

**MINUTES OF THE
CITY OF SANTA FE**

ETHICS AND CAMPAIGN REVIEW BOARD

NOVEMBER 05, 2013

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 4:00 pm in the City Councilor's Chambers, City Hall, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll call indicated the presence of a quorum as follows:

Members Present:

Justin Miller, Chair
Roderick Thompson, Vice Chair
Paul L. Biderman (arrived later)
Ruth Kovnat
Tara Lujan
Seth McMillan

Members Absent:

Kristina Martinez (excused)

Staff Present:

Melissa Byers, Legal Department
Yolanda Vigil, City Clerk
Zachary Shandler, Assistant City Attorney

Others Present:

Jim Harrington, Common Cause
Councilor Patti Bushee
Councilor Ron Trujillo
Charmaine Clair, Stenographer

b) Approval of the Agenda

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

c) Approval of the Minutes- June 11, 2013

Mr. Thompson moved to approve the minutes of June 11, 2013 as presented. Mr. McMillan seconded the motion which was passed by unanimous voice vote.

Chair Miller introduced and welcomed Seth McMillan, the Board's new member.

2. NEW BUSINESS

a) March 4, 2014 Municipal Election Update. (Yolanda Y. Vigil and Zachary Shandler)

Ms. Vigil provided an update. She ran through the names of the seven mayoral candidates; Roman Abeyta, Patti Bushee, Margaret Josefina Campos, Michael Deana, Bill Dimas, Javier González and Rebecca Wurzbarger and the City Council candidates: District 1: Signe Lindell and Michael Segura; District 2: Rad Acton, Joe Arellano, Mary Louise Bonney, Jeff Green and Joseph Maestas; Peter Bill Komis withdrew. District 3: Marie Campos, Carmichael Dominguez and Angelo Jaramillo; District 4: Ronald Trujillo.

Ms. Vigil outlined the important dates as follows:

9/3/2013- candidates picked up packets with information for their candidacy and forms for nominating petitions, qualifying contributions, seed money, etc.

11/2/2013- the last day to get petition signatures

11/7/2013- nominating petitions will be turned in; petitions would be verified within 10 days.

11/18/2013- the qualifying period ends. Candidates will apply for certification as a participating candidate and bring in qualifying contribution and seed money forms and their reports.

12/3/2013- Candidates will file their declaration of candidacy; Ms. Vigil will determine if their declarations are valid on December 4th and determine on December 5th the candidates who applied for public financing and their certification. On the same day a drawing in Council Chambers will determine the ballot positions for candidates.

Mr. Biderman entered the meeting at this time.

12/10/2013- funds will be disbursed to the certified participating candidates; also the deadline to withdraw the affidavit of candidacy from the race.

1/23/2014- Campaign financial reports must be filed and again on February 7, February 25, by noon March 3 and two weeks after the election on March 18, 2014.

1/28/2014- the first day to vote absentee in the City Clerk's Office (absentee ballots can be mailed out).

2/4/2014- voter registration books will close.

2/12/2014- early voting begins.

3/4/2014- Election Day

3/10/2014- Inauguration

Ms. Vigil said there would be a meeting with the candidates to briefly review the codes and anything the Board felt necessary. Other meetings may be scheduled if there are issues.

Chair Miller said Item B is an amendment that would include certain expenditures by persons other than the candidate or the candidate's committee. He asked Zachary Shandler to comment.

- b) An Ordinance Relating to the City of Santa Fe Campaign Code and Public Campaign Finance Code, Amending Subsections 9-2.3(I) SFCC 1987 and 9-3.3(E) SFCC 1987 to Amend the Definition of *Contribution* to Include as a Contribution Certain Expenditures by Persons Other Than the Candidate or the Candidate's Political Committee. (Councilor Calvert and Councilor Bushee) (Zachary Shandler)

Mr. Shandler said the Board could consider three actions: to recommend the bill as proposed to City Council; to recommend with changes; or to require additional study. The bill provides a new definition for *contribution* in both the Campaign Code and the Public Finance Code and now includes: "an expenditure by a person other than a candidate or the candidate's political committee that is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or candidate's political committee."

