



Agenda

2/21/14

TIME

4:52

ETHICS & CAMPAIGN REVIEW BOARD

Tuesday, February 25, 2014

3:30 p.m.

Santa Fe Community Convention Center
Coronado Room
201 Marcy Street

1. PROCEDURES

- a) Roll Call
- b) Approval of Agenda
- c) Approval of Minutes—January 22, 2014

2. REVIEW FINAL COMPLIANCE STATUS BY CANDIDATES

3. DISCUSSION AND POSSIBLE ACTION

- a) Case #2014-1. Complaint Filed by Fred Rowe Alleging Violation of Public Campaign Finance Code, SFCC 1987, Sections 9-3.8(A), 9-3.8(B), 9-3.11(D), 9-2.6, 9-2.3(L), 9-3.3(G) by Candidate Javier M. Gonzales and Jon B. Hendry

In Accordance with Section 6-16.4 SFCC 1987 "Determination of Legal Sufficiency; Setting a Hearing." Consideration of Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probably Cause to Believe There Was a Violation.

(The Board May Go Into Executive Session Under NMSA 1978, Section 10-15-1(H)(3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)

- 1) Action Regarding Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probably Cause to Believe There Was a Violation.
- 2) Action on Any Next Steps as Permitted Under Section 6-16.4(D)- Section 6-16.7 SFCC 1987.

4. BOARD MATTERS

5. PUBLIC COMMENT

6. ADJOURNMENT

PERSONS WITH DISABILITIES IN NEED OF ACCOMMODATIONS, CONTACT THE CITY CLERK'S OFFICE AT 955-6520. FIVE (5) WORKING DAYS PRIOR TO MEETING DATE.

INDEX OF
CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD

February 25, 2014

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**MINUTES OF THE
CITY OF SANTA FE**

ETHICS AND CAMPAIGN REVIEW BOARD

FEBRUARY 25, 2014

1. PROCEDURES

a) ROLL CALL

A regular meeting of the City of Santa Fe Ethics and Campaign Review Board was called to order by Justin Miller, Chair on this date at approximately 3:30 pm in the City Council Chambers, 1st floor, City Hall, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll call indicated the presence of a quorum as follows:

Members Present:

Justin Miller, Chair
Paul L. Biderman
Ruth Kovnat
Kristina Martinez
Seth McMillan

Members Absent:

Roderick Thompson, Vice Chair (excused)
Tara Lujan

Staff Present:

Zachary Shandler, Assistant City Attorney

Others Present:

Fred Rowe, Complainant
Stephen Curtice, Attorney representing J. Hendry
Justin Kaufman, Attorney representing J. Gonzales and Gonzales Campaign
Ms. Kirtan Khalsa representing PACs: Santa Fe Progressive and Santa Fe Working Families
Carl Boaz, for Charmaine Clair, Stenographer

NOTE: All items in the Committee packet for all agenda items are incorporated herewith by reference.

b) APPROVAL OF THE AGENDA

Ms. Kovnat moved to approve the Agenda as presented. Ms. Martinez seconded the motion which was passed by unanimous voice vote.

c) APPROVAL OF THE MINUTES- January 22, 2014

Mr. Biderman said on page 3 last sentence and the second paragraph of the same page in the last sentence the term "knows or reasonably knows or "know or reasonably know", should have been reasonably *should* know or reasonably *should have* known. He said the problem is that a person who goes back to this for an explanation of what the change in the recommendation from the Board is, would probably be confused.

Mr. Biderman suggested an asterisk or editorial note be inserted in the two locations to state that the Board inserted the word "*should*" so it is an accurate reflection of what was intended.

Chair Miller asked City Attorney Shandler if possible to make a note in the minutes that the intent of the Board was *reasonably should know* as opposed to reasonably know.

Mr. Shandler said that was reasonable to note with an asterisk and does not alter what was mistakenly said. He said it would be clear to a future reader that the Ordinance was misquoted.

Mr. Biderman moved to approve the minutes as amended with the two locations indicated in the minutes modified to include an asterisk and a footnote that states the intention was to insert the word "should" before the word 'know' or 'knows.' Ms. Kovnat seconded the motion and the motion passed by unanimous voice vote.

2. REVIEW FINAL COMPLIANCE STATUS BY CANDIDATES

Chair Miller said one reason the Board is here is that they are required to meet shortly before the election to review compliance status by candidates. He said Mr. Shandler had a report for the Board.

Mr. Shandler said that City Clerk Vigil is still in her office and couldn't be present because today is a filing day. The next filing day is next Monday and all candidates have filed except for four and they have until five p.m. today. He noted that at approximately 1:30 p.m. at least seven of the reports were on the City Clerk website and more have probably gone up since. He said in terms of the actual reports, all have been accepted except the four yet to be received.

Mr. Shandler said the Board would note that some of the Publicly Financed candidates show a negative or a bracket because equipment, etc. was purchased and all of it was not needed. The negative/bracket shows how the money is refunded to the candidate and not a contribution from Home Depot, etc.

He said at least one organization has a negative balance. That means the candidate had more expenditures than contributions, partly driven because of the ECRB's oral ruling in a previous case. A candidate must show the expenditures at the time the service was accepted.

Mr. Shandler said the parties have now been advised if they have more expenditures than contributions that cannot show as negative cash on hand, but must show as a loan for that amount. He said the Board would see that on some of the reports as well. He said this is a form for future elections that the Board and the City Clerk might have to modify in situations of the expenditures prior to the contributions.

Mr. Shandler said that completed the report.

Mr. Biderman said he hoped the Board is keeping track of the issues they have been discovering through this election. He said the Board could review the Board rules after the election and make improvements on some for the next time.

Mr. Shandler replied he already has fourteen.

