

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 12-07

In the Matter Of:

Scott E. Gessler, Colorado Secretary of State

Colorado Ethics Watch's Response to Motions

Colorado Ethics Watch hereby submits its response to the “motions” delivered to the Colorado Independent Ethics Commission (“IEC”) by Secretary of State Scott E. Gessler through counsel on February 14, 2013.¹

Background and Introduction

This matter is not complex. Mr. Gessler used state funds for airfare to Tampa, Florida to attend a Republican National Lawyers Association (RNLA) meeting and the Republican National Convention (RNC), for a hotel room at the Sarasota Ritz Carlton during the RNLA meeting, and for a hotel room the night before the convention. He also used state funds to pay change fees when he returned from the RNC a day early, and to pay the cancellation fee for the last night of what would have been his stay at the hotel in Tampa. At the end of Fiscal Year 2012, Mr. Gessler received payment of \$117.99 in “reimbursements” of “all remaining funds” in his office’s discretionary accounts, without presenting receipts. That year-end payment was characterized by the State Controller as “employee non-cash incentives.” None of these facts are in dispute.

In his answer, Mr. Gessler has presented explanations for the spending and has alleged additional facts, some of which may be the subject of the IEC’s staff investigation. Once the

¹ Ethics Watch will also address, as appropriate, the unauthorized “amended motions” delivered on February 21.

investigation is complete, the IEC should be able to schedule a short hearing where Mr. Gessler can appear and answer any questions the Commissioners may wish to ask as they come to a decision.

Yet Mr. Gessler has filed seven motions (plus two “amended” motions) to date – all of them improper under the IEC’s Rules of Procedure – and has even gone to Denver District Court in an attempt to derail the IEC’s constitutionally mandated investigation and to keep the anticipated staff investigation report secret. It is time for the IEC to put an end to Mr. Gessler’s expensive procedural antics and move to a decision in this matter.

Key Constitutional Provisions Governing the Complaint Process

Colo. Const. art. XXIX, § 5(1) provides in pertinent part as follows:

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

[Emphasis added.]

In sharp contrast to the adversarial system already in place for campaign finance complaints, under which the complaining party is responsible for prosecuting a case and defending it through all appeals,² Article XXIX does not require a complainant to prosecute a case or even accuse someone of a violation. To the contrary:

² Colo. Const. art. XXVIII, § 9(2)(a) provides: “Any person who believes that a violation of section 3, section 4, section 5, section 6, section 7, or section 9 (1) (e), of this article, or of sections 1-45-108, 1-45-114, 1-45-115, or 1-45-117 C.R.S., or any successor sections, has occurred may file a written complaint with the secretary of state no later than one hundred eighty days after the date of the alleged violation. The secretary of state shall refer the complaint to an administrative law judge within three days of the filing of the complaint. The administrative law judge shall hold a hearing within fifteen days of the referral of the complaint, and shall render a decision within fifteen days of the hearing. The defendant shall be granted an extension of up to thirty days upon defendant's motion, or longer upon a showing of good cause. If the administrative law judge determines that such violation has occurred, such decision shall include any appropriate order, sanction, or relief authorized by this article. The decision of the administrative law judge shall be final and subject to review by the court of appeals, pursuant to section

Any person may file a written complaint with the independent ethics commission **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) (emphasis added). The key phrase here is “asking whether” – a complaining party need only ask the question. If the question asked is not frivolous, it falls to the IEC – not the complaining party – to “conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules adopted by the commission.” Colo. Const. art. XXIX, § 5(3)(c). Moreover, only the Commissioners have the power “to subpoena documents and to subpoena witnesses to make statements and produce documents.” Colo. Const. art. XXIX, § 5(4). Article XXIX does not anticipate, much less require, that a complaining party need do anything more than file a non-frivolous complaint to initiate an investigation and hearing regarding possible ethical misconduct.