Mr. Shandler noted that the language came from federal law and federal CFR. He said important is that the effective date is immediately upon adoption. The City Attorney's office issued an advisory opinion to the City Clerk in September, 2013 and is included in the Board's packet.

Mr. Shandler said the Board should think about three entities; the candidate's committee; interpreted as the committee with the campaign manager, treasurer, etc.; the political committee and independent groups.

Mr. Shandler pointed out that the last paragraph of the opinion set up the day's discussion: "courts and regulators have struggled to find the difference between permissible coordinated activities and coordinated activities that simply disguise contributions."

Mr. Shandler said one of the cosponsors, Councilor Patti Bushee is present, as is Jim Harrington; one of the drafters of the bill. He asked for their comments on the bill.

Councilor Bushee thanked the Board for their service. She said the concern is to make the definitions of *coordination* and who could coordinate, as clear as possible. She asked Mr. Harrington with Common Cause to comment on Attorney Shandler's opinion.

Mr. Harrington said the view of Common Cause set forth in the e-mail (Exhibit 1) is mainly sent in response to press reports. The principal advantage of this bill is to remove doubt. Federal language is copied that gives case law on situations that might come up and expansive interpretation is given by both the Supreme Court and the FEC to the term *coordination*.

Mr. Harrington stressed the importance to move the bill along. He said the bill has an immediate effective date so it would be in effect for the heaviest part of the campaign activity in January/February.

Councilor Bushee said her concern is not from a candidate stance as much as she supports public campaign finance reform initiatives. She said could see potential failure for public campaign financing

in Santa Fe if the definitions are not clear. Councilor Bushee said this bill makes clear that the current campaign code does not encourage coordination between candidates and PACs.

Chair Miller asked for questions or comments from the Board.

Mr. Harrington said the FEC regulations have two parts to the definition of *coordination*; the content prong about how the ad supports the candidate and the conduct prong; about sharing staff and sharing information between the PAC and the campaign, etc. He said the hope is that would become relevant if the bill doesn't deviate from the federal wording.

Mr. Thompson said his problem is that the bill goes into effect immediately if passed and campaigns have started. He asked why it was necessary to spring the bill now.

Mr. Harrington said the bill has been in the works for some time. He said the value of passing the bill now is that most of the serious spending takes place in January and February and no one officially becomes a candidate for another month. He noted that the bill would not be retroactive.

Mr. Shandler said they talked about the committees; political, the candidate's and the independent committees. He said the political committees are the ones authorized to coordinate; not independent groups. He said with registration from only one political committee received to date, he thought there wouldn't be a lot of upheaval for this campaign.

Chair Miller asked what would happen if the law is passed and the political committee did something considered expenditure, prior to the passing of the law, in cooperation with the campaign.

Mr. Shandler said a party could file a complaint and the ECRB could decide if the complaint had jurisdiction and should be applied prospectively.

Mr. Harrington said current code and this provision prohibits spending by anyone on behalf of any publicly financed candidate, coordinated with the candidate and doesn't have to be a committee. He gave an example of a person who with candidate's approval, spent \$10,000 on a series of ads. He said that would be a coordinated expenditure and is illegal for a publicly financed candidate under the current code.

Chair Miller asked if Mr. Harrington and the City Attorney's office disagreed.

Mr. Shandler said when he wrote the memo he wanted to provide sufficient deference to the ECRB, should they have to make factual determinations.

Mr. Harrington said Common Cause and the Sierra Club both participated in the 2008 campaign and reported under Code 926, and were not political committees. He said the coordination part of the codes state "publicly financed candidates shall not accept any contributions except qualifying and seed money." He said that doesn't say from *whom*.

Chair Miller said the Board made recommendations recently passed by City Council that excluded volunteer personal services from the definition of *contribution*. He asked if expenditure by a person other than the candidate is called a contribution; would a political committee be able to coordinate with a candidate on a volunteer's personal services without running afoul of the bill.