3. DISCUSSION AND POSSIBLE ACTIONS

a) Case #2014-1. Complaint Filed by Fred Rowe Alleging Violation of Public Campaign Finance Code, SFCC 1987, Sections 9-3.8(A), 9-3.8(B), 9-3.11(D), 9-2.6, 9-2.3(L), 9-3.3(G) by Candidate Javier M. Gonzales and Jon B. Hendry

In Accordance with Section 6-16.4 SFCC 1987 Determination of Legal Sufficiency; Setting a Hearing" Consideration of Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation.

(The Board May Go Into Executive Session Under NMSA 1978, Section 10-15-1(H)(3) to Deliberate in Connection With an Administrative Adjudicatory Proceeding.)

Chair Miller said the Board met on Monday, February 17 and directed the Respondents to file a Response within seven days. The Board also directed the City Attorney's Office to contact other entities mentioned in the Complaints to give them the opportunity to provide a comment to the Board.

He said the Board has received Responses from the Respondents and several comments from other entities named and all of those submissions were received yesterday. The Board's first step is consideration of the Complaint to determine whether it is legally sufficient under the Ordinance and under the Board Rules, to move forward.

Chair Miller noted that the Agenda, Section 6-16.4 is the section of the Code the Board looks at to determine the legal sufficiency of the Complaint. He explained that the Board may go into Executive Session pursuant to the Open Meetings Act, to deliberate in connection with this proceeding.

Chair Miller opened the floor to members of the Board for comments or questions.

Mr. Biderman said with deep regret and reluctance he had to recuse himself, as he has done on several previous occasions. He said he especially regrets having to do so with this case, because he thought this a very important issue; probably the most important the Board has dealt with in terms of determining the application of the rules that the Board is sworn to enforce.

Mr. Biderman said the reason he feels obliged to withdraw is that if he is not able to perform his duties in this capacity, the public is entitled to know why. He said it is an ongoing conflict he has as a contractor with the City as an alternate Municipal Judge and means the contract comes before the City

Council. Anyone who is, or may be a voting member of the City Council may end up voting on whether or not that [contract] continues or voting on his salary.

Mr. Biderman said that may appear to be a conflict, but would not in fact, influence him.

Mr. Biderman said in this case there is the additional factor that the Board has very appropriately and correctly notified several Political Action Groups (PACs) that this proceeding may affect them and may affect their standing; that they may be found in violation of the Campaign Rules. He said it happens that several of the people who are involved are very close, long time friends personally. He does not want to cover that up. He does not feel it appropriate for him to act when their interests may be affected.

Mr. Biderman said the most important reason is that he trusts the Board to take the proper action. He does not want his personal relationships or contract to taint the Board's activity by appearing that this has influenced him in a public way. He emphasized that no one involved *has* attempted to contact him in any way, or influence anything.

He said despite the importance of this and what he feels is his responsibility to act, he also feels it is his responsibility to protect the Board's integrity in this matter. He said he would have to withdraw once again from this activity.

Mr. Biderman said on the other hand he does feel the Board is learning a lot about rules, challenges to the rules and issues the Board had not anticipated and that City Council had not anticipated when the rules were adopted. He said those will have to be dealt with in a rulemaking context and he looks forward to playing an active role in that.

Chair Miller thanked Mr. Biderman for bringing it to the Board's attention and for being conscientious about his role on the Board. He said Mr. Biderman will certainly have plenty of opportunity to consider changes to the rules.

Chair Miller said the Board has received written submissions from the Respondent and the Complainant. He said he would give both a brief chance to address the Board. He asked that their comments be kept to about five minutes.

He asked Mr. Fred Rowe to start. (Exhibit 1)

Mr. Rowe thanked Chair Miller. He said that while he supports Councilor Bushee for mayor he has filed this Complaint in his personal capacity as a concerned citizen and as an attorney, in order to preserve the Public Financing Code system. He said as a former chair, he has full confidence that this Board has legal powers, the legal alacrity and the legal wisdom to avert a potentially tainted mayoral election next week.

Mr. Rowe said he doesn't believe conversely that the Board will choose to sit on its hands and try to fix the code after the election. He said he would state up front that he believes that PAC financing in addition to public financing is wrong; it is wrong to take and feed from a public and private pot at the same time.

Mr. Rowe said as stated previously, the Gonzales campaign has benefited about \$20,000 from PAC contributions, in addition to its own. He said he agrees with the Journal editorial that said "it stinks". Mr. Rowe said as for the capability of the Board to judge the legal sufficiency; he emphasizes that at this stage we must not demonstrate by hard proof of a violation, but rather enough facts, that if taken as true, establish probable cause to believe a violation of the Code has taken place. He said some lawyers call that "the Grand Jury test" and he thinks they have met that in spades

Mr. Rowe said he also wished to point out that we are not dealing with truly independent PACs or groups. We are dealing with PACs and groups that were specifically organized for the purpose of promoting and facilitating the election of a particular mayoral candidate. He said we are not dealing with independent constitutional rights; we are dealing with a situation where there has been enough indication of special support so as to not call those groups *independent* for purposes of the constitutional rights.

He said he also would like to stress that the Response filed yesterday, while ample and detailed, does not include a specific statement that "no member of the Gonzales campaign has communicated with any PAC or private organization regarding money". He said there are all kinds of details that have been put forth, but none of them specifically state that there has been no communication; no deal, nothing between the Campaign staff and the organizations themselves.

Mr. Rowe said he also thinks it's plain that concealed, hidden contribution arrangements are not "trumpeted or advertised by the particular parties". They have an obvious interest in seeking to appear to abide by the Code. He said in his view this heightens the need for this Board to have a Discovery by way of authorized subpoenas that would check the validity of some of those; in particular into the discrepancy between Mr. Hendry's affidavit and Mr. Hendry's media statement.

