



AGENDA

ETHICS AND CAMPAIGN
REVIEW BOARD
AUGUST 19, 2021
3:00 PM
ATTEND VIRTUALLY

SPECIAL PROCEDURES FOR ETHICS AND CAMPAIGN REVIEW BOARD MEETING HEARING

Attendance: In response to the State's declaration of a Public Health Emergency, the Mayor's Proclamation of Emergency, and the need to incorporate technology and practices to re-institute in-person meetings consistent with the limitations established by the Order, the Ethics and Campaign Review Board meeting will be conducted virtually.

Viewing: Members of the public may stream the meeting live on the City of Santa Fe's YouTube channel at <https://www.youtube.com/user/cityofsantafe>. The YouTube live stream can be accessed at this address from most smartphones, tablets, or computers.

The video recording of this meeting will also remain available for viewing at any time on the City's YouTube channel at <https://www.youtube.com/user/cityofsantafe>. Staff is available to help members of the public access pre-recorded meetings on-line at any time during normal business hours. Please call 955-6521 for assistance.

Public Comment: To provide public comment prior to the meeting, please click the virtual "comment" button next to the meeting at <https://santafe.primegov.com/public/portal>. To provide live public comment you must join the Zoom meeting by internet or phone, as follows:

Internet: To join the Zoom meeting on the internet using a computer, laptop, smartphone, or tablet, use the following link: <https://santafenm.gov.zoom.us/j/95429135489?pwd=ekdzYU9ncUt3L2lrQ08vWWtlbkxzdz09>

Passcode: 126881

Attendees should use the "Raise Hand" function to be recognized by the Chair to speak at the appropriate time.

Phone: To join the Zoom meeting using a phone, use the following phone number: 1 (346) 248-7799

Webinar ID: 954 2913 5489

Passcode: 126881

Phone attendees should press *9 to use the "Raise Hand" function to be recognized by the Chair to speak at the appropriate time.



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Agenda: The agenda for the meeting will be posted at <https://santafe.primegov.com/public/portal>.

1. **CALL TO ORDER**
2. **ROLL CALL**
3. **APPROVAL OF AGENDA**
4. **APPROVAL OF MINUTES**
 - a. Ethics and Campaign Review Board Meeting – June 17, 2021
5. **DISCUSSION AND POSSIBLE ACTION**
 - a. **Case #2021-1.** Complaint Brought Forward by Alexis Martinez Johnson – 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(H)(3) to Deliberate in Connection with an Administrative Adjudicatory Proceeding.)
 1. Discussion of Actions.
 2. Action Regarding Whether the Complaint Sets Forth Legally Sufficient Facts, Which, if True, Show Probable Cause to Believe There Was a Violation.
 3. Action on Any Steps as Permitted Under Section 6-16
 - b. Discussion of Recommendation of Legislation Amending Ordinance 9-1-7(F) to Adopt the Secretary of State’s Rules for Resolving Tie Votes in Rank Choice Voting Elections.
 - c. Discussion of the 10th Circuit Opinion in *Rio Grande Foundation v. the City of Santa Fe*, Case No. 20-2022.
6. **MATTERS FROM STAFF**
7. **MATTERS FROM THE COMMITTEE**
8. **MATTERS FROM THE CHAIR**



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9. **NEXT MEETING: No Meeting Scheduled**

10. **ADJOURN**

Persons with disabilities in need of accommodations, contact the City Clerk's office at 955-6521, five (5) working days prior to meeting date.

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ETHICS AND CAMPAIGN REVIEW BOARD MEETING
June 17, 2021**

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**MINUTES OF THE CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD
THURSDAY, JUNE 17, 2021 @ 3:00 P.M.**

1. CALL TO ORDER

A meeting of the City of Santa Fe Ethics and Campaign Review Board was called to order on the above date by Justin Miller, Chair, at approximately 3:00 p.m. at a virtual meeting on Zoom at <https://www.youtube.com/watch?v=pcaqJXbpdlo>.

2. ROLL CALL

Roll call indicated the presence of a quorum as follows:

Members Present:

Justin Miller, Chair

Judith Amer

Paul Biderman (arrived at 4:10 p.m. and left at 4:32 pm)

Ruth Kovnat

Tara Luján

Kristina Martinez

Members Absent:

One vacancy

Staff Present:

Kristine Mihelcic, City Clerk

Marcos Martinez, Assistant City Attorney

Others Present:

Melissa Byers, Stenographer

3. APPROVAL OF THE AGENDA

MOTION: Member Kovnat moved to approve the agenda as presented. Member Lujan seconded the motion.

VOTE: The motion passed by roll call vote with Members Amer, Kovnat, Lujan and Martinez voting in favor and none voting against.

4. **APPROVAL OF MINUTES:** May 6, 2021

MOTION: Member Lujan moved to approve the minutes of May 6, 2021. Member Martinez seconded the motion.

