



AGENDA

ETHICS AND CAMPAIGN
REVIEW BOARD
SEPTEMBER 09, 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 and the Mayor's Proclamation of Emergency, 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/84602702418?pwd=N0U2YURSeFZSQWpGWWxmSXZ2WIBpZz09>. **Passcode: 720465**

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: 846 0270 2418

Passcode: 720465

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



AGENDA

ETHICS AND CAMPAIGN
REVIEW BOARD
SEPTEMBER 09, 2021
3:00 PM
ATTEND VIRTUALLY

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 – August 19, 2021
5. **DISCUSSION AND POSSIBLE ACTION**
 - a. **Case #2021-2.** Complaint Brought Forward by the Alan Webber for Mayor Campaign – 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
6. **MATTERS FROM STAFF**
7. **MATTERS FROM THE COMMITTEE**
8. **MATTERS FROM THE CHAIR**
9. **NEXT MEETING: No Meeting Scheduled**
10. **ADJOURN**



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.

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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



AGENDA

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

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

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**



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**ETHICS AND CAMPAIGN
REVIEW BOARD
AUGUST 19, 2021
3:00 PM
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7. **MATTERS FROM THE COMMITTEE**
8. **MATTERS FROM THE CHAIR**
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.

**INDEX OF THE CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD MEETING
August 19, 2021**

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ROLL CALL	Quorum Present	1
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APPROVAL OF MINUTES June 17, 2021	Approved, as amended	2
DISCUSSION & POSSIBLE ACTION		
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**MINUTES OF THE CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD
THURSDAY, AUGUST 19, 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 3:05 p.m. at a virtual meeting on Zoom at <https://www.youtube.com/watch?v=XC5KvDrXssg&t=47s>.

2. ROLL CALL

Roll call indicated the presence of a quorum as follows:

Members Present:

Justin Miller, Chair
Judith Amer
Paul Biderman
Ruth Kovnat
Tara Lujan
Kristina Martinez

Members Absent:

One vacancy

Staff Present:

Kristine Mihelcic, City Clerk
Marcos Martinez, Assistant City Attorney

Others Present:

Melissa Byers, Stenographer

Member Martinez said she received a text that there are people in the waiting room that needed to be let in.

Clerk Mihelcic confirmed with Chair Miller that everyone should be let into the room.

3. APPROVAL OF AGENDA

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

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

4. APPROVAL OF MINUTES: June 17, 2021

Member Kovnat asked that the word “not” be inserted to the following sentence in Section 5A: “Marcos Martinez said he did not have anything.”

MOTION: Member Kovnat moved to approve the minutes of June 17, 2021, as amended. Member Amer seconded the motion.

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

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.)**

Chair Miller asked if the representatives and respondents were present.

Alexis Martinez Johnson, the complainant, identified herself as being present.

Kate Ferlic said she represented the respondent, the Alan Webber for Mayor Campaign.

Member Martinez said she was recusing herself from consideration of this complaint because her partner, Kate Ferlic, is representing Mayor Webber.

1. Discussion of Actions.

Chair Miller explained that the Complaint before the Board alleges that the Alan Webber Campaign violated the Code of Ethics or the Election Code by utilizing taxpayer events and coordinating taxpayer resources to promote his personal mayoral campaign via campaign email distribution. The Complaint centers on the Campaign’s email Campaign's email promoting what was called “Santa Fe Cooldowns.”

The Complaint was submitted on July 15, 2021. The respondent was notified of the Complaint and was given the prescribed period of time in which to submit a written response. The respondent filed a response in the form of a motion to dismiss which was provided to the Board on August 11, 2021. He said there were no other documents in the record.

He said the initial step is for the Board to determine the legal sufficiency of the complaint. The Board must dismiss the Complaint if: (1) it was filed too late as in one year after the events complained of occurred; (2) if it does not state a violation of the Code of Ethics, the Campaign Code or the Public Campaign Finance Code; (3) if it was frivolous or was filed solely to harass or intimidate; or (4) if the Board lacks jurisdiction to hear the Complaint. If the Board dismisses the Complaint at this stage, then the matter is resolved. If the Board does not dismiss the Complaint, then the Board will proceed to a hearing.

He said each party would be allowed an opportunity to speak.

Member Biderman confirmed with Chair Miller that questions could be asked of the persons presenting their sides.

Chair Miller asked Ms. Martinez Johnson to address the Board.

Alexis Martinez Johnson Statement

Ms. Martinez Johnson introduced herself to the Board. She said she is a citizen of Santa Fe and is running for the mayoral position. She said it is entirely okay for the Mayor to participate in any City function and it is entirely okay for the Mayor to disseminate information to the entire city. As the Mayor, there's nothing wrong with that.

She said the subject matter at hand is whether the Mayor can utilize a campaign email and his campaign logo, paid for by Alan Webber and send it to all of his supporters saying that he's going to be with the firefighters at a City event. That implies that the firefighters and the optics surrounding this is a collaboration between taxpayer-funded employees and resources with a campaign.

She said what should have happened is the Mayor should have disseminated the information city-wide, not through his campaign email. This not only produces optics, but it also produces a situation where taxpayers are under the impression that there's some type of collaboration and whether the firefighters support or do not support Mayor Alan Webber. He provided the information to his supporters that it is a campaign function. She said this is something on an ethical view that we need to be cognizant of.

She said as a public servant, you are called to a higher standard. This creates a situation where there is inequity. She asked the Board to not dismiss the case. She said she was unaware that there is any type of any statute or ordinance or stipulation that addresses this function from a public official, collaborating or utilizing campaign resources with the City and City employees.

She asked that the Ethics Board understand that this campaign is a grassroots effort. It represents the voice of many New Mexicans. She said if the Board dismisses this case, it is dismissing the voice of many New Mexicans who are unable or do not have the political resources or the legal services to bring about a voice.

She said the Webber Campaign can easily dismiss this case because they're able to obtain legal services to erase the New Mexican voice. She thanked the Board for their time and asked them to make sure that this race is run in an equitable fashion.

Chair Miller thanked Ms. Martinez-Johnson and recognized Ms. Ferlic to speak on behalf of the respondent.

Alan Webber Campaign Response

Ms. Ferlic said Ms. Martinez-Johnson admitted she does not know what provision of the Ethics Code the Complaint was violating; therefore, Ms. Ferlic said this complaint should be dismissed. She filed a response with the Board, but the Board can dismiss the complaint for basically one of or all three reasons.

First, it is deficient on its face as it doesn't meet the standards prescribed by the ordinance that governs complaints. The plain language of the law requires dismissal of this complaint.

Second, the Board's rules of organization and practice unequivocally require dismissal of the complaint. These are rules that this Board promulgated to govern the way that these complaints are supposed to be heard and considered.

Third, as explained in the motion to dismiss due process concerns mandate the dismissal of the complaint.

She said under City Ordinance 6-16.2, the Board is charged with enforcing the provisions of the Code of Ethics, the Campaign Code, and the Public Campaign Finance Code. The Board has a set of procedures to follow and laws to comply with. Those procedures and the plain language of the law necessitate dismissal of the complaint.

She said that Ms. Martinez Johnson has spoken of her mayoral campaign and spoken of a vague alleged violation without being able to specify it. She read Section 6-16-3 of the City ordinance which governs complaints. The second sentence states: "*The complaint shall state the specific provision which has allegedly been violated*" and then "*and the facts which the complainant believes support the campaign.*"

Ms. Ferlic referenced Section 3 of Ms. Martinez Johnson's complaint where the complaint form asks for which specific provision of the Code of Ethics or Election Code you believe has been violated. Ms. Martinez Johnson wrote "*For ethics review board to determine.*" On its face the complaint violates the ordinance and on its face this complaint is deficient because it does not state a claim.

She then referred to the Board rules and stated that within the authority granted to the Board by ordinance, the Board promulgated rules that govern how hearings will

proceed. This is a preliminary step in the process to determine if the complaint is legally sufficient to proceed. But under no uncertain terms the Board's rules of organization require that complaints state a particular provision of the Code of Ethics, the Campaign Code, or the Public Campaign Finance Code. Those rules unequivocally require the Board to dismiss the complaint. Under Section (D)(4)(b) the Board can consider appropriate submittals by the parties. The rules provide that they shall dismiss the case if the complaint does not state a violation. The Board does not have discretion to hear the complaint, The only action the Board can take is dismissal because the rules and the ordinance require a valid complaint.

Ms. Ferlic finished up by talking about due process. She said the complaint should be dismissed because allowing it to proceed would violate the campaign's right to due process under the U.S. Constitution and the New Mexico Constitution. The right to due process ensures that judicial or in this case a quasi-judicial body need a basic level of fairness in their procedures. So, without stating a claim, first, Ms. Martinez Johnson is attempting to deny the respondent to meaningfully respond and second is that the right to due process requires that there be an impartial tribunal. When a body such as this Board acts as the decision maker, impartiality is an essential guarantee of due process. The complainant has asked the Board to act as both prosecutor and judge and that is inappropriate. It's not only inappropriate for Ms. Martinez Johnson to ask the Board to fill in the gaps of her complaint, it's impermissible for the Board to actually do so. The only permissible remedy is for the Board to dismiss the complaint.