Mr. Harrington said the idea of public financing is to get private money; if just services, it is permitted.

Mr. Shandler noted the definition in K Expenditure, in the Code; 9-2.3 of the definition section. Chair Miller confirmed that would be the payment or transfer of anything of value, but not services.

Mr. Harrington added if a publically financed candidate coordinated with a PAC and spent money on a lot of ads to support the candidate; that could be an illegal expenditure of private money by the candidate.

Mr. Shandler said part of the analysis would be that expenditure talks about services, but has an exemption for volunteer services. He said that starts you thinking about different scenarios and is why it defers to the Board to determine what coordination is.

Ms. Lujan said if an independent was not coordinating with the campaign, but created hours of manpower to assist the campaign; that isn't money per se, but she would question that.

Mr. Harrington said that would not violate the code for two reasons; that would just be volunteer services if not paid. Secondly, there was probably not a discussion with the campaign. He said if someone wants to stretch the term *services*, they could say this is just volunteer services. He said the Board could clarify or reject that argument.

Chair Miller opened the floor to public comment.

PUBLIC COMMENT

Mr. Rad Acton, District 2 City Council candidate said a gray area is if compensation is made known for services by a PAC and was coordinated. He said while made known; where the coordination would begin and end has to be addressed. He said that could open up a Pandora's Box of promotional ambiguity. He said an option is to consider all subsequent contact with that PAC be carefully defined and/or given value.

Mr. Acton said he is for the legislation, but sees a way of acknowledging collusion with a PAC and compensating them for their service. He said an ad runs seven times a week, but they paid for the service and made that known. The PAC could "run amok" with the promotions via the association that was formally compensated.

Mr. Acton asked what would happen after that and how would that be monitored. He said they have to be careful once that box is open; about other services that would be provided that have value.

Ms. Kovnat said what Mr. Acton is saying is a political PAC acting in cooperation with a political candidate. She said that is what this provision would prevent.

Mr. Acton said only if the compensation is not considered part of the public financing budget.

Councilor Patti Bushee said speaking as a candidate, the scenario Mr. Acton portrays would count against the public funds and would not just be unlimited. She gave an example: if everyone is running clean and fair campaigns, but one PAC attached to one candidate claims to run publicly funded; they would be able to spend unlimited funds.

Councilor Bushee said the remedy would be to complain as another candidate, to the ECRB about that happening and have the Board rule. She said to define what is allowed and what coordination is or is not, is the bigger concern from her perspective.

Margaret Josephina Campos said this feels like a rerun of the same material. She said for someone running for mayor, there is too much rhetoric and it is confusing. She said people in general don't understand the five dollar qualification or where that comes from.

Ms. Margaret Campos said another problem is filling out the petition and going door to door and the person is supposed to be representing everyone in the district or in Santa Fe. She hears that as long as the signatures are from your relatives and friends, you can avoid the rest of the district. She said that is a rerun of what the state level senators and representatives do and the City should look after the general public and put things in simple terms. She said no one is looking at what the PACs are doing and this is not transparent and not right.

Mr. Omar Amed agreed there is a lot that needs clarification. He said he also agrees with Mr. Thompson about the issue with timing. He worried there might be an ulterior motive; the bill is targeting one group and one candidate would be affected.

Mr. Thompson asked who Mr. Amed thought the target was.

Mr. Amed said the singular PAC Progressive Santa Fe that supports Javier Gonzalez.

Mr. Biderman asked Mr. Amed if he was a part of the Gonzalez campaign.

Mr. Amed said he does work on the campaign for Mr. Gonzales. He said his concerns were not with the bill. He thought it a great policy and said the campaign has not done anything inappropriate, but wonders about the motive to introduce and enact the bill now.

He said the PAC is coordinated with the campaign and it has already been frustrating with things in the paper about the PAC's existence and actions. He said things the PAC has said have already affected the Gonzalez campaign negatively in the press.

Mr. Biderman said if the bill is enacted promptly the campaign could coordinate with the PAC. He asked if that wouldn't give protection and coverage to Mr. Gonzalez's campaign.