VOTE: The motion passed by roll call vote with Members Amer, Kovnat, Lujan and Martinez voting in favor and none voting against.

5. **DISCUSSION**

a. Discussion Regarding Legislation Assigning ECRB the Responsibility to Appoint Members to the Independent Salary Commission.

Marcos Martinez, Assistant City Attorney, said he did have anything beyond what was provided in the packet, which was a memo from Erin McSherry, City Attorney which summarized a proposed bill as follows:

The proposed bill realigns the Independent Salary Commission's (Commission's) work schedule with the City's new election cycle; establishes an allowable salary range; corrects a cross reference; establishes an application process for appointees to the Commission; and allows the chamber of commerce representative on the Commission to be from any local chamber of commerce.

Chair Miller said the ECRB would step in and evaluate applications of proposed appointees.

Attorney Martinez recommended holding on this item for now.

b. Update on Legislative Process Following ECRB's May 6, 2021, Recommendation to Amend Ordinances to Adjust Threshold Contribution and Expenditure Amounts Triggering Reporting Requirements.

Attorney Martinez said Councilor Romero Wirth is sponsoring this legislation and Councilor Garcia is also interested in sponsoring the legislation which is based on the recommendation of the ECRB. The bill is scheduled to be introduced at the at the Governing Body meeting on June 30, 2021. If all goes well, the legislation will be adopted 30 to 45 days later.

Member Amer asked if there has been a fiscal analysis done for this. If so, how much would it cost the City to implement.

Attorney Martinez said he has consulted with the City Clerk. He doesn't see a lot of fiscal impact. Thresholds are higher, so he sees a positive fiscal impact.

Member Amer said perhaps there would be a decrease in administrative burden.

Chair Miller said if there are any questions of the Board to let the sponsors know the process for coming before the Board. The Board is available to provide information on how they got to their recommendation or to answer questions.

6. DISCUSSION AND POSSIBLE ACTION

a. Discussion and Possible Action on Whether, Pursuant to Ordinance 2018-28, the ECRB Should Enact Regulations or Otherwise Recommend Legislation to Permit the Use of Electronic Signatures on Certain Forms.

Chair Miller said there is consensus from the Board to facilitate this for candidates. The City and City Clerk are receptive to this, with the condition that this could be used in a secure manner. There are two main issues: one does the Board want to take steps, if yes, should the Board promulgate a rule or recommend legislation to the City Council. His sense from past discussion is that the Board is more inclined to make a recommendation to the Governing Body. Attorney Martinez has worked with City legislative staff and put together some draft legislation for the Board's consideration.

Member Martinez said that she and Attorney Martinez had gone over the language for recommendation to the Governing Body. If the legislation is adopted, there will be logistics that will need to be worked out by the City Clerk's Office. Allowing electronic signatures can be accomplished with a simple amendment to the ordinance.

Attorney Martinez referred to the draft bill. The language is similar in both sections, 9-3.6 and 9-3.7. The amendment deletes the sort of permissive sentence that allows the ECRB to by regulation, permit the use of electronic signatures on forms for seed money and qualifying contributions and makes it mandatory that the City Clerk shall accept these types of signatures so long as they that the signatures comply with the Uniform Electronic Transaction Act.

Chair Miller asked what the administrative process would be if the legislation were to pass.

Attorney Martinez said according to the Electronic Transactions Act the onus is on the person attempting to accept seed money contributions and qualifying contributions.

Member Kovnat asked if the City Clerk is comfortable with the bill amendments.

City Clerk Mihelcic said she is comfortable with this and supports using technology in as many ways as possible. There are already many jurisdictions that use electronic signatures and there are applications in place that can be utilized.

Chair Miller said that was good for the ECRB to hear because they don't want to impose a burden on the Clerk's Office.

Member Lujan asked if the City would be using the same platform as Albuquerque because that platform was accepted by the Secretary of State (SOS).

Clerk Mehelcic said there are certain programs that the candidates can use. They've also looked at the City of Albuquerque and are looking at using some of the platforms they use.

Member Lujan asked if the Clerk was talking with the Secretary of State (SOS) as well.

Clerk Mehelcic said she's sent communication to the SOS about setting some time to discuss this legislation.

Member Lujan said if it's working in Albuquerque then we don't have to reinvent the wheel. She asked the Clerk to follow up with the Board at some point on how that's going.

Member Amer agreed with Member Lujan. She said it begs the question about what complies with the uniform electronic transaction and a municipality has already gone down that road it would be extremely helpful to see how they've done it. Looking at the act, it talks about the retention of records. The City Clerk would need to retain electronic versions of signatures and would need to retain records for the payments. She also asked about the fiscal impact report and if somebody is preparing that.

Clerk Mihelcic said there are two simple ways to explain. Candidates themselves could utilize apps for the collection of signatures. That could be implemented faster and would have minimal fiscal impact.

