

LAW OFFICES OF
FREEDMAN BOYD HOLLANDER GOLDBERG URIAS & WARD P.A.

20 FIRST PLAZA, SUITE 700
ALBUQUERQUE, NEW MEXICO 87102

TELEPHONE
(505) 842-9960
FACSIMILE
(505) 842-0761

JOSEPH GOLDBERG
Direct Dial (505) 244-7520
Email: jg@fbdlaw.com

MAILING ADDRESS:
P.O. BOX 25326
ALBUQUERQUE, NM 87125-0326

November 13, 2014

Via Electronic Mail

Code of Conduct Review Board
c/o Robert Kidd, Compliance Officer
Bernalillo County Office of Compliance
Bernalillo County Annex
415 Tijeras NW, First Floor
Albuquerque, NM 87102
Email: compliance@bernco.gov

Re: Motion to Dismiss Complaint No. 2014-SC003

Dear Mr. Kidd, Chair and Members of the Code of Conduct Review Board:

This letter serves as our Motion to Dismiss under Sections 3(A)(5) and 3(B)(1)(d)(iv) of the Rules and Regulations of the Code of Conduct Review Board (“Code of Conduct Rules”). Complaint number 2014-SC003 (“the complaint”) fails to state a claim under the Code of Conduct Rules and is frivolous, groundless, or brought for the purpose of harassment. Ms. Toulouse Oliver respectfully requests that the Board dismiss the complaint at the preliminary hearing. The grounds for this motion follow.

I. The Complaint is Deficient on its Face

Initially, we bring to the Board’s attention the fact that Complaint number 2014-SC003 contains no attachments and does not clearly provide the Board or Ms. Toulouse Oliver with the means to identify the substance of its allegations. Instead, the complaint merely refers to “[a]n improper and false campaign ad on the County Clerk website from 22 September until 15 October...” and alleges that the “ad was contrary to the spirit and letter of the Bernalillo County Code of Conduct. Section 3(A)(2) of the Code of Conduct states that a “[c]omplaint shall specify the provision or provisions of the Ordinance alleged to have been violated *and provide a clear and concise statement of what events took place that the Complainant believes violated the provision or provisions of the Ordinance cited in the Complaint.*” (Emphasis added). Complainant has failed to comply with this basic requirement.

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Although the Rules of Civil Procedure of the District Courts, which govern legal proceedings in district courts across New Mexico, do not apply to the Board, they offer guidance to the Board as to what a plaintiff must allege for a complaint to survive. The Rules also explain how courts review the sufficiency or adequacy of a complaint. New Mexico Rule of Civil Procedure 1-008(a)(2) requires that a plaintiff make “a short and plain statement of the claim showing that the pleader is entitled to relief.” *See also* Federal Rule of Civil Procedure 8(a)(2) (exact same language). Rule 1-012(B) of the New Mexico Rules of Civil Procedure empowers New Mexico courts to dismiss complaints that are insufficient on their face for “failure to state a claim upon which relief can be granted.” *See also* Federal Rule of Civil Procedure 12(B)(6) (same).

In other words, although the standard for what plaintiff must alleged at the outset to maintain a civil lawsuit is fairly low, it is not enough for a plaintiff to simply indicate that he or she has a grievance. The plaintiff must provide the court with sufficient detail so that the court has a basic understanding of the grievance and determine whether there is a basis for it. *See, e.g., Kisella v. Dunn*, 58 N.M. 692, 275 P.2d 181 (1954). Federal courts have an even higher standard for what a complaint must contain:

While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations and citations omitted).

The court rules are similar to the standard in the Code of Conduct, which requires the party making a complaint to “include documentation as to time, place, facts, and the names of any witnesses to the alleged violations” and to provide a clear and concise statement of what event took place that the Complainant believes violated the provision or provisions of the Ordinance cited in the Complaint.” Code of Conduct Rule 3(A)(1) & (2). The complaint here merely refers to “an improper and false campaign ad” without specifying or providing that ad or any context to the Board. The complaint should be dismissed for failure to state a claim, or failure to meet the basic requirements, under Section 3(A)(2).