He said finally, the claim that they [Javier Gonzales and Jon Hendry] have immunity because the statute is not retroactive, is baseless. He said the Board at its November fifth hearing stated very clearly that this was a clarification of the Code; not a substantive change in the Code. Hence there is no valid claim of retroactive activity being made. He said the case the Respondent referred to is a murder case that has to do with the statute of limitation changes and the retroactivity thereof. He said that shows extreme assertions on their [Mr. Gonzales and Mr. Hendry] part.

Mr. Rowe said as a last matter he would read a sentence from a press release last Monday by the counsel for Mr. Hendry. (Exhibit 2) He read "*we look forward to investigating Rowe's connections with the Bushee Campaign and pursuing any applicable remedies against Rowe for any wrongdoing relating to his filing of these allegations*".

Mr. Rowe said he has been a lawyer for over 60 years and has never been threatened by opposing counsel. He suggested the Board might want to consider some kind of protective rule for citizens against intimidation of this kind; which he believes is wrong and shameful.

Mr. Rowe said he would be pleased to answer questions from the Board.

Chair Miller thanked Mr. Rowe. He asked if there were any questions from Board members and there were none.

Mr. Justin Kaufman said he is representing Mayoral Candidate Javier Gonzales and the Gonzales campaign. He thanked the Board for their efforts in scheduling the Hearing and its time and effort to sort out the issues raised by Mr. Rowe's Complaint filed earlier this month.

He said they [he and Mr. Gonzales] agree with Mr. Rowe that the issues he raised in his Complaint are important, serious and really essential for a fair election in Santa Fe. What they disagree about is whether anything Mr. Rowe alleges in his Complaint has any legal consequence. He said we think that a careful review of the Complaint and the Amendment would lead the Board to conclude that it fails to allege the legally sufficient facts, which if true, show probable cause to believe that there was a violation of the Code.

Mr. Kaufman said they [he and Mr. Gonzales] ask the Board to dismiss this Complaint immediately.

Mr. Kaufman said he doesn't have time to go through every count in their Response, but did provide detailed responses on each and every count in the Complaint. He said before getting into those details he wanted to get into the overarching issue; the coordination between Candidate Gonzales, his political committee, and any independent group that was cited by Mr. Rowe in the Complaint.

He said they tried to provide the Board with an extreme level of detail about Candidate Gonzales and his campaign; about the structure of the organization; the names of the people who work for the campaign, whether paid or unpaid; their roles and the undisputed fact repeated in all of the Responses filed yesterday; that there was absolutely zero coordination between the Gonzales campaign, his political committee and any of these independent groups.

Mr. Kaufman said he thought a fair reading of the Complaint and all of the Responses will lead the Board to that conclusion. The allegations and hearsay and Mr. Rowe's Complaint about suspected coordination without anything else, can't be enough to warrant the extreme remedy Mr. Rowe is asking for: essentially broad subpoenas both to Candidate Gonzales, as well as to a citizen of Santa Fe.

Mr. Kaufman said if it was otherwise, the Board is approving challenges like this that are going to happen in every election going forward. He said it is a huge waste of time and resources.

Mr. Kaufman said he would address any questions the Board has. He urged the Board to focus today's discussion on what is on the agenda: whether this Complaint meets the legal sufficiency threshold.

Mr. Kaufman said he expects that the Board would hear from the public, who would discuss the concept that there shouldn't be outside groups raising money in publicly financed campaigns. He said the Board may also hear from members of the public, people who support the people running against Candidate Gonzales and that "Candidate Gonzales needs to make it stop".

Mr. Kaufman said setting aside the fact that a candidate is not allowed to call those groups and tell them to stop and to undo all of that, is beside the point. The point is the fact that although these are important issues they are not issues that need to be decided by the Board.

Mr. Kaufman said City Council enacts the laws that the Board is being asked to enforce today and Councilor Ives filed a response he would urge the Board to review. He believed the response makes salient points that are essential to be considered. He said Councilor Ives raised the fact that there are legislative solutions to this; the Board can recommend changes to the City Ordinance that deals with Public Campaign Financing. He said we need to ask our City Councilors to fix this, but we shouldn't be punishing a blameless candidate for abiding by the laws in place now.

Mr. Kaufman said the Board is asked to determine whether the Complaint is legally sufficient. He said there are no legally sufficient facts in the Complaint that warrant taking any other step. They have provided a detailed affidavit on behalf of Candidate Gonzalez and the Board has affidavits from a number of people involved in the independent groups that are at issue. They point to all of the evidence in the record. He asked that the Board dismiss the Complaint in its entirety.

Chair Miller thanked Mr. Kaufman. He asked if there were questions. There were none.

Chair Miller said the Board would hear from the parties named in the Complaint, even if not technically named as Respondents. He said Mr. Curtice could speak in his role representing Mr. Hendry and then could speak in his other capacity.

Mr. Curtice said the purpose of today's hearing is to test whether there is an alleged, legally sufficient fact. He said on a purely legal basis Mr. Hendry is not a proper party to the allegations made. He said and assuming all differences in support the Complainant made; Mr. Hendry is not the right entity. He is not an entity, nor is he a candidate. He is an individual who was at one time a chairman of a PAC of an election committee, but has not been so since October eighth.

He said the Complaint identifies the Code sections alleged to have been violated; the first is 9-3.8 (A) and (B) that provides for rules governing the candidate. He said that is limited to the candidates' activities; and again Mr. Hendry is *not* a candidate. He said Rule 9-3.11(D) is again placing restrictions on a *candidate*, of which Mr. Hendry is not.

Mr. Curtice said 9-2.6 refers to a person or entity that contracts or initiates the dissemination of campaign materials. He said although there have been allegations in this Complaint of campaign materials being disseminated; none of those allegations were against Mr. Hendry. They are against the various PACs; none of whom were joined as parties to the litigation. Furthermore, there is no allegation that the PAC Mr. Hendry was involved with was one of the groups disseminating campaign materials.