Mr. Amed said he worries about other motives. He said usually things are enacted immediately to affect an ongoing process. He thought it wasn't a proper course of action even though he agrees that the proposal is a good thing and needed.

Chair Miller said it is good for the Board to hear comments about the possible impacts of the proposed legislation, but the Board should not be overly concerned with the motivation. He said the Board is more interested in the merits of the proposal and the impact.

Ms. Kovnat said she viewed this change consistent with the spirit of public finance. She said it doesn't really make a change, but clarifies the rules about finance.

Ms. Kovnat moved that the Board approve the ordinance as written and to recommend City Council adopt the ordinance. Mr. Thompson seconded the motion and the motion passed by unanimous voice vote.

Chair Miller said by hearing Item 2D first, the Board would address everything in 2C.

(Revised agenda order)

- d) An Ordinance Relating to the City of Santa Fe Campaign Code and Public Campaign Finance Code, Amending Subsection 9-2.14 SFCC 1987 and Creating a New Subsection 9-3.12 SFCC 1987 to Establish a Ban on Contributions from Businesses or Persons Who Have a Relationship With a Business That Are or May Be in the Future in a Contractual Relationship With the City of Santa Fe. (Councilor Calvert) (Zachary Shandler)

Mr. Shandler said this ordinance would establish a ban on businesses or persons who have a relationship with the business and are, or may be in a contractual relationship with the City of Santa Fe. He explained that proposal 2C differs in that it has only a *current* contractual relationship.

He pointed out he provided a variety of findings that were in response to a federal court case in Albuquerque where the judge thought there were insufficient findings. He said many of the findings were from previous documents.

Mr. Shandler said an existing State Law 13-191.1 requires prospective contractors (businesses that have submitted an offer to an RFP) be forbidden to make a contribution and must disclose any contributions made within the previous 2 years. Currently the prospective contractor has a period of time they are not allowed to make a contribution.

Mr. Shandler read from page 3: "no candidate for mayor, council, municipal judge or candidate's political committee can accept contributions from any business contributor who at the time of the contribution is in a contractual relationship with the City to provide goods and services."

Mr. Shandler continued reading "no candidate for mayor, council, municipal judge, or candidate's political committee shall accept contributions from an individual contributor (defined as at the time of the contribution: the owner, on the board of directors, the chief executive officer or registered lobbyist with a controlling interest greater than 20% in an entity/organization) in a contractual relationship with the City to provide goods and services."

Mr. Shandler explained the response is to an Albuquerque court case with a ban on business contributions where some were plaintiffs were dismissed for lack of standing. He said the idea is that

the owner could still make a contribution. The Santa Fe code specifically defines business contributor and individual contributor.

Mr. Shandler said the language regarding owner of the business, board of directors; lobbyist, etc. was from House Bill 113 that tried to broaden the state law, but was vetoed by the governor. The 20% was from the State Governmental Conduct Act concerned with a business owned by owner and spouse. The 20% was to enable the diminutive owner to still make contributions:

Mr. Shandler read: "no candidate for mayor, council, municipal judge, or candidate's political committee shall accept a contribution in violation of 13-1-191.1 current state law; or from an individual or business contributor when it can be reasonably expected that a future contract with the City is considered to be part of a reward for the contribution."

Mr. Shandler said option A and B is in an attempt to provide objective language for someone who is not a contractor, but is considering that in the future. The language might also be repeated in the Public Financing Code. He noted there is no emergency clause, but the Board could recommend one.

Mr. Biderman thanked Mr. Shandler. He said his concern was with language in sections G and H. He said the State Statute 13-1-191.1 is confusing how this would interact with that. He said it doesn't make sense that a person could be in violation of accepting a contribution from someone who has not yet made a contribution and has nothing yet to disclose.

Mr. Biderman was worried about the wording and said that could be read as someone who made the contribution and didn't disclose it and is after-the-fact. The candidate would then be in violation even though it was the responsibility of the contractor to disclose.