The other way would be the way Albuquerque does it. They host the website, and everything is collected there. An RFP would need to be done for those services and that would have a much larger fiscal impact and require more time.

Chair Miller said if the ECRB recommends this legislation, it would take some time to get to the Governing Body. He told the Clerk that if she runs into roadblocks during this process to get with the Board for their thoughts. He asked if the Clerk's Office will be ready when this gets implemented.

Clerk Mihelcic said the time it would take for this legislation to get through the process and the deadlines for signatures, it doesn't seem realistic or reasonable to

expect this ordinance to be implemented for this election. The only way it could be done for this election is to allow candidates to use their own apps and websites. She wants to discuss this with the SOS and County Clerk.

Chair Miller asked if they need an effective date on this legislation.

Attorney Martinez said the Governing Body would be curious about the ECRB's opinion on an effective date. Writing the legislation is easier than implementing the legislation. The FIR would be more intensive. He suggested making it effective for the next election.

Member Lujan said we are in the midst of an election cycle and the date should be set for the next election cycle.

Chair Miller said it sounds like there's an interest in setting an effective date down the road with enough lead time for the Clerk's Office to implement this. He asked Attorney Martinez if it would be appropriate for the Board to vote on the legislation today but incorporate an effective date of January 1, 2022.

Attorney Martinez said the Board can by motion approve the amendments with an effective date of January 1, 2022.

Chair Miller asked the Clerk if that was enough lead time and if she was comfortable with that date.

Clerk Mihelcic indicated she was comfortable with that date.

MOTION: Member Lujan moved to recommend to the Governing Body approval of the legislation with an effective date of January 1, 2022. Member Kovnat seconded the motion.

VOTE: The motion passed by roll call vote with Members Amer, Kovnat, Lujan and Martinez voting in favor and none voting against.

b. Amendments to the Election Code to Address Procedures to Resolve Tie Votes.

Chair Miller said this relates to a proposal to resolve the difference between the City Ordinance which calls for resolution of tie votes in ranked choice voting by drawing lots and the New Mexico Administrative Code which is a more complicated process. There is not draft legislation to present to the Board today, however, the Board could discuss whether legislation should be drafted to resolve the conflict between City ordinance and the New Mexico Administrative Code.

Member Amer asked if rule was provided to the Board.

Chair Miller said no but the citation for the rule is 1.10.14.9(f).

Member Amer asked if Santa Fe is a home rule municipality why would it need to follow the state administrative code.

Attorney Martinez said they would like to avoid any dispute at the time of a tie. His recommendation would be not to have a conflict. He doesn't see any downside to adopting the State administrative code language. He offered to prepare draft legislation to present at the next ECRB meeting.

Chair Miller asked Marcos to share a comparison document between the City Ordinance and ranked choice voting.

Member Kovnat said it strikes her that the state system is more compatible with rank choice voting.

Jim Harrington, a member from the public, provided a little bit of history. He said Santa Fe adopted ranked choice voting before the Local Election Act was adopted. The Local Election Act gave the Secretary of State the authority to draft rules. It looked like she almost copied Santa Fe's except for this issue on the tie votes. Because there is an ambiguity, he would suggest that Santa Fe follow the example of Las Cruces and adopt the Secretary of State rules by reference.

Chair Miller clarified with Mr. Harrington that he was talking about a more extensive procedure which included adopting the Secretary of State rules.

Mr. Harrington said the only conflict is the tie voting, however, it would be safer and better to do a clean sweep and adopt the Secretary of State's rules.

Member Lujan said the tie votes issue needs to be addressed. She agreed with Mr. Harrington's position that since the Local Election Act has been adopted, the City should comply with that fully, including the rules of the Secretary of State's Office.

Chair Miller said it sounds like the City Attorney's staff could draft legislation to resolve the tie votes issue only or decide whether all the Secretary of State Rules should be incorporated by reference.

Member Biderman joined the meeting at 4:10 p.m.

Chair Miller asked if everyone agreed to ask the staff to draft legislation. He indicated that he saw heads nodding in agreement.

Member Lujan asked to get a working draft of the proposed legislation.

Attorney Martinez said he would send the draft to the Board members individually to avoid Open Meetings Act issues. He asked the Board members to respond to him individually as the point person.

8. MATTERS FROM STAFF

a. Overview on Campaign Signs Regulation for Candidates and Other Entities.

Jason Sena, Code Enforcement Supervisor said Code Enforcement would be enforcing the Code regarding signs. They don't have a set date as to when the candidates can set up their signs. The Code is straight forward on how to enforce. They have not had too many problems with signs in the past. Candidates are good and picking up their signs.

Chair Miller asked if there any changes being considered.

Clerk Mehelcic said the sign regulations are addressed in the City Code and are included in the candidate packets.

b. Election 2021 Status Updates.

Clerk Mihelcic notified the Board that there are several candidates running for election. In District 1, there are four candidates; in Districts 2 and 3 there are single candidates and in District 4, there are two candidates and possibly a third candidate.