The 2010-11 Revisions to the IEC Rules of Procedure

The pure adversarial system adopted by the IEC in its initial rules proved unworkable, not only in Complaint 08-01 (the Coffman matter) but in other complaints. Therefore, in 2011 the IEC adopted new procedural rules, which among other things were intended “to simplify and clarify the Commission’s procedures regarding complaints” and “add a section regarding the Commission’s investigation process.” Statement of Basis and Purpose, IEC Rules of Procedure

24-4-106 (11), C.R.S., or any successor section. The secretary of state and the administrative law judge are not necessary parties to the review. The decision may be enforced by the secretary of state, or, if the secretary of state does not file an enforcement action within thirty days of the decision, in a private cause of action by the person filing the complaint. Any private action brought under this section shall be brought within one year of the date of the violation in state district court. The prevailing party in a private enforcement action shall be entitled to reasonable attorneys fees and costs.” *See also Colo. Ethics Watch v. Senate Majority Fund*, 269 P.3d 1248, 1252 n. 2 (Colo. 2012) (“In Colorado, the enforcement of campaign finance laws is left primarily to private parties.”)

(effective April 14, 2011), accessed at <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> on February 25, 2013.

The 2008 Rules permitted motions to be filed with permission of the Commission. The 2011 Rules intentionally eliminated motions practice, precisely to avoid an adversarial, court-like procedure. Another key change was to eliminate the adversarial prehearing statements to be filed by the complainant and respondent under the old rules, and replace them with the Commission's investigative report, which must be made public no later than 10 days before the hearing. IEC Rule of Procedure 7.J.2. Because the investigative report is expected to identify undisputed facts and narrow the issues for a hearing, "[t]he 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; *see also* IEC Rule of Procedure 8.B.5 (providing for hearings where there are no material facts in dispute).

While the IEC has not yet moved fully to the constitutional paradigm of a Commission-led investigation and hearing due to budget constraints, the 2011 Rules changes are intended to enable "any person" to ask the IEC whether an ethical violation has occurred, without having to engage counsel, draft responses to motions, or act as a private attorney general. Of course, a complainant may well believe a violation took place, but Article XXIX does not require a complainant to hold that belief nor act as a prosecutor at their own expense.

The IEC's decision to entertain these motions sets a bad precedent under which a well-financed defense team can break the procedural rules with impunity, force the complainant to expend resources to make sure the IEC does its job, and effectively engage in whistleblower retaliation. Ethics Watch is submitting this response, not only to move this proceeding forward,

but to encourage the IEC never to entertain such motions or allow itself to become a vehicle for retaliation against those who invoke its jurisdiction.

Analysis

1. Mr. Gessler's Strategic Motion to Disqualify Commissioner Marshall Must Be Rejected.

Mr. Gessler's counsel's comment at the February 15 meeting – that the Coffman matter provides precedent for Mr. Gessler's Motions – is highly revealing. Not only does it suggest that the three law firms and Department of State staff working on Mr. Gessler's defense apparently never read the operative 2011 IEC Rules of Procedure, it also demonstrates the problem with having an overly litigious system for resolving ethics complaints: Defense lawyers will feel professionally obligated to utilize every procedural maneuver the IEC allows, including strategic motions to disqualify to attempt to shape the Commission to their liking.

Mr. Gessler attempts to use Commissioner Wood's recusal from the hearing of Complaint 08-01 even though Commissioner Wood recused before the motion was filed. Regardless of whether Commissioner Wood's decision (based on a past personal and business dispute with Coffman) was appropriate, the circumstances here are quite different and require Commissioner Marshall to participate. *Cf. Winslow v. Lehr*, 641 F. Supp. 1237, 1238 (D. Colo. 1986) (“a judge is under an affirmative ethical duty to sit when there is no legally sufficient reason to recuse”).

As the IEC is well aware, the vacancy created when Commissioner Dorothy Butcher resigned remained open for over a year. The records of the Colorado House of Representatives reflect that Commissioner Rosemary Marshall was confirmed by voice vote as the House of Representatives' appointment to complete Commissioner Butcher's term on January 10, 2013.

By that time, the fact that this complaint was pending before the IEC was widely known, yet no one questioned that Commissioner Marshall would properly carry out her duties as a Commissioner objectively, regardless of any previous policy disagreements with Mr. Gessler.