Board Discussion

Chair Miller asked the Board members if they had any questions for the Complainant or the Respondent.

Mr. Biederman asked the Respondent's attorney how she would you respond to the idea that describing conduct that allegedly violates certain provisions of the Ethics Code, even though the Complainant has not actually designated that section, that it would satisfy the requirement.

Ms. Ferlic clarified the question with Member Biderman and said for the reasons she had discussed. The Ordinance and Board rules require that a specific provision be referenced. Also Ms. Martinez Johnson is asking the Board to take a set of facts and then try to find a violation. That's a violation of due process because it forces the Board to then become a prosecutor in this process rather than the impartial decision makers that they should be.

Following up, Member Biderman said that suppose someone files a complaint in Magistrate Court alleging a breach of contract but doesn't know the term "breach of Contract." Looking at the forms that are approved by the State Supreme Court, that complainant isn't ruled out just because the magistrate judge has to identify what the law is. He said this Board in a position of being more akin to a people's court as the magistrates like to refer to themselves than it is to a more formal proceeding such as a higher level of court.

Ms. Ferlic said this is like a (12)(b)(6) motion for a failure to state a claim. Ms. Martinez Johnson hasn't made a claim. She doesn't know that the Board knows what Ms. Martinez Johnson is alleging Mayor Webber violated.

Member Lujan called for a point of order. She stated that Ms. Ferlic is stating an opinion and not sticking to the facts.

Member Amer asked Ms. Ferlic if she thought this body has the authority to dismiss the Complaint without prejudice and ask the proponent to amend the complaint and refile.

Ms. Ferlic said that would be up to the Board. The Ordinance and Board rules require outright dismissal.

Member Lujan asked if statutes exist, is that not enough for us to act? She said she understood Ms. Ferlic's argument is with due process but if this already does exist are we being negligent by not making a ruling but giving an opinion which is under our scope as a Board to give Ms. Martinez Johnson, Mr. Chair?

Chair Miller said he understood that to be a comment rather than a question and if he was correct.

Member Lujan said partially a comment. She said she is the only member on the Board that is not a lawyer. Looking at the evidence and the facts should the Board give an opinion rather than ruling? She understands that the Board doesn't get into the confines of due process. She understands their arguments and she is at odds with it because this rule exists and if we don't act upon it, are we acting correctly and in the best interest of the public?

Member Kovnat said she's been troubled by the complaint and the able argument of the respondent. The argument convinces her that the complaint be dismissed, but without prejudice. That would give the Complainant the opportunity to amend the complaint or file a new complaint that complies with our rules of procedure

Member Amer said she agreed with Member Kovnat. The Respondent makes a very persuasive argument about a due process, and she agreed that it would infringe on the Board's impartiality for the Board to be framing what the potential statutes are that were violated. She also agreed with Member Kovnat that the proper thing to do in this case would be to dismiss it without prejudice and allow the Complainant to comply with the ordinances regarding pleading of complaints and specify which sections that the Complainant believes were violated.

Member Biderman said he was inclined to think that there's enough stated in the complaint from a layperson. He didn't think the Board had to worry about due process in these circumstances because the Supreme Court has already approved magistrate complaints that are less detailed than this as a form and if the Supreme Court wouldn't approve something that deploy people due process. He suggested that the Board go into

executive session to deliberate this among the Board as entitled to under the Open Meetings Act.

MOTION: Member Biderman moved to go into executive session. Ms. Lujan seconded the motion.

Member Amer said that the section of the Open Meetings Act needs to be cited in order to go into executive session.

Attorney Martinez clarified that the section of the Open Meetings Act is 10-15-1(H)(3) NMSA.

Chair Miller said the motion was to go into executive session pursuant to Section 10-15-1(H)(3).

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

At Chair Miller's request, Clerk Mihelcic explained to the Zoom attendees the process for going into executive session.

The Board moved into executive session at approximately 3:50 p.m.

The Board returned from executive session at approximately 4:30 p.m.

Attached hereto as Exhibit "1" are the Executive Session notes provided by Clerk Mihelcic.

MOTION: Member Biderman moved that the Board to come out of executive session and return to open session. Member Kovnat seconded the motion.

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

2. 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 the Board met in executive session for the reasons stated on the agenda, no other items were discussed, and no final action was taken. He asked the Board for continued discussion.

MOTION: Member Amer moved to dismiss the Complaint because it did not cite to a specific Code provision that was violated. The motion was seconded by Member Kovnat.

VOTE: The motion passed by roll call vote with Members Amer and Kovnat and Chair Miller voting in favor and Members Biderman and Lujan voting against.

Member Lujan explained her vote. She stated that there is a conflict of information in the way that the Board rules are written as opposed to the actual form that is provided to the public. She felt that that is something that needs to be remedied for the Board to have future hearings. There is a conflict of how a lay person interprets what information they need to fill out on that form as opposed to what is stated in technical language through the Board's rules. She said the Board needed to take that into consideration when lay community members, including herself, are filling out forms like this and don't understand the technical terminology and how to even to find it and interpret it. She said that is why she voted the way she did.

Member Biderman said he agreed with Member Lujan, especially about the importance of making our process inviting and easy for lay people to engage in without having to hire counsel to interpret complex provisions in the ordinances.

He added that the Supreme Court has approved some very general statements as to a claim as in the magistrate courts. Those general statements don't require the citation of statutes or case law, even though that might be brought to bear, but rather simply allows for the inference if a set of facts is stated that reflects a violation of the law. Then the role of the court to pick up on that and bring justice. He said that's what the Board is supposed to do so.

He emphasized that while he sees the provisions in the ordinances that are adequately invoked here by the facts that were stated. He said that didn't mean that his mind was made up as to whether those were violated. He was simply saying that a claim was stated not that it was proven.

Member Biderman asked if the motion specified that the case was dismissed without prejudice.

Chair Miller said it did not.

Member Biderman said he believed that was the intention of the members who voted for the motion. He asked if it was correct that the case was dismissed without prejudice.

Chair Miller said he didn't understand that to be part of the motion. He told Member Biderman he could state his thoughts on that.

Member Biderman said he'd leave to the members who voted for the motion to decide that.

Chair Miller said that the matter was concluded.

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.

Member Martinez rejoined the meeting at 4:40 p.m.

Chair Miller said this item has been discussed for the last couple of meetings. There is a draft of the proposed legislation for discussion and possible action as to whether the Board wants to recommend the legislation to the Governing Body.

MOTION: Member Biderman moved to recommend approval of the legislation. Member Lujan seconded the motion.

Chair Miller asked Marcos Martinez, Assistant City Attorney, to explain the legislation.

Attorney Martinez said this is another change that Common Cause has recommended the City adopt. They identified the fact that the Secretary of State's Office had adopted a rule that purported to govern all elections that were using rank choice voting. This rule specifically addressed tie votes. The City ordinance also addresses tie votes but creates the appearance of a conflict that he would prefer to avoid having to resolve in the event that the City actually finds itself in a tie under a ranked choice voting election.

He said the stricken language represents the existing City ordinance. It goes back to the time when the City was not employing ranked choice voting. The advantage that the Secretary of State's Office's rule implements how to resolve a tie. The amendment is replacing one definition with another on how to resolve a tie situation.

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

c. Discussion of the 10th Circuit Opinion in Rio Grande Foundation v. the City of Santa Fe, Case No. 20-2022.

Chair Miller asked Attorney Martinez to open the discussion.

Attorney Martinez apologized for not including the opinion but said he would send everyone on the Board the opinion so that it could be discussed at a future meeting, if the Board desires that.

He said the 10th Circuit issued an opinion on August 3, 2021, that dismissed the Rio Grande Foundations appeal for lack of jurisdiction. The basis for that lack of jurisdiction was in the 10th Circuit's opinion the inability of the Plaintiff to show that they

had standing to sue in First Amendment cases that they characterize as a “Chill Case” where regulation allegedly chills the First Amendment rights of someone who wants to speak about an election-related issue.

The 10th circuit relied on a 2006 opinion out of this Circuit called *Initiative and Referendum Institute vs. Walker* which articulated the test or prospective standing required in chilled speech cases. There's basically a three-part test and the opinion focused on the fact that the Foundation had failed to satisfy the third prong of that test which is that they would present a plausible claim that they presently have no intention to speak because of a threat that a statute forbidding that speech would be enforced. In other words, in the case of Rio Grande Foundation, they have not alleged or claimed that they have no intention to speak in future ballot proposition measures because they're afraid that the statute would be enforced. The statute being the disclosure requirement under for independent expenditures and rather what they said was that they do intend to speak and that that should satisfy the standing requirement. In other words, they shouldn't have to be so afraid that they would not speak but for the threat of prosecution.