She said there is information on the City Clerk's page regarding this election. For this year, the SOS office provided forms in Spanish and there are also seed money forms in Spanish.

She said because of the number of candidates in the mayoral race and the number of candidates in the District 1 race, rank choice voting will be triggered in those two races. The City Clerk's Office will be working collaboratively with the Santa Fe County Clerk's Office on the education piece of ranked choice voting.

Member Lujan asked about the petition signature forms that were not approved by the SOS. She said some candidates had already collected signatures on those forms. She asked when the deadline is to turn in the forms.

Clerk Mihelcic said that were some clarifications that needed to be made on the forms that had historically been used by the City Clerk's Office. She worked with the County Clerk and the Secretary of State's Office to provide the approved form from the Secretary of State's Office. Historically there had been a deadline for all nominating petition forms. The City is working to get the City election aligned with the Local Election Act. The deadline for petition signatures for candidates utilizing private campaign financing is August 24th. The deadline for candidates utilizing public campaign financing is July 19th.

Member Lujan asked how many of the initial forms had been completed and turned in.

Clerk Mihelcic said they provided updated forms fairly quickly. There were three candidates that had picked up the forms. They spoke with them and provided new forms.

Member Lujan asked if she is going to accept the original forms if they are turned in.

Clerk Mihelcic said she notified the candidates, after speaking with the SOS, that the preference would be to use the form approved by the Secretary of State's Office. They had already sent the original forms out but any that were signed they agreed to get those signatures again. She stated that this is a transition year, she is a new City Clerk and there is a new County Clerk. They are working through things procedurally and collaboratively along with the Secretary of State.

Chair Miller and other Board members expressed their appreciation for the City Clerk's efforts and work during this election cycle.

9. MATTERS FROM THE BOARD

Member Biderman said he'd like to start meeting in person again.

Chair Miller asked the City Clerk if the City is close to allowing committees to meet in person.

Clerk Mihelcic said they are working to get many of the committees back in person, hopefully by the middle of July or beginning of August. The Attorney General was encouraging meeting on Zoom, however, the City is testing hybrid meetings.

Member Biderman left the meeting at 4:32 pm.

10. MATTERS FROM THE CHAIR

There were no matters from the Chair.

11. NEXT MEETING

None scheduled, however, Chair Miller said there would be a meeting possibly in the next quarter.

12. PUBLIC COMMENT

Chair Miller said public comment was not listed on the agenda, but he opened up the floor for public comment.

Roger Carson, a candidate, thanked the Board for having this opportunity and expressed that the Board is doing a great job.

12. ADJOURNMENT

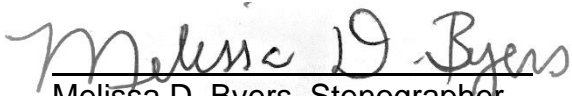
MOTION: Member Amer moved to adjourn the meeting at 4:38 p.m. Member Martinez seconded the motion.

VOTE: The motion passed by roll call vote with Members Amer, Kovnat, Lujan and Martinez voting in favor and none voting against.

Approved by:

Justin Miller, Chair

Submitted by:



Melissa D. Byers, Stenographer
For Byers Organizational Support Services

CASE # 2021-1

Complaint Form

(Please print or type)
(Additional pages may be added)

City of Santa Fe
Ethics & Campaign Review Board

Date: 7/15/2021

1. Name of person and/or group charged with alleged violation. Mayor Alan Webber
Campaign

2. Please explain briefly the nature of the alleged violation. Utilizing taxpayer events and coordinating taxpayer resources to promote personal mayoral campaign via campaign email dissemination

3. Please state which specific provision(s) or part(s) of the Code of Ethics or Election Code you believe have been violated. -for Ethics Review Board to determine

4. Please state the facts you have regarding the violations, including:
the date(s) 7/14/21
the time(s) 2:34pm
the place(s) email correspondence to Alan Webber Mayoral Campaign Support
people involved Alan Webber Campaign and City Fire Department
other facts Please see attached 3 page letter and corresponding documentation

5. Are there any witnesses to the violation who are willing to confirm your charge? Please list with addresses, phone numbers and what they know. Alan Webber Campaign Email Supporter List, Alan Webber, Alan Webber Staff, and City Fire Department coordinating personnel.


