due process requirements for individuals affected by those laws. *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1108 (Colo. App. 2009).

The IEC was created to govern the Gift Ban, Revolving Door Prohibition, and "ethics issues arising ... under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX. While on its own, the phrase "other standards of conduct" appears vague, it is limited by "and reporting requirements as provided by law." This limiting phrase means the IEC can only prosecute public officers who have violated applicable legal

standards. That qualification means that public officers are, therefore, on notice for any infraction that could prompt an IEC investigation.

The IEC investigated Gessler for violations of specific State Fiscal Rules; C.R.S. §24-9-105, the Colorado statute concerning discretionary funds for elected officials; and, C.R.S. §24-18-103, the Colorado statute charging public officers to carry out their duties "for the benefit of the people of the state." (IEC's Order at 11-12). These rules and statutes clearly apply to public officers and elected officials such as Gessler. A law is unconstitutionally vague if a person of common intelligence must guess at its meaning. *Charnes*, 728 P.2d 1287 a 1290. Gessler previously demonstrated understanding of the meaning of the statute when he cited to it in a reply in another case. (IEC's Answer at 22). The statute's language limits the IEC to only investigating and penalizing individuals for violations of published standards of conduct and reporting requirements. For these reasons, the Court finds that the enabling statute is not unconstitutionally vague.

### **B. Whether the IEC exceeded its jurisdiction.**

Gessler asserts that the IEC is limited to investigating improper gifts to public officers. (Gessler's Opening Brief at 9). The Court finds that this interpretation contravenes the plain language of the IEC's enabling statute and the applicable provisions in the Colorado Constitution. The IEC's enabling statute grants the commission authority to inquire into other areas.

The IEC was created to govern the Gift Ban, Revolving Door Prohibition, and "ethics issues arising ... under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX, §5. The IEC should begin investigating when "any person" files a complaint "asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months." Colo. Const. art. XXIX, §5(3)(a). Colorado case law also supports the idea that the IEC was created to govern the ethical behavior of employees of the executive branches, among others, and to conduct investigations when concerned parties bring ethics complaints to its attention. *Developmental Pathways*, 178 P.3d 524 at 527 - 8. Additionally, once the IEC begins its investigation, its inquiries are not restricted to the violations alleged in the complaint. "The scope of the hearing shall be determined by the IEC and may be limited to specific factual, ethical or legal issues." IEC Rule of Procedure 8.A.2. The IEC is also charged with ensuring "that those within its coverage 'avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated.'" *Developmental Pathways*, 178 P.3d 524 at 532.

The IEC was well within its jurisdiction. The commission complied with the applicable constitutional provisions and its own rules of procedure. The CEW's initial complaint alleged ethical violations by Gessler that the IEC subsequently investigated. Based on the results of that investigation, the IEC held a hearing on the matter, eventually concluding that Gessler had violated the State Fiscal Rules, C.R.S. §24-9-105, and C.R.S. §24-18-103. Consequently, the IEC levied penalties pursuant to those statutes. The IEC's actions mirrored the procedural requirements set out for the agency in Colo. Const. art. XXIX, §5 and in the agency's own procedural rules. Thus based on the plain language of the IEC's enabling statute and the Constitutional provisions that govern the commission, the Court finds that the IEC was within its jurisdiction when it prosecuted Gessler for alleged ethical violations.

### **C. Whether the IEC violated Gessler's right to due process.**

Gessler asserts that his due process rights were violated because the IEC: (1) failed to remove biased commissioners from the investigatory panel; (2) failed to provide sufficient notice of the charges; and, (3) failed to allow Gessler to introduce all of the testimony and present all the evidence he needed to mount an adequate defense.