Attorney Martinez said that was a general overview. He said what has happened since then is that on Tuesday, the Rio Grande Foundation filed a petition for rehearing en banc. On Wednesday, the Court ordered the City to respond to that petition for rehearing. Normally a petition for rehearing would be taken under advisement and the Court would determine if a rehearing was appropriate. Not in this case. They want to give the City an opportunity to respond. So, we're now looking at the petition for rehearing.

He said there may be more developments for discussion in future meetings.

Member Biderman commented that the request by the full Court for briefing from the City is unusual. That might mean that they want to get to the merits now. That doesn't say what the outcome would be if they get to the merits of the case rather than decide to dismiss it on the procedural grounds that they just missed it on the standing grounds. If they do decide to rehear it, we may be getting down to the nitty-gritty of the facts and that might not be a bad thing to resolve hopefully in our favor.

Attorney Martinez said two things might affect the litigation. Some of the amendments that this Board has recommended might change some of the factual allegations that the Rio Grande Foundation is making. For example, they continue to repeat the fact that if you spend a penny (independent expenditure) you're going to have to disclose that. This Board has made a recommendation to the Governing Body that is being considered, which is an amendment to the Code that would raise the expenditure threshold to \$500.00. The law both in terms of the positive law that the City is promulgating and in terms of the case law that is evolving is an interesting area.

Chair Miller followed up by saying that the narrowness of the 10th Circuit's opinion really didn't resolve the issues that this Board dealt with in trying to decide about the appropriate limits under the ordinance. The Board's recommendation to the Governing Body and the progress of those changes proceeds and is not really affected by this decision.

6. MATTERS FROM STAFF

There were no matters from staff.

7. MATTERS FROM THE BOARD

Member Biderman said the Board just got a new complaint that has not been responded to.

Chair Miller acknowledged that a complaint was recently filed. He asked Clerk Mihelcic if the respondents have been notified.

Clerk Mihelcic said they notified by email the three organizations, however, for two of those emails, they received a bounce back. So for those two organizations, the complaint was filed and hand delivered. They were also provided the guidebook which dictates the 10-day rule for responding to the complaint.

Member Lujan said we are discussing interpretative information to the public. She just got a question about the first complaint they voted on and whether it could be resubmitted. She just wanted to say yes, it can be resubmitted.

8. MATTERS FROM THE CHAIR

There were no matters from the Chair.

9. NEXT MEETING:

Chair Miller said since the complaints were submitted to the respondents on August 18th, according to his calculations a meeting could be scheduled after September 1st.

Clerk Mihelcic recommended September 9, 2021, if that is the desire of the Board.

Chair Miller stated that tentatively, the meeting would be scheduled for September 9, 2021.

10. ADJOURNMENT

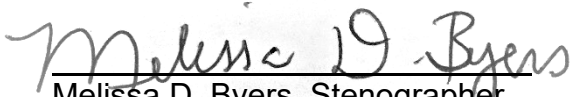
MOTION: Member Biderman moved to adjourn the meeting at 5:00 p.m. Member Martinez seconded the motion.

VOTE: The motion passed by roll call vote with Members Amer, Biderman, 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

Exhibit 1
8/19/21
ECRB Meeting

Ethics Campaign and Review Board Executive Session

Started at 3:52 p.m.

Ended at 4:28 p.m.

Members Present

Justin Miller

Paul Biderman

Judith Amer

Ruth Kovnat

Tara Lujan

Stephen Ross, Outside Counsel

Marcos Martinez, Assistant City Attorney

Kristine Mihelcic, City Clerk

CASE # 2021-2

Complaint Form

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

City of Santa Fe
Ethics & Campaign Review Board

Date: August 18, 2021

1. Name of person and/or group charged with alleged violation. _____
Union Protectiva, VFW Post 2951, and American Legion Post 1, all domestic nonprofit corporations based in Santa Fe, NM.

2. Please explain briefly the nature of the alleged violation. _____
Between March - July 2021, these three organizations paid for advertising that unambiguously called for the defeat of Alan Webber for Mayor, and failed to register as political committees. We believe they may also engaged in coordinated expenditures with the campaign of JoAnne Vigil Coppler.

3. Please state which specific provision(s) or part(s) of the Code of Ethics or Election Code you believe have been violated. Sections 9-2.5(B); 9-2.7(A) and (B); 9-2.8(A); and 9-2.2(K)

4. Please state the facts you have regarding the violations, including:
the date(s) March 31 through approximately July 31, 2021
the time(s) No specific time
the place(s) Advertisements in the Santa Fe Reporters on 3/31/21, 4/7/21, and 7/28/21; printing of yard signs; Facebook ads
people involved Union Protectiva, VFW Post 2951, and American Legion Post 1
other facts See attachment

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. _____
See attachment

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

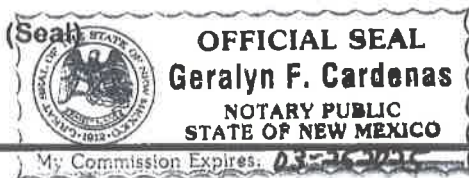
7. What is your name? Alan Webber for Mayor Campaign
8. Address? 1000 Cordova Pl PMB #232 Zip Code 87505
9. Telephone Number? 505-570-2733 Work: _____
10. Email Address? campaign@alanforsantafe.com

Received on: August 18 20 21
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 18th day of August 20 21



[Signature]
Notary Public

1. Union Protectiva, VFW Post 2951, and American Legion Post 1 have engaged in illegal political activity.

According to the New Mexico Secretary of State's office, [Union Protectiva](#), [VFW Post 2951](#), and [American Legion Post 1](#) are each New Mexico domestic nonprofit corporations, and each [registered](#) in Santa Fe, New Mexico.

The following four exhibits are paid political ads placed by these three nonprofit organizations.

Exhibit 1: Advertisement by Union Protectiva, Santa Fe Reporter, March 31, 2021 and April 7, 2021



Exhibit 2: Advertisement by VFW Post 2951 and American Legion Post 1, Santa Fe Reporter, July 28, 2021

The destruction of the Soldiers Monument (the Obelisk) on the Plaza, the removal of the Don Diego de Vargas statue from Cathedral Park and the boarding up of the Kit Carson memorial

WHAT "CHART" REALLY STANDS FOR

C CANCELING
H HISPANIC
A ARTS
R RELIGION
T TRADITIONS

ANGER CHAOS MISINFORMATION ILLEGAL

SANTA FEAN'S are shocked that the **MAYOR WEBBER** believes his made-up "CHART" - culture, history, art, reconciliation and truth - process will proceed because it is in direct violation of New Mexico's Prehistoric and Historic Sites Preservation Act of 1989