6. Attach documentation of actual evidence you have to support your complaint, to this form.

7. What is your name? Alexis Martinez Johnson
8. Address? 315 Dea Fernando Rd. Zip Code 87505
9. Telephone Number? 505-316-0636 Work: same
10. Email Address? lex314@hotmail.com

Received on: July 15, 2021
By: [Signature]
City Clerk's Office

To the best of my knowledge, the above statements are true and complete.
[Signature]
Signature

Subscribed and sworn to before me this 15th day of July, 2021


OFFICIAL SEAL
Xavier I. Vigil
NOTARY PUBLIC - STATE OF NEW MEXICO
My Commission Expires: March 25, 2025

[Signature]
Notary Public

Hand-Delivered to City of Santa Fe

July 15, 2021

Dear Ethics Board of the City of Santa Fe,

Subject: Illegal Use and Unlawful Coordination of Taxpayer Funds and Equipment for Personal Mayor Campaign Promotion by Alan Webber

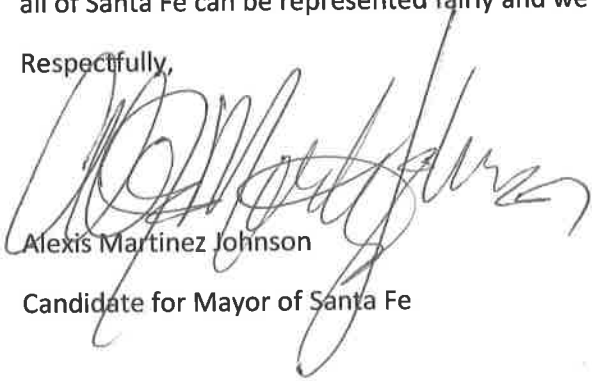
It has come to my attention that the current Mayor Alan Webber of Santa Fe has sent a personal campaign email from his personal campaign promoting a city-wide event utilizing city employees and taxpayer equipment to promote his campaign. The coordination by Mayor Alan Webber, his campaign, and city personnel for a campaign event is unethical. It is illegal to use taxpayer funded monies and employees to promote the mayoral campaign of Mayor Alan Webber in this manner.

I request that an immediate cease and desist letter be issued from the City of Santa Fe Ethics Board to the Mayor Alan Webber Campaign to prevent the illegal use of taxpayer monies, taxpayer funded employees, and resources to fund the campaign for Mayor Alan Webber. It is requested that the campaign immediately refrains from promoting and coordinating city events for the benefit of the Mayor Alan Webber Campaign as seen in the attached email. The coordination among Mayor Alan Webber, his staff, and city employees and promoting the event through his personal campaign email is improper and illegal. No taxpayer should be forced to promote or pay for any campaign event against their will and the promotion of these events, via the personal campaign email, reflects these optics.

I request a notification letter be sent to the Mayor Webber for Santa Fe Campaign, as soon as possible, to prevent further misuse of city taxpayer monies and resources. I also request that any fines to the campaign that can be imposed or further measures the City of Santa Fe Ethics Board deems appropriate be levied immediately.

Please inform me, Alexis Martinez Johnson, candidate for Mayor of Santa Fe, of the actions taken so that all of Santa Fe can be represented fairly and we can restore trust in this governmental body.

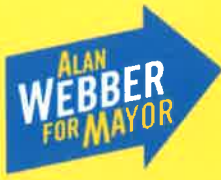
Respectfully,



Alexis Martinez Johnson

Candidate for Mayor of Santa Fe

From: Alan Webber <campaign@alanforsantafe.com>
Date: 7/14/21 2:34 PM (GMT-07:00)
To: [REDACTED]
Subject: It's time to cool down with the Santa Fe Fire Department!



SANTA FE COOL DOWNS!

Join the Mayor and the Fire Department as they turn on the hoses for City-sponsored fun water play!



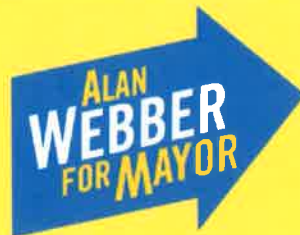
It's warm outside, and the Santa Fe Fire Department is here to help kids cool down with a City-sponsored Santa Fe Cool Down! Join the Fire Department on two Saturdays in July across the city as they turn on the hoses for fun water play. Perfect for kids of all ages!

You'll find fire trucks (and Mayor Webber!) ready to play at each of the following locations for these City-sponsored events:

- **July 17:** SWAN Park
- **July 24:** Franklin Miles Park

All events begin at 11:30 AM.

We hope to see you there!



JULY 17: SWAN PARK

JULY 24: FRANKLIN MILES PARK

THE FUN STARTS AT 11:30 AM

MAYOR WEBBER WILL SEE YOU THERE!



Alan Webber for Santa Fe

1000 Cordova Place, PMB #232, Santa Fe, NM 87505

(505) 570-2733

Paid for and authorized by Alan Webber for Santa Fe. Delyse Fields, Treasurer.

Sent via ActionNetwork.org. To update your email address, change your name or address, or to stop receiving emails from Alan Webber for Santa Fe, please [click here](#).

**CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD**

ALEXIS MARTINEZ JOHNSON,

Complainant,

v.

ALAN WEBBER,

Respondent.