Moreover, the disqualification request is based on comments allegedly made by Commissioner Marshall to Mr. Gessler himself (though only attested to by a staff member who claims to have overheard a conversation) in 2011, and (in the amendment) a personal political contribution to Mr. Gessler's opponent in the 2010 election. Presumably the factual basis for the disqualification request, therefore, was known to Mr. Gessler at the time Commissioner Marshall was nominated. Yet not only did Mr. Gessler express no concern at her nomination, he allowed the Commissioner to participate in two meetings – and filed a lawsuit to block these proceedings that made no mention of her alleged bias – before seeking her disqualification. Essentially, Mr. Gessler got a “free look” before deciding to request recusal. The law frowns upon this procedural gamesmanship. “If grounds for disqualification are known and not promptly raised, it may constitute waiver, depending on the facts and circumstances of the case.” *People ex rel. A.G.*, 262 P.3d 646, 652 (Colo. 2011).

Article XXIX anticipates this type of objection and provides protection for respondents through the composition of the IEC. The procedure for nominating members of the IEC is carefully spelled out in Colo. Const. art. XXIX, § 5(2). The Senate, House, Governor and Chief Justice each appoint a member, then the four members select a fifth who shall be a local government official or local government employee. *Id.* To protect against partisan capture of the commission, “[n]o more than two members shall be affiliated with the same political party.” *Id.* § 5(2)(b). Given the prevalence of former members of the General Assembly on the IEC, including four of the current five Commissioners, it must be expected that some Commissioners

will have a “history” of being a “political opponent” (or a supporter) of a respondent, without raising any inference that the Commissioner cannot perform his or her job impartially.

Mr. Gessler’s amended motion reinforces the weakness of his claims of bias. In his continued effort to bully the IEC, he alleges that it was misconduct for Commissioner Marshall to participate in the discussions regarding his request for an advisory opinion (No. 13-01) regarding a legal defense fund for the ongoing criminal investigation of his spending. Yet the amended motion does not criticize or even mention Commissioner Marshall’s participation in the consideration of Mr. Gessler’s advisory opinion request No. 13-02, in which she voted to allow Mr. Gessler to accept certain payments in connection with a trip to a conference at the William and Mary School of Law. Commissioner Marshall’s vote in favor of the request destroys Mr. Gessler’s contention that she cannot fairly judge him. Nothing could make it clearer that Mr. Gessler’s constant cries of “bias!” are intended to bully the IEC into agreeing with him: In his view, disagreeing with him is improper and proof of bias, while agreeing with him signals impartiality.

Mr. Gessler is not entitled to be judged only by his supporters. Rather, he should face the duly appointed Commissioners and answer their questions.

2. The Conduct of the Investigation Is Left to The IEC’s Discretion.

Mr. Gessler alleges that the IEC’s Executive Director is biased against him based on two actions taken before the complaint regarding Mr. Gessler was filed. First, he points to evidence allegedly contradicting the Executive Director’s characterization of an August 2012 telephone conversation between herself and someone who contacted the IEC regarding gift ban compliance at the Republican National Convention (“RNC”) in a private email to the IEC Chairman. Of

course, no non-frivolous complaint has been filed to date regarding gifts to attendees at the RNC, so there has been no investigation of any potentially disputed facts regarding those events.

Second, Mr. Gessler alleges bias because the Executive Director went beyond the bare minimum required by the Colorado Open Records Act in responding to a document request from Ethics Watch. This formal CORA request and response occurred before the complaint in this matter was filed and concerned a wholly separate topic (gifts received by delegates at the national party conventions) than the subject of this complaint. Moreover, Ethics Watch is unaware of any directive from the IEC to its Executive Director that she must not provide CORA requestors with any more information than the bare minimum.

Mr. Gessler's allegations of bias are strange considering that the investigative report has not been released to the public. Mr. Gessler's motion includes allegations of improper conduct by the Executive Director during the investigation. Ethics Watch has no knowledge of these alleged facts as it has not been involved in the investigation of this matter – consistent with the constitutional scheme. (In contrast, Mr. Gessler seems to have been kept well-advised of the course of the investigation.) Ethics Watch expects that if the Commission determines the unreleased draft investigative report is incomplete or inadequate in any regard, it will not approve the report for public release and instead will request more investigation. While the Constitution requires that the IEC conduct an investigation, it is the IEC's prerogative to determine how the investigation is to be conducted. Whether that may involve hiring additional personnel to conduct the investigation is up to the IEC, and Ethics Watch takes no position on that issue.