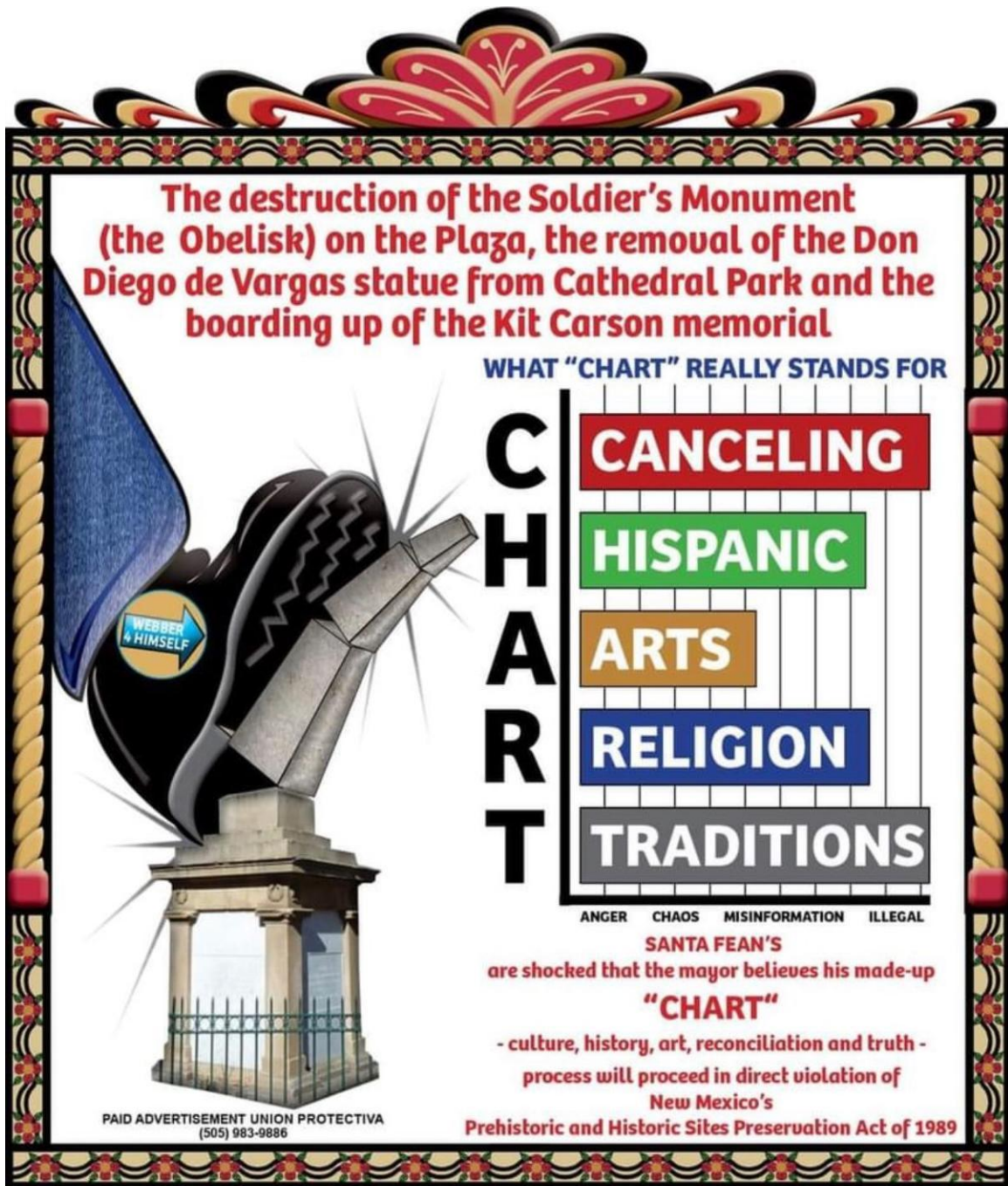
PAID ADVERTISEMENT
VFW POST 2951 & AMERICAN LEGION POST 1

74 JULY 28-AUGUST 3, 2021 • SFREPORTER.COM

Exhibit 3: Yard Sign by VFW Post 2951 and American Legion Post 1, seen in late July 2021



Exhibit 4: Facebook Advertisement by Union Protectiva, seen in late July 2021



**The destruction of the Soldier's Monument
(the Obelisk) on the Plaza, the removal of the Don
Diego de Vargas statue from Cathedral Park and the
boarding up of the Kit Carson memorial**

WHAT "CHART" REALLY STANDS FOR

C **CANCELING**

H **HISPANIC**

A **ARTS**


R **RELIGION**

T **TRADITIONS**

ANGER CHAOS MISINFORMATION ILLEGAL

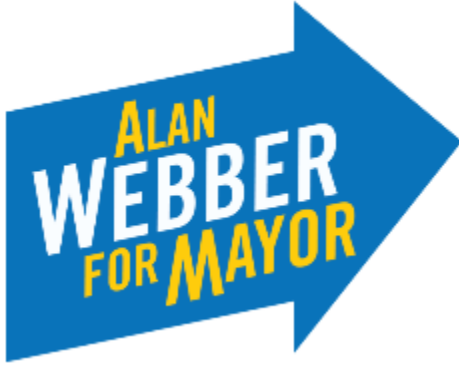
SANTA FEAN'S
are shocked that the mayor believes his made-up
"CHART"

- culture, history, art, reconciliation and truth -
process will proceed in direct violation of
New Mexico's
Prehistoric and Historic Sites Preservation Act of 1989



PAID ADVERTISEMENT UNION PROTECTIVA
(505) 983-9886

Exhibit 5: 2021 Campaign Logo of Alan Webber for Santa Fe



Sections in Violation (Exhibit 1)

The Santa Fe City Code uses the phrase “expressly advocates,” but does not define the term “express advocacy”:

9-2.6 - *Independently sponsored campaign communications and reporting.*

- A. *Any person or entity that makes expenditures of two hundred fifty dollars (\$250.00) or more in the aggregate during a single election to pay for any form of public communication including print, broadcast, cable or electronic advertising, billboards, signs, pamphlets, mass mailers, mass electronic mail, recorded phone messages, organized phone-banking or organized precinct-walking, that is disseminated to one hundred (100) or more eligible voters, and that either **expressly advocates** the election or defeat of a candidate,*

However, the [Federal Election Commission](#) defines “express advocacy” as follows (emphasis ours):

“Express advocacy” means that the communication includes a message that unmistakably urges election or defeat of one or more clearly identified candidate(s). There are two ways that a communication can be considered express advocacy: by use of certain “explicit words of advocacy of election or defeat” or by meeting the “only reasonable interpretation” test.

Explicit words of advocacy of election or defeat

The following words convey a message of express advocacy:

- *“Democratic nominee,” “cast your ballot for the Republican challenger for the U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ‘22”;*
- *Words urging action with respect to candidates associated with a particular issue, for example, “vote Pro-Life”/“vote Pro-Choice,” when accompanied by names or photographs of candidates identified as either supporting or opposing the issue;*
- *“Defeat” accompanied by a photograph of the opposed candidate, or the opposed candidate’s name, or “reject the incumbent”; and*
- *Campaign slogan(s) or word(s) that in context can have no other reasonable meaning than to support or oppose a clearly identified candidate, for example, posters, bumper stickers and advertisements that say “Nixon’s the One,” “Carter ‘76,” “Reagan/Bush.”*

“Only reasonable interpretation” test

In the absence of such “explicit words of advocacy of election or defeat,” a communication expressly advocates when, taken as a whole and with limited reference to external events, such as the proximity to the election, it can only be interpreted by a “reasonable person” as advocating the election or defeat of one or more clearly identified candidate(s).

This test requires advocacy of a candidate that is unmistakable, unambiguous and

suggestive of only one meaning (that being the election or defeat of a candidate).

Note that the author's intent is irrelevant. The test is how a "reasonable" receiver of the communication objectively interprets the message. If reasonable minds could not differ as to the unambiguous electoral advocacy of the communication, it is express advocacy regardless of what the author intended.

In Exhibit 1, Union Protectiva unambiguously engaged in express advocacy, despite its nonprofit status. In its ad, Union Protectiva:

- Referred to an election in the first sentence: *"Mayor Webber of Santa Fe recently announced his reelection for a second term as Mayor,"* referencing the upcoming election on November 2, 2021.
- Stated that *"Mayor Webber [sic] job performance does not deserve a second term..."* which can have no other reasonable interpretation other than a call to unelect Mayor Webber, given the previous reference to Mayor Webber's reelection campaign.
- Stated that *"It's time to **vote for** leaders that take their hands out of their pockets,"* with an arrow pointing directly to a photograph of Mayor Webber with his hands in his pockets, another unambiguous call to "vote for" a leader other than Mayor Webber.

The cost of a full-page ad in the Santa Fe Reporter's print edition at the time of its publishing was \$1,300.00 for nonprofit and governmental entities and \$1,968.00 for commercial entities.

Union Protectiva's ad is express advocacy, meeting both the "explicit words" and "only reasonable interpretation" tests. By engaging in express advocacy, Union Protectiva has violated the following sections of Chapter IX - Election and Political Campaign Codes in the Santa Fe City Code:

- 9-2.5(B): In its express advocacy ad, Union Protectiva failed to *"conspicuously identify the name of an officer or other responsible person of the political committee sponsoring such materials."*
- 9-2.7(A) and (B): Union Protectiva failed to file as a political committee within ten days of *"The date on which it receives or has information which causes it to anticipate that it will receive contributions or will make expenditures in any election campaign."* The deadline for submitting an advertisement for the March 31, 2021 edition of the Santa Fe Reporter was March 29, 2021. Presuming that Union Protectiva needed at least one business day to write, design, receive authorization, and submit the ad and payment, the ten-day period would have ended on Friday, April 9, 2021. As of the filing of this complaint, Union Protectiva has not filed as a political committee with the City of Santa Fe. Union Protectiva would then also be in violation of subsection (B) for failure to submit the required information on its statement of organization.
- 9-2.8(A): By the same reasoning, Union Protectiva is in violation of this section for failure to

designate a campaign treasurer and list a campaign depository.

Sections in Violation (Exhibits 2, 3, and 4)

In Exhibits 2, 3, and 4, Union Protectiva, VFW Post 2951, and American Legion Post 1 sponsor the same graphic image, on a yard sign, in a Santa Fe Reporter ad, and on a Facebook advertisement. In all three cases, these organizations engaged in express advocacy, despite their nonprofit status. They:

- Included a graphic referencing candidate Alan Webber: a revised version of Webber's current campaign logo (see Exhibit 5), a clear reference to the November 2, 2021 election and Webber the candidate.
- Criticized the City's Culture, History, Art, Reconciliation, and Truth (CHART) process and Mayor Webber, stating, "Santa Fean's [sic] are shocked that the mayor believes his made-up 'CHART'...process will proceed in direct violation of New Mexico's Prehistoric and Historic Sites Preservation Act of 1989."