#### **1. Whether Gessler's right to due process was violated because Commissioners Marshall and Grossman failed to recuse themselves.**

Gessler's right to due process was not violated because Commissioners Rosemary Marshall and Dan Grossman failed to recuse themselves. Reviewing courts accord deference to the IEC's decisions. *Developmental Pathways*, 178 P.3d 524 at 535. Administrative Law Judges ("ALJ") are accorded a presumption of honesty, integrity, and impartiality. *Mountain States Tel. & Tel. Co. v. Pub. Utilities Comm'n of State of Colo.*, 763 P.2d 1020, 1028 (Colo. 1988). While an ALJ may be disqualified for personal bias, the decision is within the discretion of the ALJ. *Rice v. Dep't of Corr.*, 950 P.2d 676, 681 (Colo. App. 1997). Reviewing courts should examine the record for evidence of a judge's manifestation of ill will, bias, favoritism, impropriety, or other conduct that would overcome the presumption of impartiality. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1277 (Colo. App. 2008); *Brewster v. Dist. Court of the Seventh Judicial Dist.*, 811 P.2d 812, 814 (Colo. 1991). Even when the subject of a disciplinary proceeding alleges that an ALJ is biased, if the respondent fails to provide evidence to substantiate the respondent's suspicion that bias impermissibly influenced the commission, the presumption of impartiality will not be overcome. *Lopez-Samoyoa v. Colorado State Bd. of Medical Examiners*, 868 P.2d 1110, 1113 (Colo. App. 1993) (reversed on other grounds). Hallmarks of fair proceedings conducted by unbiased ALJs include: notice of the charges; an opportunity for the accused to present witnesses and evidence; and, a written opinion by the ALJ supported by evidence in the record. *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 501-02 (Colo. App. 2004).

Gessler asserts that Commissioner Marshall, a former Democratic state representative, had interactions with Gessler prior to the IEC's investigation that could be construed as evidence of bias. (Gessler's Opening Brief at 40). Specifically, Gessler cited an instance when Commissioner Marshall appeared to rule hastily in an IEC vote against the Secretary and then made remarks about the action to the media. (Gessler's Opening Brief at 41). Also, Gessler stated that amongst other politically motivated actions, Commissioner Marshall donated to the campaign of Gessler's opponent for Secretary of State in 2010. (Gessler's Opening Brief at 41).

Gessler states that Commissioner Grossman, a former Democratic state representative and senator, contributed to the campaign of Gessler's opponents, or potential opponents, in 2010 and 2014. (Gessler's Opening Brief at 41). Gessler asserts that Commissioner Grossman had opposed him in other political ways and that Commissioner Grossman had referred negatively to the Deputy Secretary of State as "The Dragon Lady." (Gessler's Opening Brief at 41-2).

The Court has reviewed the records of the IEC's hearings on this matter as well as the IEC's Order, and despite Gessler's allegations of bias, the Court does not find sufficient evidence to overcome the IEC's presumption of impartiality. The IEC was purposefully structured so that Republicans and Democrats would be equally represented. The applicable provisions in the Colorado Constitution allow for no more than two members of a single political

party to serve at the same time. Colo. Const. art. XXIX §5(2)(b). The IEC states that Commissioner Marshall said on the record in a meeting on March 4, 2013 that she could be fair and impartial. Her fellow Commissioners agreed unanimously. (IEC's Response at 29).

The transcripts and orders from the IEC evidence no manifestations of ill will, bias, or other conduct that would overcome the presumption of impartiality. (See Gessler's Complaint, Ex. D; IEC's Opposition Brief to Motion for Temporary Restraining Order and/or Preliminary Injunction w/attach, Ex. 6; IEC's Response, Ex. 1). The IEC's Order is well-reasoned and based on substantial factual evidence properly entered into the record. During the eleven-hour hearing on June 7, 2013, Gessler was accorded a fair opportunity to make his case. He was represented by counsel, allowed to present evidence, allowed to put on his own witnesses, and allowed to cross-examine the CEW's witnesses. (IEC's Answer at 3-4). After the hearing, both parties submitted written closings to the IEC, which deliberated and then wrote a detailed, fact-based opinion. (IEC's Answer at 4; IEC's Order). For these reasons, the Court finds no evidence in the record of bias or ill will sufficient to overcome the commissioners' presumption of impartiality. Thus, it was not an abuse of discretion for the IEC to allow Commissioners Marshall and Grossman to remain on the commission during Gessler's hearing. Accordingly, the IEC did not violate Gessler's right to due process by not forcing Commissioners Marshall and Grossman to recuse themselves.