Mr. Shandler agreed Mr. Biderman's point was valid. He explained the intention was to notify everyone about the current state law. He said the Procurement Code applies to everyone, but this particular law specifically references that the law applies to municipalities.

Mr. Biderman said if someone made a contribution 2 years prior to having a contract, they would just have to disclose that; it isn't that they couldn't make a contribution. He was confused how that fits with the ordinance when talking about disclosure.

Mr. Shandler said those were good points and the language could be redrafted to avoid those scenarios.

Mr. Biderman said his problem with H is similar because it is a ban on the candidate of the committee accepting the contribution and not a ban on the prospective contractor. He said his concern is how a candidate who is not an incumbent would know who would be a prospective contractor. Mr. Biderman said that could be an unfair burden for a candidate outside the system.

Mr. Shandler said he used the existing language, but the sentence could be flipped to put the burden on the contractor. He said regarding the policy makers deciding; Councilor Calvert wanted to put both options on the table so policymakers could have this type of debate.

Ms. Kovnat said she was concerned that H is so open-ended. She said a person who hopes for a City contract is precluded, but the candidate is precluded from accepting a contribution. She said a firm time period linked to the procurement process would make sense.

Mr. Biderman pointed out he is a contractor in Santa Fe, as an alternative municipal judge.

Mr. Thompson agreed with Ms. Kovnat's concerns. He said it is important for any governing body or anyone with influence to try to avoid litigation. He would prefer governing elected officials decide this.

Mr. Thompson moved that the Board not approve the bill and that the bill be sent back for further study. Ms. Lujan seconded the motion.

Ms. Kovnat thought the questions could be severed. She said she had fewer problems with E and F and thought they don't need to be sent back. Mr. Thompson agreed.

Mr. Thompson modified the motion to send the bill and the discussion centering on 2D, back for clarification.

There was no further discussion on the motion.

The motion passed by majority voice vote. Mr. Biderman abstained as a contractor with the City.

- c) An Ordinance Relating to the City of Santa Fe Campaign Code and Public Campaign Finance Code, Amending Subsection 9-2.14 SFCC 1987 and Creating a New Subsection 9-3.12 SFCC 1987 to Establish a Ban on Contributions from Businesses or Persons Who Have a Relationship With a Business That Are In a Contractual Relationship With the City Of Santa Fe. (Councilor Calvert and Councilor Bushee) (Zachary Shandler)

Chair Miller said item 2C is similar and focuses on the ban on contributions from business contributors or individuals who are part of a business, or a lobbyist.

Chair Miller asked Mr. Shandler how many government contractors the City has and how many people this would affect. He said he wants a sense of the candidate's ability to run and the candidate's ability to collect qualifying contributions.

Mr. Shandler was not aware of the current number of contractors who made a contribution in this election cycle. He said businesses could make seed money contributions and qualifying contributions and it would depend on the effective date.

Chair Miller asked if the bill would prohibit a business contributor from making a qualifying contribution.

Mr. Shandler said he looked at whether a business could make a seed money contribution, but not whether they could make a qualifying contribution. He said the City Clerk advised him to look at that.

Mr. Thompson said to echo his fear from the last proposed ordinance change; he doesn't like doing this last minute. He said there isn't time to figure out who would be affected by the changes. He suggested if the ordinance passed, there be an effective date that does not interfere with the current election.

Ms. Lujan agreed. She said to spring this upon this campaign cycle would be unfair to those who are running and basing their campaign on current law. She supported having a different effective date.

Mr. Shandler said he had identified that a qualifying contribution must come from a qualified elector. He deferred to the policymakers on the issue made by Ms. Lujan.

Chair Miller asked if a qualified elector is also a contractor, would they be able to make a qualified contribution.

Mr. Shandler said if the analysis is that a qualified elector is an individual contributor as defined under the code, he would follow Chair Miller's analysis.

Chair Miller asked about changing the effective date to March 4 or later. He said the Board should have a better sense of the impact and he wants to know the number of contractors in Santa Fe.