3. No Basis Exists To Refer This Matter To An Administrative Law Judge.

Given that Mr. Gessler's motion to refer this matter to an Administrative Law Judge (ALJ) is based on his poorly-supported assertions that the IEC is biased against him, it should be summarily rejected. *See also* the Order on Motion to Recuse in Complaint 08-01, referred to by Mr. Gessler, which explains in detail reasons not to refer a matter to an ALJ that also apply here.

Referral to an ALJ would not solve the alleged problem of bias. Once again, Mr. Gessler seems to confuse the ALJ procedures for campaign finance cases – where the ALJ issues an “agency decision” in the name of the Secretary of State, reviewable only by the Court of Appeals -- with the ALJ procedure mentioned in the IEC Rules. *Compare Patterson Recall Comm., Inc. v. Patterson*, 209 P.3d 1210, 1215 (Colo. App. 2009) (ALJ has express authority to decide merits of a complaint and impose penalties, subject to appeal to the Court of Appeals) *with* IEC Rule of Procedure 8.A.1 (hearings referred to ALJ are subject to exceptions that will be resolved by the IEC itself).³ There is no way to bypass the duly appointed Commissioners.

Moreover, referral should be considered an extreme measure for unusual cases. An “unusual case” should not be defined as one where the public official under investigation has a seemingly unlimited budget for outside counsel to file motions accusing the complainant, the IEC, and its staff of every kind of misconduct they can imagine. Rather, referral to an ALJ should occur (if at all) only when the facts are so complex and disputed that a judge could assist the IEC by sifting through disputed evidence and making factual findings upon which the IEC could then determine whether an ethical violation has occurred. That simply is not the case here. Mr. Gessler does not dispute that the transactions that are the subject of the complaint occurred. Any additional facts pertinent to his explanations, justifications or excuses for those transactions

³ IEC Rule of Procedure 8.A.1 does not state whether IEC staff would litigate before the ALJ, or whether the IEC would force the person who requested an investigation to do so.

presumably are the subject of the yet-to-be-released investigative report. This matter is far closer to a Rule 8.B.5 hearing based on undisputed facts than it is to a matter suitable for referral to an ALJ under Rule 8.A.1.

Certainly, Mr. Gessler's attempt to bully the IEC into improperly subpoenaing Ethics Watch – under the guise of “confronting his accuser” – must be summarily rejected. The “right to confront one's accuser” is not a right to retaliate against a person who asks the IEC whether an ethics violation has been committed. Rather, the “essence of the fundamental right to confront one's accuser is to meet **adverse witnesses** face-to-face and to have the opportunity to cross-examine them.” *Jefferson v. Colorado Dep't of Social Servs.*, 874 P.2d 408, 410 (Colo. App. 1993) (emphasis added). As much as Mr. Gessler may wish it were otherwise, Ethics Watch and its staff simply are not witnesses to the transactions and events that are the subject of this matter.

Moreover, as a matter of law, there is no “accuser” in an IEC ethics complaint proceeding. Rather, “any person” can file a complaint “asking whether” a violation has occurred. The IEC does not have jurisdiction to investigate or make findings regarding persons who file complaints. The complainant's testimony - and the right to cross-examine the complainant - is relevant only in cases in which the complainant is also a witness to disputed facts, which is not the case here.

In the same vein, due process does not require that the IEC enable Mr. Gessler to pursue a publicly-funded campaign of retaliation against Ethics Watch and its staff for exercising their right to criticize government officials and petition for redress. It is well-settled that due process requires only “that a respondent be notified of the nature of the proceedings and apprised of the right to present evidence in his or her own behalf.” *Colorado Bd. of Medical Examiners v. Boyle*, 924 P.2d 1113, 1117 (Colo. App. 1996). Specifically, at the time a hearing is set, the

respondent is entitled to know the “time, place, and nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted.” *Id.* Ethics Watch expects the IEC will comply with these requirements when the investigative report is released and the public hearing is set.