Mr. Curtice said lastly the Complaint cites 9-2.3 (L) and 9-2.3(G) which are the twin and identical definitions of the word *expenditure*, in both the Campaign Code and the Public Campaign Finance Code. He said thus, the general tenor of the Complaint is that certain PACs and additionally AFSCME, which is not a PAC, coordinated their expenditures with the Gonzales campaign. He said you would

think the natural response to such a claim would be the Gonzales campaign and those PACs. Mr. Curtice said none of those PACs were made parties of this proceeding; Mr. Hendry was.

Mr. Curtice said moreover the remedy sought, particularly in the Complaint Amendment, is something that Mr. Hendry cannot provide; which is Mr. Gonzales being forced to return money on the Public Finance.

Mr. Curtice said he would not go through every point, but would make two broader points. He said it had been stated there was a suggestion in the Complaint that the purpose of the Public Finance Code was to eliminate independent expenditures altogether. He said that is clearly false.

He said often when dealing with interpretation of statutes you are left with the problem of what the legislature intended. He said in this case they told us in no uncertain terms; they put in a Purpose section and an Objective section which were directed at campaign contributions. The purpose of the Public Financing is to eliminate the need for candidates to fund raise and to solicit contributions to their campaign.

Mr. Curtice said there is a broad line distinction in election law, between a campaign contribution and campaign expenditure. He said there is a reason for that distinction and as he put forth in his memo; is carried forward into this Code. He said an expenditure is an activity of First Amendment implications. He said what this Complaint is alleging is that the state has a right to tell people that they don't have the right to advocate on behalf of people they feel strongly should be in office. He said that would eliminate people from the public sphere.

He said he wasn't involved in the public narrative of the passing of the Code, but again the Code has set forth a Purposes section, all of which are aimed at contribution. He thought the reason for that was limiting campaign expenditures raises serious First Amendment implications; you are telling people not to involve themselves in politics altogether.

Mr. Curtice said the second broad point he wanted to make is that the Complaint seems to suggest that because the Javier Gonzales campaign may have benefited from certain activities of independent groups that that must deem those groups coordinated. He said that can't be the test. The groups would not engage in political activity if it did not benefit one candidate or the other. He said moreover, it is an ironic claim, because clearly the Patti Bushee Campaign has benefited from Mr. Rowe's activities. He said if that were the test of concert, then Mr. Rowe's Complaint itself is a violation of the Code.

He said the only one of the other four counts that directly deals with Mr. Hendry is the first one. He quoted from the Complaint: *"this count challenges the failure to report an indirect contribution; the \$1925 payment of the Santa Fe Progressive PAC for political research in concert with the Gonzales campaign"*.

Mr. Curtice said first, as the Complaint acknowledges, the payment was made in January; three or four months after Mr. Hendry left the PAC. Secondly, if the claim is that the PAC should have reported the payment differently than it did, then the PAC, *not* Mr. Hendry, should be the Respondent to that claim. He said of course they did not report it incorrectly, they reported it as an expenditure.

Mr. Curtice said the Complaint doesn't state *who* failed to report it, presumably because it didn't join the PAC, it must mean that the Javier Gonzales campaign failed to report it as a contribution. Again, an expenditure by an independent group is not a contribution except in one narrow circumstance; following the change to the Code made on January eighth- *if* it has been made in concert.

Mr. Curtice said the federal regulations on coordinated contributions have about five pages and objective requirements to avoid this type of innuendo and hearsay. The objective requirements look to content-based requirements and conduct based requirements. He said you have to have both; a Finding that there is one of the conduct based requirements and one of the content-based requirements. He said there is no allegation of that anywhere in the Complaint.

Mr. Curtice said he would address AFSCME. He said he previously identified incorrectly count two, which is actually count three, that deals with the alleged paid volunteers. He quoted from the Complaint: "*basically this count challenges a Code violation by AFSCME about January 28, 2014 to arrange Santa Fe paid volunteer opportunities and to organize 'paid volunteers' to work on the Gonzales mayoral campaign*". He said again the Complainant is alleging what appears to be a violation by AFSCME, however was not joined.

He thanked the Board for the opportunity to respond on AFSCME's behalf. He said this is simply not true and the documents that are attached in support of this alleged claim show that they are not true. He said Carter Bundy provided an affidavit that shows how those were his and explains how those were disseminated.

Mr. Curtice said first was an e-mail (Exhibit N) to the Complaint in early January that said: "we are going to begin a member to member outreach program. We haven't started it yet, in the meantime you are free to volunteer for the Javier Gonzales campaign. We cannot pay you for that activity".

Mr. Curtice said that couldn't be clearer.

Mr. Curtice said the second e-mail was after the member to member program began. He said in that case the people who participated were not volunteering for the Javier Gonzales campaign. They were instead doing member to member outreach. They were union members talking to other union members about the candidates, including Mr. Gonzales but not limited to, that the union had endorsed. He said first of all there is no allegation, nor could there be, because there are no campaign materials as part of this. It was just face to face, phone to phone conversations between union members about candidates.

Mr. Curtice said the timing of this stipend is irrelevant because, AFSCME or CLC (Central Labor Council) the PAC is a political committee under the definition set forth in the Code. They are not required to report it as such. He said clearly it is a matter of convenience that allows for a time payment when all of the work has been performed.

Mr. Curtice said more importantly this type of member to member communication has been recognized as protected activity since at least 1948 by the US Supreme Court. He said as he stated in the Brief, the regulation of union participation in political campaigns is not new, going back to at least 1925. He said however, there is the CIO case where indictments were brought against the union and its

president for allegedly violating that code because they sent an internal newsletter to members of the union saying "I urge you to vote for this particular candidate for Congress."