**2. Whether Gessler's right to due process was violated because the IEC failed to provide sufficient notice of the charges.**

Gessler's right to due process was not violated because the IEC documents provided sufficiently detailed information of the facts underlying Gessler's alleged violations for him to prepare a defense. There are no specific requirements or rules of procedure to ensure that a defendant's due process rights are preserved, especially in an administrative hearing. *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 501 (Colo. App. 2004); *Bourie v. Dep't of Higher Educ.*, 929 P.2d 18, 22 (Colo. App. 1996). Rather, "[d]ue process is satisfied by providing adequate notice of opposing claims, a reasonable opportunity to defend against those claims, and a fair and impartial decision." *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496 at 501. The IEC's decision is entitled to a presumption of validity. *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496 at 501. An agency need only give a respondent notice of "the legal authority and jurisdiction under which [the hearing] is to be held, and the matters of fact and law asserted." C.R.S. §24-4-105(2)(a). Notice is adequate if it informs the respondent in a timely way of the nature of the charges and the matters of fact and law to be asserted, allowing the respondent an opportunity to refute the charges. *Colorado State Bd. of Med. Examiners v. Boyle*, 924 P.2d 1113, 1117 (Colo. Ct. App. 1996); *Bourie*, 929 P.2d 18 at 22. Due process in an administrative hearing may be preserved even if the specificity and detail required in criminal proceedings is absent. *Bourie*, 929 P.2d 18 at 22. "When the government implements laws that adversely affect individual interests, the publication of those laws provides adequate notice to satisfy constitutional due process." *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1108 (Colo. App. 2009).

Gessler alleges that his due process right to notice was violated because the IEC did not inform him of the specific statutes that he was accused of violating prior to the hearing. (Gessler's Opening Brief at 35). However, the IEC sent Gessler a copy of the formal complaint against him, which contained all of the CEW's allegations and exhibits supporting the CEW's claims. (Gessler's Opening Brief, Ex. A). The complaint's attached exhibits included Gessler's flight information, expense reports, relevant calendar entries, information about the RNLA, and

Gessler's itinerary for the Sarasota trip. Gessler submitted a Motion to Dismiss to the IEC on December 20, 2012, in which he incorporated many of the facts included in the initial complaint. (Gessler's Opening Brief, Ex. B). The IEC sent Gessler a Pre-Hearing Order informing him that he was suspected of having violated the State Fiscal Rules and that the exact rules he violated, if any, would be determined once the hearing was over and the parties had presented evidence and testimony. (Gessler's Opening Brief at 36). Gessler's own filings and the responses from the IEC indicate that Gessler was aware of the nature of the suspected conduct, who was accusing him, and, generally, what statutes and rules he was accused of violating. Due process requirements are satisfied when an agency tells a respondent the matters of fact and law asserted. C.R.S. §24-4-105(2)(a). Thus, even though Gessler began the hearing unaware of the specific rules and statutes that the IEC ultimately found he violated, because he was aware of the facts and the conduct the IEC found suspect, the Court finds that the IEC provided Gessler sufficient notice to satisfy the due process requirements under the APA.

### **3. Whether Gessler's right to due process was violated because the IEC excluded some witnesses and evidence.**

Gessler alleges that his due process rights were violated because the IEC excluded some of the witnesses and evidence that he wanted to present during the hearing. The Court disagrees.

Trial courts have broad discretion in deciding what evidence and testimony to admit during the proceedings, and reviewing courts will uphold the trial court's ruling absent an abuse of discretion. *People in Interest of Martinez*, 841 P.2d 383, 384 (Colo. App. 1992). The APA allows for relaxed evidentiary rules in administrative hearings and states that the individual conducting the hearing "may exclude incompetent and unduly repetitious evidence." C.R.S. §24-4-105. Evidence at an administrative hearing is admissible if a reasonably prudent person would consider that it has probative value. *Craddock v. Colorado State Bd. of Assessment Appeals*, 819 P.2d 1100, 1103 (Colo. App. 1991).