These exhibits by Union Protectiva, VFW Post 2951, and American Legion Post 1 are express advocacy, meeting the "only reasonable interpretation" test. These exhibits unmistakably and unambiguously suggest one meaning: that candidate Alan Webber should not be reelected to second term. If these organizations had intended to communicate their displeasure with Mayor Webber's official actions as Mayor related to the CHART process, they could easily have used his official photograph from the City of Santa Fe's [website](#) or another image from his role as Mayor. By using a clear variation of Alan Webber's campaign logo, the ads make clear that they are referring to a clearly-identified candidate and urging the defeat of that candidate.

By engaging in express advocacy, Union Protectiva, VFW Post 2951, and American Legion Post 1 have violated the following sections of Chapter IX - Election and Political Campaign Codes in the Santa Fe City Code:

- 9-2.5(B): In its electioneering ad, Union Protectiva, VFW Post 2951, and American Legion Post 1 failed to "*conspicuously identify the name of an officer or other responsible person of the political committee sponsoring such materials.*"
- 9-2.7(A) and (B): Union Protectiva, VFW Post 2951, and American Legion Post 1 failed to file as a political committee within ten days of "*The date on which it receives or has information which causes it to anticipate that it will receive contributions or will make expenditures in any election campaign.*" Exhibits 2, 3, and 4 were purchased in late July 2021. As of the filing of this complaint, Union Protectiva, VFW Post 2951, and American Legion Post 1 have not filed as a political committee with the City of Santa Fe. Union Protectiva, VFW Post 2951, and American Legion Post 1 would then also be in violation of subsection (B) for failure to submit the required information on its statement of organization.

- 9-2.8(A): By the same reasoning, Union Protectiva, VFW Post 2951, and American Legion Post 1 are in violation of this section for failure to designate a campaign treasurer and list a campaign depository.

Union Protectiva, VFW Post 2951, and American Legion Post 1 are domestic nonprofit organizations, and at least in the case of Union Protectiva, are prohibited from engaging in express advocacy. A story in the [Santa Fe New Mexican](#) on April 5, 2021 states (emphasis ours), “*Virgil J. Vigil, president of Union Protectiva de Santa Fé, said Monday he disagreed with Webber’s claims that language in the ad was false....Vigil said Union Protectiva doesn’t see the ad as political, and the organization’s bylaws prevent it from supporting any political candidates.*”

But Union Protectiva did engage in express advocacy. And as the FEC noted above:

Note that the author’s intent is irrelevant. The test is how a “reasonable” receiver of the communication objectively interprets the message. If reasonable minds could not differ as to the unambiguous electoral advocacy of the communication, it is express advocacy regardless of what the author intended.

Finally, the Santa Fe City Code states (emphasis ours):

9-2.2 - Purpose and intent. It is the public policy of the city of Santa Fe:

- A. That public confidence in municipal government is essential and must be promoted by all possible means;
- B. **That political campaign contributions and expenditures be fully disclosed to the public and that secrecy in the sources and application of such contributions be avoided;**
- C. **That the public’s right to know how political campaigns are financed far outweighs any right that this matter remain secret and private;** and
- D. That the public interest is served by encouraging the widest participation of the public in the electoral process by reducing the dependence of candidates on large contributions.

A [Santa Fe New Mexican article](#) stated on October 24, 2020:

Officials of Union Protectiva de Santa Fe declined to divulge details about its finances but said it is financially strong.

We could fund an [advertisement] against what’s going on in the city today every week and it won’t even make a dent on us,” [Union Protectiva President Virgil] Vigil said.

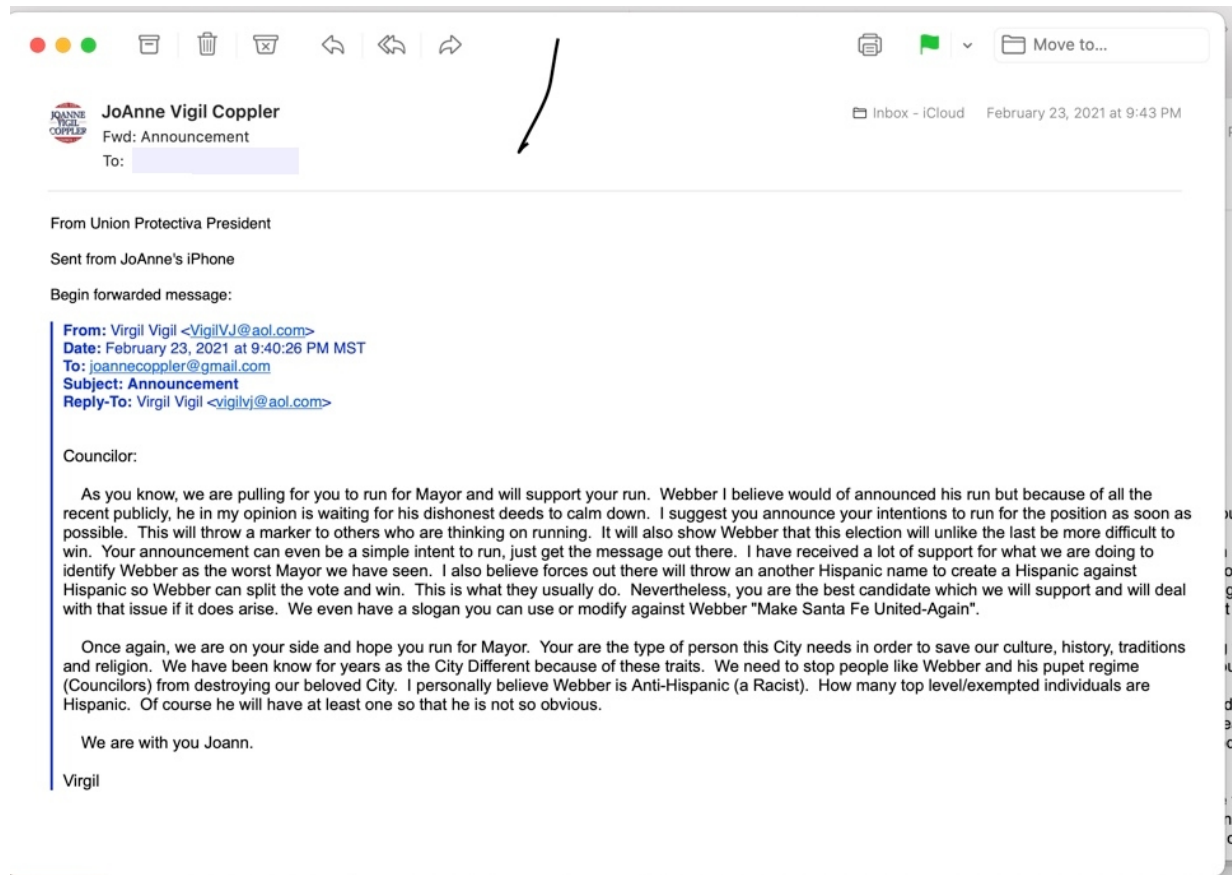
“We’ve grown a lot,” said outgoing Santa Fe County Treasurer Patrick “Pat” Varela, who has helped the organization invest its money. “I use my business skills to help the organization.”

Barela said Union Protectiva has an estimated \$14 million in real estate assets....

Union Protectiva, led by President Virgil Vigil, is a multimillion dollar nonprofit organization that has engaged in express advocacy. Union Protectiva has a responsibility to voters to disclose their contributions and expenditures related to their independent expenditures, rather than have their finances be secret and private.

2. Union Protectiva, VFW Post 2951, and American Legion Post 1 may have engaged in a coordinated expenditure or coordinated expenditures with the campaign of mayoral candidate JoAnne Vigil Coppler.

Exhibit 6: Forwarded email from Virgil Vigil, President, Union Protectiva, to JoAnne Vigil Coppler, candidate for Mayor of Santa Fe. Virgil Vigil is also the Treasurer of VFW Post 2951.