Mr. Shandler said a fourth option would be to study the ordinance. He said at the point of the Board's biannual review of election practices, the number of contractors who gave contributions would be known and how many contracts exist could be determined.

Chair Miller opened the floor to public comment at this time.

PUBLIC COMMENT

Ms. Signe Lindell asked on the qualifying contributions, how that would affect City employees.

Mr. Shandler said the Albuquerque Charter has express language stating "...other than a city employee." He said he couldn't come up with clear language when drafting the ordinance and took the position that a city employee has an employment relationship. He said he could rewrite that.

Mr. Thompson agreed the language should be changed to avoid a possible negative outcome.

Mr. Biderman noted that the Governmental Conduct Act addresses that specifically and relates to a former employee, but not contracts of employment.

Chair Miller said subsection F does not speak of a contractor, but a *contractual* relationship.

Ms. Kovnat said the Board agrees a City employee should not be precluded from making contributions. She said they would want language to make that clear.

Mr. Harrington said another concern is the status of City employee unions. He said there is recent case law on the constitutionality of banning groups like this. He said he differed with Mr. Shandler on the Albuquerque decision. The Albuquerque decision had two parts and a bill passed in 2007

prohibited any business entity from making a contribution regardless of whether a contractor. Mr. Harrington said he read the opinion as not touching the Albuquerque contractor contribution ban.

Chair Miller said he understands that the Charter Review Commission made recommendations to City Council, but Council did not act on them. He said one recommendation was to change the Charter to require an ordinance provide limitations or bans on campaign contributions from contractors/entities doing business with the City.

Mr. Shandler confirmed that the recommendation was turned down.

Ms. Margaret Josephina Campos said part of ethics is to have a separate entity other than the City Clerk and City Attorney, to enforce what people are doing on the campaign trail. She said that is called being transparent and the Board should suggest that to City Council. She said when someone is doing very wrong things; the City has never given a slap on the hand or told them to stop and the City needs a code of conduct that looks at things that hurt the political movement in Santa Fe. She said the time has come for the Ethics Committee to say this cannot continue.

Marie Campos said she understands the Board is trying to create a frame within the ordinances to protect the City from corruption and any ability for a contractor to buy their way into their contracts through their contributions. She thought that could be captured in how things are worded, like with the timeframe, etc. She said it is important to take corruption out of contracting with the City and their candidates.

Ms. Kovnat moved that the proposal be sent back for further study. Mr. Thompson seconded the motion.

Chair Miller summarized that the Board wanted: information on the potential impact of the ban; how many contractors might be affected; a clarification on City employees and whether they are covered by the ban; and the effect on unions and unions versus corporations and if there would be discriminatory impact on how the bill is drafted.

Ms. Lujan asked to add to make sure the procurement language is integrated. Mr. Biderman suggested the Procurement Code not be referenced. Mr. Thompson thought the timing of the passing of the ordinance problematic.

The motion passed by majority voice vote. Mr. Biderman abstained.

3. BOARD MATTERS

There were no Board matters.

4. PUBLIC COMMENTS

Councilor Ron Trujillo said as City Councilors they don't thank the Board enough. He said as he listened to the debate and appreciated the Board's work. He said the Board gives City Councilors the tools they need to make better decisions and he appreciates that.

Mr. Biderman requested the Board receive a permanent set of codes, from the standpoint of the paper used for copies to be given at each meeting.

Ms. Vigil clarified that the Board orientation with the certified candidates, campaign managers and the treasurers was actually in January. The Board would discuss the requirements, deadlines and sanctions of the Campaign Code and the Public Campaign Finance Code.

Ms. Vigil said the Board would hold a similar pre-election meeting shortly preceding the March election to review final compliance status by all candidates.

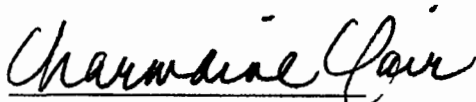
5. ADJOURNMENT

There being no further matters to discuss and the agenda having been completed, the meeting adjourned at 5:50 p.m.

Approved by:

Justin Miller, Chair

Submitted by:


Charmaine Clair, Stenographer