Mr. Curtice said the US Supreme Court had to determine if that violated what was then a broad prohibition on any contribution or any expenditure by a labor organization or a Corporation in a federal election. He quoted from the case: "if the Act were constructed to prohibit the publication by corporations and unions in the regular course of conducting their affairs, periodicals advising the members, stockholders or customers of danger or advantage to their interests from the adoption of measures or the election of office to men; espousing such measures, the gravest doubt would arise in our mind as to its constitutionality".

He said going to 1957 to a UAW case and in 1972, the Pipefitters case; the Supreme Court has repeatedly recognized that the member to member communication is simply outside the realm of Campaign Finance laws.

Mr. Curtice said given that the Code is alleging violation against AFSCME, but not actually joining AFSCME; timed so that the only way that it could be heard as was insisted prior to the election, to shorten the normal response time; that the facts alleged in the Complaint are contradicted by the materials attached in support of the alleged facts; that it alleges contact that is not even arguably within the subject of the Campaign Code or the Public Campaign Finance Code and that further more would be protected under the First Amendment; suggests that we make the further request that you not only dismiss the Complaint, but that you make and publish a Finding that it is frivolous and sought solely to intimidate or harass.

Mr. Curtice thanked the Board.

Chair Miller said at this time the Board would hear from other entities.

Ms. Kirtan Khalsa said she represents the Progressive Santa Fe PAC and Santa Fe Working Families [PAC]. She said initially she would respond to count one, the Progressive Santa Fe Political Action Committee.

She said the essence of the claim, and she thought, the essence of *all* of the claims, is that Mr. Rowe thought that any participation by political committees should be disallowed, regardless of whether there is evidence of any coordination or communication regarding expenditures and any concert. She said of course that is not the law.

Ms. Khalsa said it is well settled, as Mr. Curtice pointed out that the government cannot infringe the First Amendment rights of independent expenditure groups to advocate for or against candidates for political office. And within that right have the right to commission polls, to conduct research, and to engage in activity that they have independently determined appropriate and in line with the goals of the particular PAC.

Ms. Khalsa said both the Progressive Santa Fe PAC as well as the Santa Fe Working Families PAC has submitted affidavits indicating that there has been absolutely no communication, concert, or coordination between any of their independent expenditures in the Javier Gonzales campaign.

Ms. Khalsa said furthermore Mr. Rowe's Complaint does not allege any facts that are legally sufficient to indicate anything to the contrary or anything that would indicate that these affidavits are in fact false. There is absolutely no probable cause in this case to believe that there has been a violation by the Respondents or by the Political Action Committees.

Ms. Khalsa said she would not go through arguments that Mr. Curtis has brought up, but would invite any questions that the Board may have for either of the PACs.

Ms. Kovnat asked if correct that the Santa Fe Working Families PAC had disseminated campaign materials.

Ms. Khalsa said they did not disseminate any materials. She thought that was addressing count three against Working America. She said the allegation against Working Families had to do with poll that was commissioned; information was presented in the media that there was a poll.

Ms. Khalsa said there has never been any communication directly with the Javier Gonzales campaign or Jon Hendry for that matter that research would be conducted or the results of that poll.

Ms. Kovnat said she understood that, but she saw that there was a difference in the expenditures between from the poll and the total expenditures. She said she wondered whether that was for preparing mailers or dissemination.

Ms. Khalsa consulted with her client. She apologized. She said mailers *were* sent out and she had been confused because that was not raised as part of the allegations in the Complaint. The mailers *were* not created or sent in any way in concert with the Javier Gonzales campaign. She said the mailers cannot be considered anything but independent expenditures by an independent group and there is no allegation concerning that in the Complaint.

There were no further questions from the Board.

Chair Miller asked if everyone had been heard from under the responding entities.

Chair Miller said Mr. Rowe had asked for a chance for rebuttal and everyone has had an opportunity to present their thoughts to the Board. He asked if there were any comments or discussion from the Board.

Ms. Kovnat said she would like to hear from Mr. Rowe.

Mr. Rowe said he wanted to briefly address the three counts from the two [Respondents] that spoke at some length. First, Mr. Gonzales' counsel reiterated and the papers [newspapers] and their affidavits reiterated that there was no coordination. He said the statute that we are talking about does not require

coordination and that is an important point. MR. Rowe said *concert* means mutual, harmonious, mutually beneficial actions and does not require a contract or agreement or treaty.

Mr. Rowe said regarding the paper filed by Councilor Peter Ives, whom he respects as a colleague and a friend. (Exhibit 3) He said he is dead wrong by indicating that his [Mr. Rowe's] pro bono volunteering is somehow a contribution that should be reported and in some way comparable to the monies of the expenditures by the PACs and the other groups before this Board. He said that is a collateral point.

Mr. Rowe said with regard to the points made by the counselor for Mr. Hendry. He is not claiming a violation by way of any expenditures by Mr. Hendry or AFSCME or any other group; none of which are independent; which were organized for the purpose of promoting and collecting money and spending to promote the election of Candidate Gonzales.

He said all of these precedents of the Supreme Court back to 1925 and before, has arguably no pertinence to this case. None of them involve public financing, none of them involve contributions pertaining to public financing, none of them pertain to groups that have previously endorsed and were organized for the purpose of electing a candidate, which is the case here.

Mr. Rowe said there is no basis for those charges. He said for that reason he re-iterates that concerted campaign promotions and activities by the Code, as amended by the City Council at the recommendation of this Board; do not require any kind of agreement or coordination. He said what it does indicate is mutual and harmonious and beneficial activities reached as indirect contributions.