Sections in Violation (Exhibit 6)

The Santa Fe City Code defines a “Coordinated Expenditure” as (emphasis ours):

9-2.2(K). *Coordinated expenditure means an expenditure made:*

1. *By an individual or entity other than a candidate or the candidate's political committee; and*
2. *In cooperation, consultation or concert with, or at the request or suggestion of, a candidate, his/her representatives or agents or the candidate's political committee, including but not limited to, the following examples in subsections 9-2.3(K)(2)(a)—(d) SFCC 1987:*
 - a. *There has been substantial discussion between the individual or entity making the expenditure and the candidate, candidate's political committee, or his/her representatives or agents. Substantial discussion includes, but is not limited to, an exchange of campaign strategies, polling information, voter lists or any other similar information that would facilitate the election or defeat of a candidate.*
 - b. *An entity making the expenditure is directly or indirectly formed or established by or at the request or suggestion of, or with the encouragement of the candidate, candidate's political committee, or his/her representatives or agents;*
 - c. *The candidate, candidate's political committee or his/her representatives or agents has solicited funds or engaged in other fundraising activities on behalf of the person or entity making the expenditure during the twelve-month period preceding the date of the expenditure. Fundraising activities include, but are not limited to, exchanging names of potential donors or other lists to be used in engaging in fundraising activity, regardless of whether or not the individual or entity pays fair market value for the names or lists provided; or being a featured guest or speaker at a fundraising event for the benefit of the entity making the expenditure.*
 - d. *If the individual or entity making the expenditure has employed, has in a leadership position, or has accepted a donation of the campaign related professional services of any person, who, during the twelve-month period preceding the date of the expenditure, has been an employee of, has advised, or provided or is providing services to the candidate or candidate's political committee. These services include, but are not limited to, any services in support of the candidate's or candidate's political committee's campaign activities, such as advertising, message, strategy or policy services, polling, allocation of resources, fundraising or campaign operations.*
 - e. *An expenditure is not a coordinated expenditure solely because:*
 - i. *The individual or entity and a candidate or candidate's political committee use the same vendor to provide polling services,*

printing or distribution services or physical space, provided that the vendor has in place prior to the expenditure a firewall to ensure that there is no exchange of information between the individual or entity and the candidate or campaign committee. Evidence of an adequate firewall is a vendor's formal written policy or a contractual agreement with the vendor prohibiting the exchange of information between the individual or entity and the candidate or candidate's political committee, which policy or contract is distributed to all relevant employees, consultants, and clients affected by the policy or contract. The firewall shall be designed and implemented to prohibit the flow of information between employees and consultants providing services to the individual and entity and to those currently or previously providing services to the candidate or candidate's political committee. Coordination will be presumed in the absence of such a firewall; or

- ii. The individual or entity making the expenditure interviews a candidate; has endorsed a candidate; has obtained from the candidate a biography of the candidate or a position paper, press release, or similar material about the candidate; has invited the candidate to make an appearance before the person's members, employees or shareholders; or has shared space with a candidate or candidate's political committee for one (1) or more single events of limited duration.*

Mr. Vigil states in his email to Ms. Vigil Coppler that:

...we are pulling for you to run for Mayor and will support your run....I have received a lot of support for what we are doing to identify Webber as the worst Mayor we have seen...Once again, we are on your side...

He further discusses strategy with Ms. Vigil Coppler, suggesting that she:

...announce your intentions to run for the position as soon as possible. This will throw a marker to others who are thinking on running...We even have a slogan you can use or modify against Webber "Make Santa Fe United-Again."

To be considered a "coordinated expenditure," (9-2.2(K)) an expenditure must:

- Be made by an individual or entity other than a candidate. Union Protectiva, VFW Post 2951, and American Legion Post 1 each meet that definition.
- Be made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, his/her representatives or agents or the candidate's political committee. We

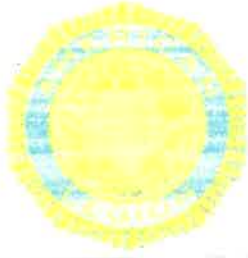
believe, based on Exhibit 6, that Mr. Vigil may have cooperated, consulted with, worked in concert with, or acted at the request or suggestion of Ms. Vigil Coppler and or representatives of hers.

It is worth noting that Mr. Vigil, in addition to serving as President of Union Protectiva, is also treasurer of VFW Post 2951.

3. Requested Remedy

We respectfully request that the Ethics and Campaign Review Board consider the following remedies, at a minimum, should it determine that Union Protectiva, VFW Post 2951, and/or American Legion Post 1 are guilty of the complaints outlined above:

- Require VFW Post 2951/American Legion Post 1 to remove all yard signs that are out in community; AND
- Impose a maximum fine of five hundred dollars (\$500.00) per violation on each of the entities in question (6-16.7.2); AND
- Require Union Protectiva, VFW Post 2951, and/or American Legion Post 1 to file as a political committee so that they are required to disclose their donors and expenditures related to this municipal election; AND
- Determine, based on the initial email and any subsequent emails between Mr. Vigil and Ms. Vigil Coppler, whether Exhibits 1, 2, 3, and/or 4 were coordinated expenditures made by Union Protectiva, VFW Post 2951, and/or American Legion Post 1 with the campaign of Ms. Vigil Coppler. If the Board finds that these expenditures were coordinated, than the Board should assess whether Ms. Vigil Coppler filed as a political committee within ten days of the coordinated expenditure; whether she reported these coordinated expenditures; and whether she violated any applicable contribution limits.



AMERICAN LEGION MONTOYA Y MONTOYA POST 1
1601 BERRY AVENUE
SANTA FE, NM 87505-3437
MAIL: PO BOX 5052, SANTA FE, NM 87502-5052
PH 505-982-9622, EMAIL: mympost1@yahoo.com

REC'D - CITY CLERK
AUG 26

To whom it may concern,

American Legion Post 1 vehemently denies the allegations made against it by the Webber campaign. While the campaign attached exhibits of political advertisements and yard signs purporting to be paid for by the Post and the VFW, Post leadership has never authorized or paid for such expenditures. We will be investigating how the Legion inaccurately came to be listed as a sponsor. The Legion is not a political organization and stands firmly committed to its core mission of enhancing the well-being of veterans, their families, our military, and our communities by our devotion to mutual helpfulness.

David Lucero

Commander American Legion Post 1

Harold Dun - Trusty President



CHARTER OF
THE AMERICAN LEGION

**National
Constitution
and By-laws**

Uniform Codes of Procedure for the
Revocation, Cancellation or Suspension
of Department and Post Charters

Prepared by
THE AMERICAN LEGION
NATIONAL HEADQUARTERS
Indianapolis, Indiana

§ Section 21704A - Nondiscrimination

The requirements for holding a staff position in the corporation may not discriminate on the basis of race, color, religion, sex or national origin.

§ 21705. Exclusive right to name, emblems, and badges

The corporation and its State and local subdivisions have the exclusive right to use the name "The American Legion" or "American Legion". The corporation has the exclusive right to use, manufacture, and control the right to manufacture, emblems and badges the corporation adopts.

§ 21706. Political activities

The corporation shall be nonpolitical and may not promote the candidacy of an individual seeking public office.

§ 21707. Service of process

As a condition to the exercise of any power or privilege granted by this chapter [36 U.S.C.A. § 21701 et seq.], the corporation shall file, with the secretary of state or other designated official of each State, the name and address of an agent in that State on whom legal process or demands against the corporation may be served.

§ 21708. Annual report

Not later than January 1 of each year, the corporation shall submit a report to Congress on the activities of the corporation during the prior calendar year. The report may not be printed as a public document.

BEFORE THE CITY OF SANTA FE ETHICS AND CAMPAIGN REVIEW BOARD

ALAN WEBBER FOR
MAYOR CAMPAIGN,

Complainant,

v.

Case No. 2021-2

UNION PROTECTIVA, VFW
POST 2951, and AMERICAN
LEGION POST 1,

Respondents.

ANSWER OF RESPONDENT UNION PROTECTIVA

Understandably unhappy with the views of Union Protectiva de Santa Fe, a century-old fraternal organization in Santa Fe, the campaign of Mayor Alan Webber asks this Board to fine Union Protectiva, require it to file as a “political committee,” as that phrase is used in the Santa Fe Municipal Code, and require it to provide information about its donors and expenditures related to the upcoming municipal election.¹ The requested relief is foreclosed by both the Municipal Code and federal case law concerning the extent to which governmental entities may burden the First Amendment rights of organizations like Union Protectiva in the electoral context. The Board should dismiss the complaint or otherwise deny to Complainant the relief it seeks.

¹ In connection with its allegations concerning expenditures coordinated with the campaign of Joann Vigil Coppler, Complainant also asks the Board to “assess whether Ms. Vigil Coppler filed as a political committee within ten days of the coordinated expenditure; whether he reported these coordinated expenditures; and whether she violated any applicable contribution limits.” Neither Ms. Vigil Coppler nor any person or entity formally associated with her campaign is a party to this matter.

Background

Respondent is one of the oldest Hispanic fraternal organizations in the United States. Founded in 1915 and chartered in 1916, it has continuously operated in Santa Fe for more than a century. It was formed to preserve the language, history, arts, traditions, and culture of the Spanish colonists who arrived in Santa Fe in the 1600s. Its primary mission at its founding and today is to provide financial aid for the burial of its members and spiritual support to their families.