RESPONDENT’S MOTION TO DISMISS

RESPONDENT ALAN WEBBER, by and through his attorneys, Egolf + Ferlic + Martinez + Harwood, LLC (Kate Ferlic and Jeff Herrera, appearing), responds to Complainant Alexis Martinez Johnson’s Complaint for Violations of the Santa Fe Code of Ordinances. Respondent moves to dismiss on the grounds that Complainant failed to meet the requirements of a valid complaint to the Ethics and Campaign Review Board. The complaint fails to state a specific provision of the Code of Ethics, the Campaign Code, or the Public Campaign Finance Code. Because the complaint fails to state a specific provision the Respondent is alleged to have violated, the Rules of Organization and Practice require the Board to dismiss the Complaint. The Board has an additional basis on which to dismiss the complaint: consideration of a complaint that fails to specifically specify a provision of law that has allegedly been violated, like Complainant’s complaint, would force the Board to abandon impartiality in violation of Respondent’s right to due process under the U.S. Constitution and the New Mexico Constitution.

ARGUMENT

- I. The Santa Fe City Code and the Ethics and Review Board Rules of Organization and Practice require the Complaint to be dismissed because Complainant failed to allege a violation of a specific provision of the municipal code.**

Due process requires that an individual accused of wrongdoing be informed of the law that the complainant believes he has violated. To present a cogent defense on the merits of a complaint before this Board, the Respondent has a right—at a minimum—to know what ordinance the Complainant accuses him of violating. Without a specific allegation of a violation, a Respondent is deprived of a meaningful opportunity to respond to a complaint.

Moreover, the plain language of the Santa Fe ordinances authorizing and empowering the Ethics and Campaign Review Board (“the Board”) recognize this principle. The Santa Fe Code states that “[a]ny person may make a sworn written complaint,” but that the “complaint *shall* state the specific provision which has allegedly been violated and the facts which the complainant believes support the complaint.” Section 6-16.3 SFCC 1987 (emphasis added). Further, the Rules of Organization and Practice for the Board state that “The Board . . . *shall* dismiss the case if the complaint . . . [d]oes not state a violation of the Code of Ethics, the Campaign Code, and/or the Public Campaign Finance Code” Ethics and Campaign Review Board Rules of Organization and Practice, Section D(4)(b) (2012) (emphasis added).

The use of the word “shall” in both the ordinance and the Rules of Organization and Practice is instructive. For a complaint to be successful, it must allege violation of a specific provision of the municipal code. Absent a Complainant citing a specific provision, the Board is required to dismiss a complaint. Multiple Supreme Court cases in New Mexico have interpreted legislative bodies’ use of the word “shall” to be a mandatory provision. See *Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24 (internal citation omitted) (“It is widely accepted that when construing statutes, ‘shall’ indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent an [sic] clear indication to the contrary.”); *Tomlinson v. State*, 1982-NMSC-074, ¶ 9, 98 N.M. 213 (internal citation omitted) (“‘Shall’ will be given its mandatory meaning, unless there

are indications in the statute that the mandatory reading is repugnant to the manifest intent of the legislature.”). Therefore, given the Santa Fe Code provision for the Board requiring a complainant to state a specific provision violated and the Rules of Organization and Practice requirement that complaints shall be dismissed where a complainant does not state a violation of the codes under the Board’s jurisdiction, the Board is required to dismiss such complaints.

Here, Complainant plainly failed to meet the minimum requirements of a valid complaint. Question 3 of the Board’s Complaint form asks complainants to “Please state which specific provision(s) or part(s) of the Code of Ethics or Election Code you believe have been violated.” *See Ethics and Campaign Review Board Complaint Form*, at 1. Rather than perform any research to determine a specific theory of liability—or even to ensure that the Complaint she was filing met the basic requirements—Complainant answered Question 3 with the statement, “—for Ethics Review Board to determine.” *See Complaint*, at 1. This answer fails on its face to meet the requirements of a valid complaint under the Santa Fe Code. The Board’s own rules requires that this complaint be dismissed.

II. The Complaint should be dismissed because Complainant’s failure to state a violation would require the Board to abandon impartiality in violation of Respondent’s right to due process.

If the Board allows this Complaint to proceed without alleging a violation of a specific provision of the Santa Fe Code, Respondent’s constitutional right to due process would be violated. This circumstance would require the Board to determine the theory of liability under the Santa Fe Code. Because the Board is also the body charged with determining whether Respondent has committed a violation, the Board would be in the impermissible position of both prosecuting and adjudicating the case against Respondent. Respondent’s constitutional guarantee to due process requires that this Board maintain impartiality. If the Board allows this Complaint to proceed and subsequently decides on Complainant’s behalf what the theory of

liability is against Respondent, this would infringe Respondent's guarantee of an impartial tribunal.