Gessler asserts that he was prevented from mounting an adequate defense during the hearing, because the IEC did not allow him to call the following witnesses: Kevin Collins, a governmental accounting expert, who would conclude that the uses of all the funds at issue were completely proper; former Secretaries of State, who would talk about ways that they spent their own discretionary funds; and, other current office holders with discretionary accounts. (Gessler's Opening Brief at 38-9). Gessler also stated that he was unable to mount an adequate defense, because the IEC did not allow him to present evidence that he was in compliance with state accounting standards. (Gessler's Opening Brief at 9).

Chairman Grossman reasoned that because governmental accounting expert Kevin Collins did not have knowledge of the State Fiscal Rules, his testimony would not assist the trier of fact. (IEC's Response, Ex. 1, Hearing Tr. p. 245 1.1 – p. 246, 1.14). Ultimately, the IEC ruled by unanimous decision that the testimony would be irrelevant because Collins' expertise lay in auditing, not the state fiscal rules. (IEC's Response, Ex. 1, Hearing Tr. p. 244 1.17 – p. 254, 1.19).

Even though the IEC did not allow Gessler to present Collins' testimony, Gessler did have a chance to cross examine all of the CEW's witnesses including: Ellis Arimistead, the IEC's investigator who confirmed the factual allegations in the CEW's report; State Controller Robert Jaros, who discussed a variety of topics including the permitted uses of a discretionary fund; former Deputy Secretary of State William Hobbs, who worked for five Secretaries of State

and discussed reimbursement policies and the proper use of discretionary funds; and, Colorado Chief Financial Officer Heather Lizotte, who explained, among other things, that political expenditures should not be reimbursed.

Gessler, himself, testified and presented testimony from Gary Zimmerman, his Chief of Staff. Zimmerman stated that Gessler had spent the funds from his discretionary account in a typical fashion and that the expenses from the Florida trip were appropriate. (IEC's Response, Ex. 1, Hearing Tr. p. 256 1.5 – p. 260, 1.13). In addition, Gessler presented testimony from former Secretary of State Brian Buescher, who described the ways he had spent his own discretionary fund. (IEC's Response, Ex. 1, Hearing Tr. p. 96 1.1 – p. 108, 1.23).

In light of all of the testimony that was presented concerning the use of discretionary funds by Secretaries of State, including testimony from a former Secretary of State and the testimony from a former Deputy Secretary of State who had served five different Secretaries of State during his tenure, the Court finds that the record supports the IEC's determination that further testimony on that subject from additional former Secretaries of State would be cumulative. The Court also finds that it was not an abuse of discretion for the IEC to disallow the testimony of Keith Collins, who lacked direct knowledge of the fiscal rules. Similarly, the Court finds that, considering the extensive evidence Gessler presented, it was not an abuse of discretion for the IEC to exclude further evidence concerning the accounting practices of Gessler's office. Accordingly, the Court finds that the IEC did not abuse its discretion or deprive Gessler of his right to due process by limiting Gessler's presentation of evidence and testimony.

#### **D. Whether the IEC violated Gessler's right to free speech and assembly.**

Gessler alleges that the IEC's policies make it hard to determine what CLEs and conferences public officers may pay for out of their discretionary funds. (Gessler's Opening Brief at 44 – 48). Gessler argues that this uncertainty violates his First Amendment right to free speech and assembly by creating a chilling effect, because he would fear possible sanctions by the IEC whenever he used his discretionary fund to pay for CLEs and conferences. (Gessler's Opening Brief at 44-8).

The Court is unconvinced, and accordingly finds that the IEC did not violate Gessler's First Amendment rights.

#### **E. Oral Argument**

The Court recognizes that the parties have requested oral argument. The request is declined as the Court finds the written pleadings and the record provide sufficient information upon which to base its decision.

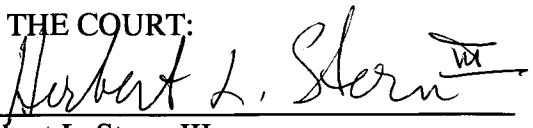
#### **V. Conclusion**

The IEC's decision is AFFIRMED.

DATED this 12<sup>th</sup> day of March 2014



BY THE COURT:

Handwritten signature of Herbert L. Stern, III in cursive script, with a horizontal line underneath.

Herbert L. Stern, III  
District Court Judge

CC: Counsel of Record by e-filing