Respondent is undeniably disappointed with Mayor Webber, particularly with his handling of the circumstances surrounding the removal of the Soldier's Monument obelisk in the Santa Fe plaza. To express its disappointment, Respondent took out one full page advertisement in the Santa Fe Reporter and funded another. The first advertisement ran on March 31, 2021 and again on April 7, 2021. The second ran on July 28, 2021. The graphic used for the second advertisement also appeared as a Facebook advertisement in July and was printed on yard signs. These advertisements cost Respondent a fraction of its annual budget.

Answer

The Municipal Code cannot be construed to require of Respondent the steps Complainant urges the Board to require. The complaint alleges that, by funding the ads and posters identified in the complaint, Respondent has violated four provisions of the Municipal Code: (1) Section 9-2.5(B); (2) Section 9-2.7(A); (3) Section 9-2.7(B); and (4) Section 9-2.8(A). Each of these provisions set forth obligations of a "political committee," a term defined in Section 9-2.3.

Respondent is not a political committee. The only provision that could even possibly apply to Respondent to require reporting of any kind is Section 9-2.6. While the complaint refers to it, Complainant does not seek relief based on any alleged violation of Section 9-2.6. Even if it did, Respondent did not violate the provision.

Lastly, Complainant seeks relief – some of which would be directed to a person not a party to this proceeding, a notion offensive to the most fundamental tenets of due process – on the basis of rank conjecture. Nothing in the complaint resembles a credible allegation of coordination between Respondent and Complainant's opponent, and the Board should dismiss it out of hand.

I. RESPONDENT IS NOT A POLITICAL COMMITTEE AND IS THUS NOT SUBJECT TO THE REQUIREMENTS OF SECTIONS 9-2.5, 9-2.7, OR 9-2.8.

First and foremost, the complaint fails because each and every violation it posits is a violation of a provision that governs “political committees,” and Respondent is not a political committee. Complainant contends that each of the communications identified in the complaint violate the same four provisions of the Municipal Code: Section 9-2.5(B), Section 9-2.7(A), Section 9-2.7(B), and Section 9-2.8(A).

Section 9-2.5(B) requires that “[c]ampaign materials disseminated or communicated by a political committee . . . conspicuously identify the name of an officer or other responsible person of the political committee sponsoring such materials.” Section 9-2.7(A) requires “[e]very political committee” to “file a statement of organization with the city clerk” no later than the date on which it “contracts for or initiates the dissemination of any campaign materials.” Section 9-2.7(B) sets forth the information to be contained in that statement of organization. Lastly, Section 9-2.8(A) requires a “political committee, at the

time it is required to file a statement of organization,” to identify a treasurer and a “campaign depository.”

So what is a “political committee” that must comply with these provisions? The answer is found in Section 9-2.3(N):

Political committee means any entity formed for the principal purpose of:

- (1) Raising or collecting, and expending or contributing money or anything of value for supporting the election or defeat of any identifiable candidate or candidates or for supporting the approval or defeat of ballot propositions; or
- (2) Coordinating or cooperating in efforts to support the election or defeat of any identifiable candidate or of supporting the approval or defeat of any ballot proposition.

Respondent simply does not meet either definition. Respondent's “principal purpose” is the preservation of Hispanic heritage in Santa Fe and, even more particularly, ensuring that its members and their families have the resources they need to pay for the burial of a member. For over a century, that purpose has neither wavered nor changed. Respondent rarely wades into anything resembling political waters. Indeed, as best any current member of Respondent knows, the advertisements underlying the complaint are the the **only** advertisements of this nature that Respondent has **ever** paid for in its entire history.

Because it is not a political committee, none of the provisions Complainant contends Respondent has violated apply in any way to Respondent. It is thus impossible for Respondent to have violated those provisions and Complainant is not entitled to any of the relief it seeks.

II. THE COMPLAINT DOES NOT SEEK RELIEF ON THE BASIS OF ANY VIOLATION OF SECTION 9-2.6, BUT RESPONDENT DID NOT VIOLATE THAT PROVISION EITHER.

The complaint urges the Board to find violations only of the provisions identified above. The complaint does, however, cite to Section 9-2.6 and also engages in a brief discussion of express advocacy and its functional equivalent, concepts federal courts have crafted in examining the role of the First Amendment in the regulation of electioneering communications. Out of an abundance of caution, Respondent will address whether it must file the contribution and expenditure reports required by Section 9-2.6(A). It is not, for two reasons. First, the advertisements are not express advocacy or its equivalent. Second, even if they were, the communications were made well outside of the 60-day window triggering the disclosure requirement.

A. The Material Underlying the Complaint Is Not Express Advocacy or its Equivalent.

The United States Supreme Court has consistently held that the reporting burdens on free speech like those found in Section 9-2.6(A) are constitutionally permissible only when they apply to express advocacy or its functional equivalent. Express advocacy consists of language unambiguously urging a reader or listener to vote for or against a particular candidate. Complainant does not, to its credit, urge that either of the advertisements at issue meet this standard.

Instead, Complainant contends that both advertisements are the functional equivalent of express advocacy, a standard requiring a finding that the advertisements are “susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 470 (2007).

Neither advertisement meets this standard. The second advertisement presents the easier case. It identifies what is perhaps best described as a philosophical platform of Mayor Webber – his CHART (Culture, History, Art, Reconciliation, and Truth) – and uses it to express displeasure with the removal of the plaza obelisk, the removal of a statue of Don Diego de Vargas from Cathedral Park, and the boarding up of the Kit Carson memorial. The advertisement is classic issue advocacy. It identifies an issue and states Respondent's viewpoint concerning that issue. It identifies Mayor Webber but does not even faintly suggest that anyone should vote for or against him. Indeed, it does not even mention the upcoming municipal election. In short, the most reasonable interpretation of the advertisement is that the speaker is unhappy with Mayor Webber. The First Amendment robustly protects that speech.

The first advertisement is perhaps a closer question, as it asserts that Mayor Webber does not deserve a second term and suggests that the reader should vote for leaders who “take their hands out of their pockets” under a photograph of Mayor Webber standing in front of the plaza obelisk with his hands in his pockets. The entirety of the advertisement is approximately two columns of print. The vast majority of the advertisement expresses displeasure with Mayor Webber in much the same way as the CHART advertisement. If the advertisement were limited to the text identified by Complainant, it might well be the equivalent of express advocacy. But Claimant has cherry picked two sentences out of two columns of print, ignoring the remainder. Claimant stretches too far by arguing that the advertisement can only be reasonably interpreted as advocacy against Mayor Webb in an election seven months away at the time of printing.

B. Even if the Advertisements Are the Equivalent of Express Advocacy, They Were not Published Within Sixty Days of the Municipal Election and thus not Subject to Regulation.

The distance in time between the advertisements and the municipal election is important for a second reason. Section 9-2.6(A) requires any person (not just political committees) to file a contribution and expenditure report with the City Clerk if that person spends \$250.00 or more on a communication that either (1) expressly advocates for the election or defeat of a candidate; or (2) refers to a clearly identifiable candidate and is published within 60 days of the election in which that candidate is running. As discussed above, Complainant does not suggest – rightly – that either advertisement constitutes the kind of express advocacy that would trigger the reporting obligation of Section 9-2.6(A). It is also undeniable that none of the advertisements appeared within 60 days of the municipal election, which will be held on November 2, 2021. That cutoff is September 1, 2021. The most recent advertisement, published on July 28, 2021, ran 35 days before that cutoff. None of the advertisements are sufficient to subject Respondent to the reporting obligations found in Section 9-2.6(A). Thus, even if Complainant had alleged a violation of Section 9-2.6(A), the allegation would fail.

III. THE COMPLAINT SEEKS RELIEF NOT LEGALLY AVAILABLE.

The relief available to a complainant under the Municipal Code for violations of the provisions Complainant has identified is set forth in Section 6-16.7. Complainant seeks imposition of a fine of \$500.00 for each alleged violation and two types of injunctive relief: (1) an order requiring the removal of yard signs; and (2) an order requiring Respondent to file as a political committee. Section 6-16.7 does not provide any authority whatsoever for

the injunctive relief Complainant seeks (or, indeed, any injunctive relief at all). Instead, that provision authorizes the Board to: (1) issue a public reprimand; (2) issue a fine of not more than \$500.00 per violation; (3) recommend removal of a public officer; (4) refer complaints against public officials to law enforcement; and (5) in the case of a violation of the Public Campaign Finance Fund, revoke a candidate's public finance certification. The injunctive relief Complainant seeks finds no expression anywhere in the Municipal Code, and the Board lacks the authority to provide it.

IV. THE COMPLAINT DOES NOT CONTAIN COMPETENT ALLEGATIONS OF COORDINATED EXPENDITURES, AND ANY RELIEF FLOWING FROM SUCH ALLEGATIONS WOULD LIE NOT WITH RESPONDENT, BUT WITH A PERSON NOT A PARTY TO THIS PROCEEDING.