He said they are not violations by the PAC or by the group; they are violations by the candidate for not reporting those expenditures made in concert and for the purpose of benefiting one candidate against another.

Mr. Rowe thanked the Board.

Chair Miller said he is trying to understand Mr. Rowe's comment about coordination. He asked if his position is that there could have been a contribution from the PACs to Mr. Gonzales' campaign without any involvement or knowledge on the part of Mr. Gonzales' campaign...as long as those activities benefited Mr. Gonzales' campaign.

Mr. Rowe said he would not go that far; although the Board may determine that a PAC or another group organized for the purpose of promoting and electing a candidate is not independent. Hence even a minor activity by such a group is a reach by the ban on concerted, not *coordinated*, activities.

Chair Miller thanked Mr. Rowe. He asked if there were further questions for Mr. Rowe. There were none.

Ms. Kovnat moved that the Board go into Executive Session for discussion of the Complaint before the Board. Ms. Martinez seconded the motion.

A roll call vote approved the motion unanimously with Mr. McMillan, Ms. Kovnat and Ms. Martinez voting in favor. There were no votes against.

The Board went into Executive Session at 4:34 p.m. under NMSA 1978, Section 10-15-1(H)(3) to deliberate in connection with an administrative adjudicatory proceeding.

Mr. McMillan moved to reconvene from Executive Session. Ms. Kovnat seconded the motion and the motion passed by unanimous voice vote.

The Board returned to Open Session at 5:44 p.m.

Chair Miller asked the record to show that while in Executive Session the Board discussed only matters that fall within the purview of the item on the agenda in the evaluation of Complaint 2014-1 and the legal sufficiency of that Complaint.

Chair Miller thanked everyone for their patience. He said the Board engaged in a lot of deliberation about the Complaint. He would announce the decision of the Board and the voting Board members would then vote on that decision.

- 1) Action Regarding Whether the Complaint Sets Forth Legally Sufficient Facts Which, if True, Show Probable Cause to Believe There Was a Violation.

Chair Miller said first the Board evaluated under Ordinance Section 6-16.4 and made a determination of legal sufficiency of the Complaint. There were four factors involved in the determination:

1. *If the Board lacks jurisdiction to adjudicate the Complaint.*

Findings: The Board finds that the Board does have jurisdiction to adjudicate the Complaint.

2. *If the Complaint is frivolous or intended solely to harass or intimidate.*

Findings: the Board does not find that the Complaint is frivolous or intended solely to harass or intimidate.

3. *If the Complaint was filed within one year after the Discovery or when the Complainant should reasonably have discovered the information on which the Complaint is based.*

Findings: the Board finds that the Complaint was timely filed.

4. *If the face of the Complaint sets forth the legally sufficient facts, which if true, show probable cause to believe that there was a violation.*

Findings: The Board disagrees with the Complainant's interpretation of this standard for coordination or a contribution between a political committee and a candidate.

The Board finds that the Complaint fails to allege facts that show there is probable cause to believe that the Respondents may have benefited by a contribution made in cooperation, consultation or concert with the candidate's committee.

2) Action on Any Next Steps as Permitted Under Section 6-16.4(D)- Section 6-16.7 SFCC 1987.

Chair Miller said the Complaint is dismissed. He said the deciding Board members intend to issue an explanation of the decision in writing that would follow this ruling of the Board.

Chair Miller said he would entertain a motion and vote by the Board to confirm the decision of the Board is as he has read it.

Mr. McMillan moved to dismiss the Complaint for the reasons outlined previously by Chairman Miller. Ms. Kovnat seconded the motion.

A roll call vote showed unanimous approval of the motion to dismiss with Mr. McMillan, Ms. Kovnat and Ms. Martinez voting in favor of the motion. There were no votes against.

Chair Miller said the Complaint is dismissed and Item three of the Agenda is resolved.

4. BOARD MATTERS

Ms. Kovnat said she would like to add to her vote. She said it is her belief that it is the candidate or the candidate's responsibility who accepts the public financing, to create and maintain a firewall between the campaign and independent groups. She said there were no facts alleged in the Complaint that rose to the level of showing there was an action in cooperation with the campaign. She said she would emphasize the requirement of maintaining a firewall between a publically financed candidate and those independent groups that seek to support that candidate.

Ms. Martinez said she thought the Complaint failed to allege facts to support the allegations. She said she is particularly troubled by certain discrepancies in the affidavits of Mr. Hendry and Candidate Gonzales regarding whether or not they actually spoke to each other. Ms. Martinez said the public should be aware of that, but the Complaint failed to meet the standard by which the Board evaluates that.

There were no further matters from the Board.

5. PUBLIC COMMENT

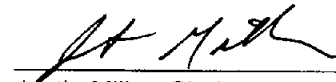
There were none.

6. ADJOURNMENT

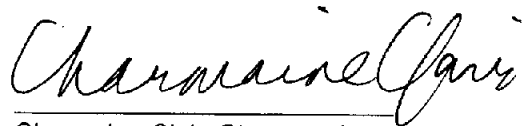
Ms. Martinez moved to adjourn the meeting. Ms. Kovnat seconded the motion and the motion passed by unanimous voice vote.

There being no further matters to discuss and the agenda having been completed, the meeting adjourned at 5:55 p.m.

Approved by:


Justin Miller, Chair

Submitted by:


Charmaine Clair, Stenographer

ETHICS AND CAMPAIGN REVIEW BOARD
EXECUTIVE SESSION
February 25, 2014

The Ethics and Campaign Review Board of the City of Santa Fe met in an executive session duly called on February 25, 2014 beginning at 4:34 p.m.