II. The Substance of the Complaint is Inadequate

In addition to not meeting the basic requirements of the Code of Conduct Rules, the complaint simply lacks merit. Section 3(B)(1)(d)(iv) of the Code of Conduct Rules provides that the Board may dismiss a Complaint at the preliminary hearing if “[t]he Complaint on its face is frivolous, groundless, or brought for the purpose of harassment.” Ms. Toulouse Oliver respectfully requests that, if the Board determines the complaint provides a clear and concise statement of what events allegedly violate the Code of Conduct, the Board dismiss the Complaint as being frivolous, groundless or brought for the purpose of harassment.

A. The Press Release is not Political Activity

The crux of the complaint appears to be that Ms. Toulouse Oliver used or misused government resources in an attempt to advance her campaign as a candidate for Secretary of State. This is simply not the case. The Code of Conduct Rules outline nine areas of behavior that constitute “political activity.” The definition is set out below in its entirety:

Political activity means:

- (1) Preparing for, organizing or participating in any political meeting, political rally, political demonstration or other political event;
- (2) Soliciting contributions on behalf of a political candidate or political party including, but not limited to, the purchase of, selling, distributing, or receiving payments for tickets for any political fundraiser, political meeting or other political event;
- (3) Soliciting, planning the solicitation of, or preparing any document or report regarding anything of value intended as a political contribution;
- (4) Soliciting votes on behalf of a candidate for elective office or a political organization;
- (5) Initiating for circulation, preparing, circulating, reviewing or filing any petition on behalf of a candidate for elective office;
- (6) Preparing or reviewing responses to candidate questionnaires in connection with a campaign for elective office or for or against any referendum question;

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- (7) Campaigning for any elective office;
- (8) Managing or working on a campaign for elective office; or
- (9) Preparation or design of any campaign materials or any form of media for a candidate for elective office.

The first six categories of the definition simply have no potential bearing on this case. Although not clearly alleged, the complaint ostensibly claims that Ms. Toulouse Oliver wrote or directed the writing of the September 21, 2014 Press Release to further her campaign. However, as explained in more detail in the Answer, the September 21, 2014 Press Release was issued at the tail end of a long and public discourse related to advisory issues being placed on the general election ballot and the preparation and timely mailing of absentee ballots to voters in the military or voters overseas. The Press Release was issued in Ms. Toulouse Oliver's official capacity as Bernalillo County Clerk, was directly related to issues that were hot topics in the news at the time, and were designed to provide voters with important information and to correct inaccurate or false information in the Secretary of State's press release.

As further evidence that the September 21, 2014 Press Release does not constitute political activity, it is helpful to consider what the federal government considers to be political activity, or "express advocacy." The Federal Election Commission ("FEC"), in executing 2 U.S.C. Section 431(17), created the following regulation:

Expressly advocating means any communication that—

- (a) Uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in 94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One," "Carter '76," "Reagan/Bush" or "Mondale!"; or

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(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 C.F.R. § 100.22. The United Supreme Court has also weighed in on the issue, explaining that express words of advocacy include those “of election or defeat, such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘[candidate] for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject.’” *Buckley v. Valeo*, 424 U.S. 1, 44, n. 52 (1976) *superseded by statute as stated in McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 93 (2003) *overruled by Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010); *see also Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 668, 597 N.W.2d 721, 730 (1999) (noting that there are no “magic words” in express advocacy, and the list in *Buckley* is exemplary, rather than exhaustive). On the state level, the Supreme Court of Wisconsin explained that any definition of express advocacy “may encompass more than the specific list of ‘magic words’ in *Buckley* footnote 52, but must, however, be ‘limited to communications that include explicit words of advocacy of election or defeat of a candidate.’” *Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 682, 597 N.W.2d 721, 737 (1999) (quoting *Buckley*, 424 U.S. at 43).

The Press Release informed the public of an important public issue and did not seek anyone’s vote, ask anyone to support Ms. Toulouse Oliver, or ask anyone to vote against Secretary of State Duran. The Press Release did not seek campaign contributions or make any reference to a political campaign. Instead, as explained above, the Press Release was one contribution to the public discourse surrounding issues that were political but that were also wholly unrelated to Ms. Toulouse Oliver’s campaign for Secretary of State. Ms. Toulouse Oliver had an obligation to inform residents of Bernalillo County that her office had timely mailed ballots to voters overseas and in the military and to explain the legal proceedings that created a time crunch for her office in doing so. The press release informed the public that overtime pay was required to get ballots to voters and also corrected information that had been incorrectly conveyed to the public. The Board should summarily dismiss the complaint.