More fundamentally, to allow a respondent enjoying a publicly-funded defense to retaliate against the complainant by effectively putting the complainant on trial before an ALJ (or by forcing a complainant to bear the expense of a trial before an ALJ) would chill complaints even more completely than under the current system. Unlike many respondents, complainants receive no public funds to pay for participation in an IEC proceeding and have no prospect of winning an award as a result of filing a complaint with the IEC. *See* Colo. Const. art. XXIX, § 6 (fines payable to jurisdiction employing covered person found to have enjoyed personal gain through an ethics violation). Persons who file ethics complaints are not plaintiffs who seek awards of damages against public officials.⁴

Mr. Gessler’s counsel has publicly called on Ethics Watch to withdraw the complaint. Of course, a non-frivolous complaint cannot be withdrawn by the complainant – an investigation and hearing are mandatory. Any other rule would promote intimidation of complainants, or worse, the buying-off of complainants or the use of ethics complaints as leverage to settle private disputes, only to be withdrawn once a deal is reached. The IEC has wisely chosen to accept stipulated resolutions of complaints, but only after a hearing in which it satisfies itself of the

⁴ Ethics Watch notes that while this is not the first time a covered individual has enjoyed a publicly funded defense of an ethics complaint, the legal authority supporting public funding of the defense is dubious. C.R.S. § 24-10-110(1)(a) provides that a public entity is liable for a public employee’s costs of defense “where the claim against the public employee arises out of **injuries sustained** from an act or omission of such employee occurring during the performance of his duties and within the scope of his employment, except where such act or omission is willful and wanton.” [Emphasis added.] But this proceeding does not arise from any injury allegedly sustained by Ethics Watch, and the IEC does not resolve claims for injuries.

truth of the underlying facts and the reasonableness of the agreed penalty. *See In the Matter of Whitfield (Buescher v. Whitfield, Complaint 10-06); In the Matter of Public Trustees Association of Colorado (Colo. Ethics Watch v. Public Trustees Association of Colo., Complaint 11-12).*

Finally, Mr. Gessler reveals too much when he accuses the IEC of rushing to an “artificial deadline” of June 30 to resolve this complaint. Presumably, Mr. Gessler believes he is entitled to delay this proceeding until two new Commissioners join the IEC and get up to speed, in addition to disqualifying Commissioner Marshall from the hearing. While Ethics Watch is not aware that such a deadline has been set, it would be understandable that the present Commissioners whose terms end on June 30 would not want to kick the can down the road to their successors. Members of the General Assembly have already expressed concern that the IEC takes too long to resolve complaints. Whether that criticism is fair, certainly the public and the IEC have an interest in resolving complaints in a speedy manner. One might expect that a respondent who believes he will be exonerated would also want a speedy hearing.

Conclusion

Unfortunately, the lesson Mr. Gessler seems to have learned from the Coffman matter is that ethics complaints should be defended by overwhelming the IEC with motions, attacking both the complainant and the IEC in the hope that the IEC will simply rule in favor of the respondent to make the attacks stop.⁵ Mr. Gessler has already partially succeeded by bullying the IEC into accepting numerous improper motions, and has partially achieved the goal of retaliating against Ethics Watch by putting it in the position of expending staff time to respond to them. The IEC should reject the motions and all further attempts to derail the investigation. It

⁵ Indeed, the IEC would be setting a dangerous precedent for if it rewards Mr. Gessler’s strategy of suing the IEC to stop the investigation and then using that “adverse party” status of his own creation to dub the IEC biased and demand referral to an ALJ.

should also send a clear message that no complainant will be penalized for daring to exercise the people's right to question their elected leaders' conduct.

Respectfully submitted this 26th day of February, 2013.

_____/s/ Luis Toro
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Certificate of Delivery

The undersigned certifies that a copy of Colorado Ethics Watch's Response to Motions was transmitted by e-mail on February 26, 2013 as follows:

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