The following was discussed:

In Accordance with the New Mexico Open Meetings Act, Section 10-15-1(H)(3) NMSA 1978, Deliberation in Connection with an Administrative Adjudicatory Proceeding Relating to a Complaint Filed by Fred Rowe Alleging Violation of Public Campaign Finance Code, SFCC 1987, Sections 9-3.8(A), 9-3.8(B), 9-3.11(D), 9-2.6, 9-2.3(L), 9-3.3(G) by Candidate Javier Gonzales and Jon Hendry

PRESENT

Justin Miller, Chairperson
Ruth Kovnat
Kristina Martinez
Seth McMillan

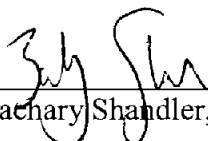
ABSENT

Paul Biderman (Recused)
Tara Lujan
Roderick Thompson

STAFF PRESENT

Zachary Shandler, Assistant City Attorney

There being no further business to discuss, the executive session adjourned at 5:44 p.m.



Zachary Shandler, Assistant City Attorney

ECRB

Tue:

Support PJB, but filed complaint in personal capacity as citizen and attorney to preserve Santa Fe PCFS. As former chair, I believe this Board has the legal power, the legal acumen, and the legal wisdom to avert a tainted election next week, which would doom Santa Fe's public campaign financing as a farce.

PAC money spent for publicly financed candidates is wrong. It is wrong for the Gonzales campaign to benefit from \$20,000 in group spending, which doubles its own outlays as of 2 weeks ago—and more from today's campaign finance reports.

Feeding from BOTH public AND private money pots is fundamentally unfair. According to the Journal,, IT STINKS!

Today's legal issue is whether our Feb.10 Complaint sets forth enough facts which, if true, show PROBABLE CAUSE TO BELIEVE there was a violation- - probable cause to believe—NOT HARD PROOF of violations.

Smart campaign operators don't advertise their PAC money plans. Also, we have no bugs, spies, or hackers inside the Center for Progress and Justice headquarters to tape them.

Our Complaint plainly meets the probable cause to believe standard for concerted actions, which presuppose no agreements or handshakes but actions reflecting harmonious interests—in this case by groups organized solely to endorse and promote a Gonzales election, and hence not truly independent.

Early on, AFSCME itself agreed that campaign finance laws forbid money stipends to so-called volunteers. This alone may meet the probable cause standard.

Also, our complaint sets out PAC payments of nearly \$2000 to Blue Searchlight, a DC political research firm which was hired by the Progressive PAC headed by Mr. Hendry, a local union leader who was active in the Gonzales campaign.

It also sets out \$5,700 spent for a tilted poll run by DC-based Third Eye Strategies and paid by an AFSCME-linked Albuquerque PAC, which registered as Supporting Javier Gonzales for Mayor and Opposing Bill Dimas and Patti Bushee. Doubtless there are more such expenditures in TODAY's Finance Reports.

Due to the nature of hidden campaign promotions, a Board subpoena for Mr. Hendry's e-mail communications and business calendars is the best and may be the only way for the Board to get at the true facts, and square his affidavit

with his prior media statements. This is doable in a couple of days. Any stalling by Mr. Hendry would alert the Board and the public.

Yesterday's responses fail to come clean. As predicted, they are big on details, conclusory affidavits, and blanket denials about acting in concert, or asking for PAC coordination. But NOWHERE is there a sworn statement that, aside from the candidate's select Political Committee, NO campaign staffer ever dealt with Mr. Hendry or any pro-Gonzales group about money for a Gonzales election.

Their claim of immunity for pre-January violations is baseless. According to the Board's November 5 minutes, the Code amendment including concerted actions was a clarification, not a substantive change. Telling is their reliance for no retroactivity on Morales, a capital crime statute of limitations case. Anyway, many violations are shown from reporting failures the February 7 finance reports, and more are likely from the reports being filed today.

Like NJ's Governor, candidate Gonzales understandably knows of no communications with PACs or union groups. He wants them to stand down, whatever that means, but will NOT give back any part of his \$60,000 City funds. Mr. Hendry likewise went missing in action after his ouster as Progressive PAC chair, last October.

As for PAC First Amendment rights, these are NOT independent or issue-oriented groups. They were organized solely to endorse and promote a Gonzales election.

One last point, made with reluctance. Quoting from a February 17 Official Press Release FOR THE RECORD by the lawyers for AFSCME and Mr Hendry about my Complaint about union communications: QUOTE— WE LOOK FORWARD TO INVESTIGATING ROWE'S CONNECTIONS WITH THE BUSHEE CAMPAIGN AND PURSUING ANY AVAILABLE REMEDIES AGAINST ROWE FOR ANY WRONGDOING RELATING TO HIS FILING OF THESE ALLEGATIONS—END OF QUOTE.

In over 60 years, NEVER before threatened by opposing lawyers. This is vile and unacceptable. The Board should look into a rule protecting citizens from intimidation for petitioning the Board for redress of civic grievances.

YOUTZ & VALDEZ, P.C.
ATTORNEYS AT LAW

EXHIBIT 2
Ethics and Campaign Review Board
February 25, 2014

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JAMES A. MONTALBANO, NM
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February 17, 2014

*******OFFICIAL PRESS RELEASE*******

The allegations against AFSCME by Patti Bushee supporter Fred Rowe are beyond frivolous and harassing. As an attorney and former chair of the Ethics and Campaign Review Board, Rowe knows that the allegations are without any basis whatsoever.

Before AFSCME had established any member to member program (in which union members talk to other union members about elections), we informed our members that they could volunteer directly for the Gonzales campaign. We explicitly noted that due to campaign finance laws, they could not receive any payments or stipend.

Weeks later, once the Central Labor Council had established a member-to-member program, we noted that union members could receive a stipend for that work. Neither AFSCME nor the CLC has coordinated any part of our member program with the Gonzales campaign. Member to member communications are highly protected under the First Amendment's right of association, and have been upheld by the Supreme Court of the United States repeatedly.