The Fourteenth Amendment requires states and their subdivisions to provide "due process of law" in the adjudicatory process. U.S. Const. amend. XIV, § 1; *see also Mills v. State Bd. Of Psychologist Exam'rs*, 1997-NMSC-028, ¶ 14, 123 N.M. 421 (holding that the Fourteenth Amendment of the U.S. Constitution protects citizens from government action that results in "deprivation of liberty and property without due process of law."). The same requirement of due process exists in the New Mexico Constitution: "No person shall be deprived of life, liberty or property without due process of law." N.M. Const. art. II, § 18. The requirement of procedural due process exists "not only to ensure abstract fair play to the individual," but to "minimize a substantively unfair or mistaken deprivation" by the state. *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). The U.S. Supreme Court has held that the requirement "of an impartial decision maker is essential" to procedural due process. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). Further, the New Mexico Supreme Court has held that "procedural due process requires a fair and impartial hearing before a trier of fact who is disinterested and free from any form of bias or predisposition regarding the outcome of the case." *N.M. Bd. of Veterinary Med. v. Riegger*, 2007-NMSC-044, ¶ 27, 142 N.M. 248 (internal quotation and citation omitted).

Disinterest in the outcome of a case is merely one aspect of due process. As the N.M. Supreme Court noted in *Riegger*, impartiality may be threatened when there is any "predisposition regarding the outcome of the case." *Id.* "[O]ur system of justice requires that the appearance of complete fairness be present...The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." *Reid v. N.M. Bd. of Exam'rs in Optometry*, 1979-NMSC-

005, ¶ 7, 92 N.M. 414 (internal citations omitted). The impartiality of a tribunal is threatened when the decision-making body acts as both decisionmaker and as prosecutor, grand jury, or complainant. In *In re Murchison*, the U.S. Supreme Court held that Michigan trial court violated a defendant's right to due process where the judge acted as "*complainant*, indicter and prosecutor." *In re Murchison*, 249 U.S. 133, 135 (1955). In the case, the petitioner challenged conviction of contempt of court by the same judge who had previously acted as a "one-judge grand jury." *Id.* at 133-34. The Court reasoned that, because the judge participated in the "accusatory process" by acting as grand jury to bring contempt charges, that the judge could not be "wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137.

So, too, would this Board's impartiality be threatened if it were to take up the role of Complainant in determining a theory of liability against Respondent. While this case is not before a New Mexico court, the Board exists to act in a quasi-judicial function and is therefore subject to the same procedural due process requirements. While a municipal body functions like a judicial body, it is "bound by ethical standards comparable to those that govern a court in performing the same function." *Albuquerque Commons P'ship v. City Council of Albuquerque*, 2008-NMSC-025, ¶ 33, 144 N.M. 99 (internal quotation and citation omitted). Further, the "principles [of procedural due process] apply to administrative proceedings as well as to trials." *Reid*, 1979-NMSC-005, ¶ 8, 92 N.M. 414 (internal citation omitted).

If the Board were to allow this Complaint to proceed, this would not only violate the Santa Fe Code and the Board's Rules of Organization and Practice, it would also place the Board in an improper position. By allowing a complaint that does not state a specific violation to proceed, the Board would be in the position of creating the theory of liability on Complainant's behalf, effectively putting the Board in the position of prosecuting the ethics violation. If the Board were to both create the theory of liability on Complainant's behalf *and* determine whether

Respondent is liable under that theory, this would constitute a denial of Respondent's right to procedural due process. Allowing this Complaint to proceed would, at a minimum, create an impermissible "indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him." *Id.* at ¶ 7. As both acting Complainant and decisionmaker in Respondent's case, a Board member may be tempted to fit the facts of Respondent's case to the Board-created theory of liability. Such a circumstance would be an impermissible denial of Respondent's right to an impartial tribunal and, therefore, to his right to due process.

Rather than threaten the impartiality of this Board by acting as would-be Complainant and filling in the gaps for the actual Complainant's failure to state a claim, the Board must dismiss the Complaint.

CONCLUSION

For these reasons, Respondent respectfully requests that the Board grant the motion to dismiss the Complaint for failure to comply the requirements of a valid complaint under the Santa Fe Code and the Rules of Organization and Practice and because allowing the Complaint to proceed would constitute a violation of Respondent's right to procedural due process under the U.S. and New Mexico constitutions.

Respectfully submitted,

EGOLF + FERLIC +
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[bracketed material] = delete

underscored material = new

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CITY OF SANTA FE, NEW MEXICO

BILL NO. 2021-__

INTRODUCED BY:

AN ORDINANCE

AMENDING SECTION

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Section 9-1.7 of SFCC 1987 (being Ord. No. 2017-26, § 1, as amended)

is amended to read:

9-1.7 - Ranked Choice Voting.

A. *Authority.* The city has the authority to enact this section under all powers possible for a city to have under the constitution and laws of New Mexico by virtue of its enactment of its charter pursuant to the provisions of Article X, Section 6 of the New Mexico Constitution, and pursuant to the New Mexico Municipal Charter Act including all implied powers and all powers necessary to implement all express powers of the city, as if each and every one of the city's implied powers were fully, completely and expressly enumerated in its charter.