The complaint alleges, based on a single email of support sent to Joanne Vigil-Coppler by Virgil Vigil, that the expenditures made by Respondent on the advertisements in question constituted coordinated expenditures under the Municipal Code. That allegation lacks any semblance of factual support. It instead constitutes little more than fanciful musing by an entity politically opposed to Councilor Vigil-Coppler that *maybe* the expenditures were coordinated with her campaign.

Equally problematically, even if Complainant had competent evidence (or any evidence) of the kind of coordination it alleges, such coordination would only trigger reporting obligations for the candidate with whom the expenditures were coordinated. Indeed, in describing the relief Complainant seeks from the Board, Complainant asks the Board to determine whether these were coordinated expenditures and, if they were, to “assess whether Ms. Vigil Coppler filed as a political committee within ten days of the

coordinated expenditure; whether she reported these coordinated expenditures; and whether she violated any applicable contribution limits.”

In other words, in connection with its unsupported allegations of coordinated spending, Complainant seeks relief *only* against Councilor Vigil-Coppler. She is, of course, not a party to this proceeding. The guarantees of due process enshrined in the constitutions of both the United States and New Mexico flatly prohibit that relief.

Conclusion

Complainant has failed to identify any violations of the Municipal Code by Respondent. Respondent is not a political committee, making Sections 9-2.5, 9-2.7, and 9-2.8 flatly inapplicable. The only provision that could even possibly apply to Respondent's communications is Section 9-2.6, and Complainant seeks no relief under that section. The request would, in any event, be futile because the advertisements at issue are not express advocacy or its functional equivalent and did not occur within the 60-day window Section 9-2.6 provides. The Board should summarily dismiss the complaint.

Respectfully submitted,

/s/ Scott Fuqua
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Attorney for Respondent Union Protectoriva de Santa Fe

Kristine M Mihelcic

Dear Kristine,

This is in responses to the Campaign Ethics Violation complaint that mayor Webber has issued to the Veterans of Foreign Wars Post 2951 Santa Fe New Mexico.

Accusing the Veterans of supporting another organization to use our name in their posters, this is not true. The VFW never allowed anyone to use our name in any campaign agenda.

The mayor has also accused the VFW of paying for advertisement to an organization that unambiguously called for the defeat of Webber also not true, we request that an investigation be conducted. Our books are available.

It is a shame that the leader of our city disrespects the veterans that served our country. At a Boys and Girls club event the VFW Post 2951 and the City Fire Department were passing out ice cream and bike helmets the mayor showed up and disrespected a member of the VFW. The member reached his hand out to the mayor to say hello once the mayor noticed that it was a veteran, he stopped and frozen in place turned and walked away. This veteran is a disabled veteran wounded in action earned a purple heart and has a serves dog. Most people will thank this veteran but not this disrespectful mayor that does not support Veterans.

I am requesting that the Mayors appointed committee conduct an investigation, to ensure a fair and understanding proves that the VFW Post 2951 is in no way involved in any campaign activities.

Commander Gilbert Romero

Gilbertromero2951@gmail.com

505-699-6472



**CITY OF SANTA FE
ETHICS AND CAMPAIGN REVIEW BOARD
COMPLAINT NO. 2021-2**

**VFW POST 2951 ANSWER TO COMPLAINT NO. 2021-2
BROUGHT BY MAYOR ALAN WEBBER**

COME NOW the members of VFW Post 2951 who make a general denial of all factual allegations made against them by mayor Webber and the ethics board and demand strict proof thereof. This complaint is “frivolous and intended solely to harass and intimidate” VFW Post 2951, its members and any other organization or individual who speaks negatively of the mayor’s organized and systemic efforts to eradicate Hispano art, influence and culture from *la Villa Real de la Santa Fe de San Francisco de Asis*.

The mayor brought and the board approved this complaint without a basic investigation of the facts. VFW Post 2951 had nothing to do with the advertisement posted in the *Santa Fe Reporter*. The paid statement “Mayor Webber’s Dark Side” specifically provides that the advertisement was paid for by Union Protectiva and included only the Union’s telephone number. The *Reporter* staff would have verified it had no communication with and received no funds from VFW Post 2951 to pay for the advertisement.

Had the parties charged with investigating this matter contacted Union Protectiva or VFW Post 2951, it would have quickly learned that VFW Post 2951 did not grant its permission for its name to have been included on the C.H.A.R.T. protestations. Had VFW Post 2951 granted Union Protectiva the right to include it in its posters, which it did not, it still would not have been in the wrong, as those posters are sacred freedoms of expression protected by our New Mexico and United States Constitutions.

VFW Post 2951 further answers as follows:

- A. VFW Post 2951 states that there is no indication on the complaint that an "Initial Investigation" was performed by the board;
- B. VFW Post 2951 states that there is no summons to appear before the board issued by the Supreme Court or any of its inferior courts or by the State of New Mexico or any of its subdivisions;
- C. VFW Post 2951 denies that it is a domestic non-profit corporation as alleged by mayor Webber in paragraph 1 of his complaint and states that it is an unincorporated association;
- D. VFW Post 2951 denies the allegations mayor Webber makes against it as contained in paragraph 2 of the complaint. VFW Post 2951 states that it has not paid for any advertisements as wrongly alleged by mayor Webber and that it has the financial records to prove it;
- E. VFW Post 2951 denies the allegations mayor Webber makes against it as contained in paragraph 3 of the complaint. VFW Post 2951 states that the Ethics and Campaign Review Board does not have the constitutional or statutory authority to impose civil sanctions or injunctive relief upon VFW Post 2951 or its members;
- F. VFW Post 2951 denies the allegations mayor Webber makes against it as contained in paragraph 4 of the complaint. VFW Post 2951 states that it did not pay for any such advertisements or posters and that use of its name was not authorized by its commander, board or members;
- G. VFW Post 2951 states that the speech contained on the posters is protected by the First Amendment of the United States Constitution and Article II, Section 17 of the New Mexico Constitution. VFW Post 2951 again states that it did not grant permission to use its name on the posters in question and that it paid nothing to publish any advertisement. Had mayor

Webber contacted the *Santa Fe Reporter*, it would have verified this information prior to serving a complaint on VFW Post 2951 and its members;

H. VFW Post 2951 denies that it engaged in express political advocacy, denies that it is a political action committee or that it made political expenditures. None of the false allegations made by mayor Webber were alleged to have occurred within sixty (60) days prior to the election;

I. VFW Post 2951 denies mayor Webber's belief that "they may also engaged [sic] in coordinated expenditures with the campaign of JoAnne Vigil Coppler;"

J. VFW Post 2951 states that the complaint was improperly notarized as no "individual" signed the complaint under oath. This omission is a violation of the Notary Public Act and the board's rules. As such, the complaint must be dismissed;

K. VFW Post 2951 states that mayor Webber's complaint was not "filed by any person;" rather, it was filed by an unincorporated association- the mayor's re-election campaign;

L. VFW Post 2951 states that mayor Webber's complaint was not "sworn" to, there is no "person" indicated in the acknowledgement, there is no indication of representative capacity and the alleged notarization does not comply with the Notary Public Act;

M. LEFT INTENTIONALLY BLANK

N. VFW Post 2951 mayor Webber's complaint is "frivolous and intended solely to harass and intimidate" VFW Post 2951, its members and any other organization or individual who speaks negatively of the mayor;

O. VFW Post 2951 states that there is no indication that the complaint was "made only upon motion and a finding by the board that the benefits of the proposed referral . . . will outweigh any potential costs of the referral in terms of reduced openness of the board's proceedings or

diminished prestige of its judgments” as required by the board’s rules. As such, this complaint should be dismissed;

P. VFW Post 2951 states that there is no indication that the board “has voted that a valid complaint has been filed;”

Q. VFW Post 2951 states that this board is neither constitutionally nor statutorily authorized to exercise jurisdiction over the subject matter(s) or individuals against whom the complaint is made;

R. VFW Post 2951 denies that this committee is legally empowered to enact its Rules of Organization and Practice,

S. VFW Post 2951 states that this board is not constitutionally empowered with the authority to issue injunctive relief, subpoenas, find a party in contempt or to issue other penal or civil penalties;

T. VFW Post 2951 states that the board’s rules, as enacted and applied, further deprive the members of VFW Post 2951 of their United States and New Mexico constitutional rights of free speech, due process and equal protection.

WHEREFORE this complaint and the manner in which it was filed and the relief it seeks constitute an abuse of the legal process and should be dismissed and the parties granted costs and fees. It is obvious that mayor Webber’s campaign is utilizing this process as an instrumentality of oppression against exercise of free speech of the citizens of Santa Fe.

For these and other reasons, legal and factual, this complaint should be dismissed and mayor Webber should be sanctioned for its filing.