For an attorney and former chair of the Ethics and Campaign Review Board to bring an allegation trying to conflate unpaid volunteering at the campaign with paid member to member communications is, we believe, an intentional abuse of process for political gain. Not only do we expect for AFSCME and the Central Labor Council to be fully exonerated, we look forward to investigating Rowe's connections with the Bushee campaign and pursuing any available remedies against Rowe for any wrongdoing related to his filing of these allegations.

For additional information, please contact attorney Stephen Curtice at (505) 244-1200 (office), (505) 440-5361, or by e-mail at stephen@youtzvaldez.com.

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IN THE MATTER OF CASE NO. 2014-1 COMPLAINT BY FRED

To the Members of the Ethics and Campaign Review Board,

EXHIBIT 3
Ethics and Campaign Review Board
February 25, 2014

I have prepared and filed this statement in connection with the above consideration. I have reviewed the Rule of Organization and Practice of the Board and nowhere therein an opportunity for persons other than a complainant and a respondent to have any input on a matter pending before the Board. Not having found reference to submissions such as mine, I believe it is within the discretion of the Board and therefore request your consideration of it under your broad powers to supervise the matters that come before you.

I read the Complaint Form, Memorandum Supporting Complaint and Complaint Amendment that have been filed with the Ethics and Campaign Review Board by Fred M. Rowe. It has been my pleasure in the past several years to work with Mr. Rowe in his capacity with the Neighborhood Law Center on the annual conference sponsored by the Neighborhood Law Center and the City of Santa Fe. I consider Mr. Rowe a friend and colleague, who, like me, is passionate about our City and its future.

Like Mr. Rowe, I am a strong supporter of Santa Fe's public campaign financing ordinance and do not want to see its intent circumvented by anyone, and I do not doubt that the Council will have the opportunity to consider modifications to the existing ordinances based on the issues raised in this elective cycle.

What concerned me regarding Mr. Rowe's filing is the following: Mr. Rowe is an attorney and supports Councilor Bushee for Mayor as reported on several occasions by the New Mexican. He complains of the possible coordination between several PACs, formed in accordance with law and legal, and the Gonzales campaign, arguing that the PACs will taint the election, by virtue of their participation in terms of financial expenditures, and that the denials by the Gonzales campaign of any coordination with the PACs simply cannot be true. Mr. Rowe argues that the expenditures and services undertaken by the PACs constitute improper campaign contributions to Mr. Gonzales.

The filing by Mr. Rowe of his complaint, like the work done by the PACs, appears to have been done in favor of a particular campaign for mayor, constituting a negative attack on the character of the opponent, Mr. Gonzales, in the instance. It is certainly true that the circumstance of the participation of the PACs in an election where public campaign financing is available highlights some difficult issues, the significance and impact of which were not anticipated by the policy makers. And it is certainly fair to raise as a criticism of the PACs the argument that their participation in the campaigns, on behalf of a candidate, undermines the equal opportunity that motivates our public campaign financing efforts.

However, Mr. Rowe's efforts do more than simply raise a valid question for consideration by the Board. Rather, Mr. Rowe makes his averments, in my opinion, as an advocate seeking to call out an opponent's perceived misdeeds. His use of negative and demeaning phrases and terms such as: "denials...are inconclusive and do not wash", "only way to get at the true facts" and "serial reporting offenses" and "subversion of Santa Fe's public campaign financing system", "ongoing

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program to subvert ... public financing system", speak to his role as advocate for a campaign, rather than simply and solely as an advocate for the public campaign finance system. Mr. Rowe does not identify himself as representing any particular mayoral campaign and nothing suggests that he is being compensated by any mayoral campaign for his efforts in this regard. Mr. Rowe does bring to the table his skills as an attorney, and the focus of his complaint on the character of Mr. Gonzales with much circumstantial argument, but without extensive hard evidence, is, in my opinion, meant at least as much if not more to discredit Mr. Gonzales as to honor our public campaign finance system. One question in my mind is to what extent, if any, has Mr. Rowe coordinated his efforts with any mayoral campaign.

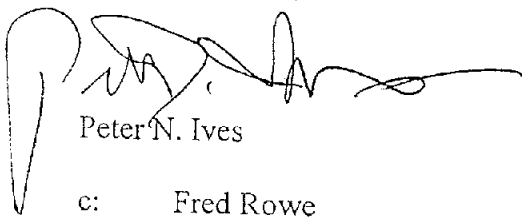
Had an attorney been formally paid by a campaign to prepare and file such a document, and appear before the Board when the matter is being considered, the payment to that attorney would already have amounted to many thousands of dollars. Is this expenditure of time and effort by a professional attorney, who supports a particular candidate for mayor, making allegations attacking the character of another candidate for mayor, any less a challenge to Santa Fe's public campaign financing laws than what is complained of by Mr. Rowe in his filing?

In an interesting turn, at the end of his complaint, Mr. Rowe argues to the Board that it has been Mr. Gonzales' very refusal to coordinate with the PACs that evidences the need for strong deterrent relief. He states that such relief is justified because Mr. Gonzales refused to request of the PACs that they dissolve, though he does note Mr. Gonzales' professed disdain for the PACs. Of course, Mr. Gonzales' asking that of the PACs in the first instance would be the very coordination and control that our ordinances, and Mr. Rowe, rightly condemn.

I look forward to working cooperatively with Mr. Rowe to work legislatively to address these complex and difficult issues which have been raised during this election season and to ensure the continued vitality of our public campaign financing system.

Thank you for your consideration of these remarks which are solely mine.

Very truly yours,



Peter N. Ives

c: Fred Rowe
Javier M. Gonzales
Santa Fe Progressive PAC
Santa Fe Working Families PAC
Working America of Santa Fe PAC