B. *Definitions.* As used in this section, the following terms have the following meanings:

1 (1) *Choice* means an indication on a ballot of a voter's assigned ranking of
2 candidates (i.e., first choice, second choice, third choice) for any single office according
3 to the voter's preference.

4 (2) *Continuing ballot* means a ballot that counts towards a continuing
5 candidate.

6 (3) *Continuing candidate* means a candidate that has not been eliminated.

7 (4) *Duplicate ranking* means a voter has ranked the same candidate at
8 multiple rankings for the office being counted. The highest ranking for the candidate is
9 valid and any lower rankings of that candidate shall be ignored.

10 (5) *Exhausted ballot* means a ballot that cannot be advanced because no
11 further continuing candidates are ranked on that ballot.

12 (6) *Incorrectly marked ballot* means a ballot showing an overvote,
13 undervote, duplicate ranking, skipped ranking, or unused ranking, and shall be rejected
14 with an error message. A person who accidentally spoils or erroneously prepares the
15 ballot may return the spoiled or erroneously prepared ballot to the election judge and
16 receive a new ballot.

17 (7) *Majority of votes* means fifty (50) percent plus one (1) of the votes cast
18 for a continuing candidate.

19 (8) *Next ranked* means the highest ranked choice for a continuing candidate.

20 (9) *Overvote* means a voter has ranked more than one candidate at the same
21 ranking. If a voter gives the same ranking to more than one (1) candidate, the voter's
22 rankings shall be counted in order of preference, stopping at the point where the ballot
23 contains the same ranking for more than one (1) candidate.

24 (10) *Ranked choice voting* means an election system in which voters rank the
25 candidates for office in order of preference, and the ballots are counted in rounds that

1 simulate a series of runoffs until one candidate receives a majority of votes. Ranked
2 choice voting is also known as "instant runoff voting."

3 (11) *Round of counting or round* means a step in the counting process during
4 which votes for all continuing candidates are tabulated for the purpose of determining
5 whether a candidate has achieved a majority of the votes cast for a particular office and,
6 absent a majority, which candidate or candidates must be eliminated.

7 (12) *Skipped ranking* means a voter has left a ranking blank and ranks a
8 candidate in a subsequent ranking. If a voter skips a numerical ranking, the skipped
9 ranking will be ignored and the next indicated ranking on that ballot will be valid.

10 (13) *Undervote* means a voter did not rank any candidates for an office.

11 (14) *Unused ranking* means the voter has ranked at least one (1), but not all,
12 candidates.

13 (15) *Vote* means a ballot choice that is counted toward the election of a
14 candidate. During each round of counting, each continuing ballot contains one vote. All
15 first choices are votes and lower ranked choices are potential runoff votes that may, in
16 accordance with the requirements of this section, become votes and subsequently
17 credited for a continuing candidate.

18 C. *General Provisions.*

19 (1) Ranked choice voting elections for the offices of mayor, councilor and
20 municipal judge shall be conducted according to the procedures in this section.

21 (2) Ranked choice voting shall commence with the 2018 regular municipal
22 election and continue for all regular municipal elections thereafter unless later repealed
23 or invalidated by a subsequent federal, state or city law, statute, rule, regulation, or
24 ordinance.

1 (3) The New Mexico secretary of state must certify the software prior to the
2 use of ranked choice voting.

3 D. *Ballot.* The ranked choice voting ballot shall allow voters to rank all choices.

4 E. *Tabulation.* The ballots shall be counted in rounds.

5 (1) In the first round, every ballot shall count as a vote towards the first
6 choice candidate.

7 (2) After any round, if any candidate receives a majority of votes, that
8 candidate shall be declared the winner.

9 (3) If no candidate receives a majority of votes, the candidate receiving the
10 fewest number of votes shall be eliminated.

11 (4) Every ballot counting towards the eliminated candidate shall be
12 transferred to the next ranked continuing candidate. All the continuing ballots for all
13 continuing candidates shall be counted again in a new round.

14 F. *Ties.* ~~[In the event that two (2) or more candidates tie for the fewest number of~~
15 ~~votes, the candidate to eliminate shall be chosen by lot]~~ If a tie between candidates occurs at any
16 stage in the tabulation, the tie shall be resolved in favor of the candidate who received the greatest
17 number of combined first choice votes and transferred votes at the previous stage of tabulation.

18 G. *Severability.* The requirements and provisions of this section and their parts,
19 subparts and clauses are severable. In the event that any requirement, provision, part, subpart or
20 clause of this section, or the application thereof to any person or circumstance, is determined to
21 be impossible of performance, or held to be invalid or unenforceable by a court of competent
22 jurisdiction, it is the intent of the governing body that the remainder of the section be enforced
23 to the maximum extent possible consistent with the governing body's purpose of this Campaign
24 Code.

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APPROVED AS TO FORM:

ERIN K. McSHERRY, CITY ATTORNEY