B. The Press Release Does not Violate the Specific Resolutions Cited

1. Section 2-127

Although we maintain that the complaint is unclear, vague, and insufficient to state a claim, we assume that the complaint alleges that Ms. Toulouse Oliver somehow used the resources of the County Clerk's office for "personal gain." Section 2-127 of the Bernalillo County Code of Conduct requires, in relevant part, "that public office or the pursuit of public office not be used for personal gains." As shown above, this is simply not the case.

New Mexico laws place numerous duties on county clerks with respect to elections. Among the numerous duties, county clerks must register voters (*see, e.g.*, NMSA 1978, Section 1-4-8), conduct elections (*see* NMSA 1978, Section 1-12-1 *et seq.*), and prepare, handle, mail, and process ballots. *See, e.g.*, Section 10-10-1 *et seq.* With respect to absentee ballots, there are numerous duties placed on county clerks to ensure that absentee, overseas, and military voters timely receive their ballots and are able to exercise their constitutional right to vote. *See* NMSA 1978, Section 1-6-1 *et seq.* Of particular importance for this proceeding, county clerks are required to mail absentee ballots to overseas and military voters forty-five days before the election NMSA 1978, Section 1-6-6.

In addition to these statutory duties, our elected officials have an obligation to keep us informed of the functioning of our government. In other words, we have a right to know what our government officials are doing. For example, "[e]very person has a right to inspect public records" under the Inspection of Public Records Act, NMSA 1978, Section 14-2-1. We also have an expectation that our public officials will keep us apprised of important issues.

Ms. Toulouse Oliver's September 21, 2014 News Release addressed an important public issue, notified the public that the absentee ballots had been mailed, corrected false or inaccurate information provided by the Secretary of State's office, and provided input from Ms. Toulouse Oliver on the process. Our democracy thrives because it is a marketplace of ideas. Public debate is essential to the functioning of our society. The September 21, 2014 press release was done in Ms. Toulouse Oliver's capacity as an elected official and was an important and fully warranted attempt to provide Bernalillo County residents with important information related to the general election.

2. Section 2-130(a)

The Complaint alleges that the September 21, 2014 Press Release violates Section "2-130(a) of the Code of Conduct, which prohibits the use of county property or resources for

political activity.” Section 2-130(a) is presented below:

(a) *General ethical standards of public service.*

(1) Public servants shall treat their position as a public trust, with a fiduciary duty to use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

(2) Public servants shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

(3) Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

(4) No public servant may request or receive, and no person may offer any money, thing of value or promise thereof, other than any county pay received, that is conditioned upon or given in exchange for promised performance of an official act.

Presumably, the complaint is referring to subsection (A)(4) and claiming that Ms. Toulouse Oliver received something of value from the County by issuing the Press Release. The Press Release speaks for itself and did not contribute any value to Ms. Toulouse Oliver’s candidacy for Secretary of State—other than, perhaps, the credibility gained from voters in properly performing her job as Bernalillo County Clerk.

3. Section 2-130(h)(5) & (6)

The complaint appears to allege that the Press Release violates Sections 2-130(h)(5) and (6) of the Code of Conduct because “this partisan political attack was conducted during business hours.” Section 2-130(h)(5) states:

Public servants shall not perform any political activity while at work and during any compensated time, other than annual leave, personal leave, holidays or other time off. Public servants shall not use any county property or resources for any political activity for the benefit of any campaign for elective office or any political organization.

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Section 2-130(h)(6) states:

At no time shall any public servant solicit or require any employee to perform any political activity; (i) as part of the employee's county duties; (ii) as a condition of county employment; or (iii) during any time off that is compensated by the county (such as annual leave, personal leave or holidays).

Although we maintain that the complaint fails to sufficiently allege a violation of Sections 2-130(h)(5) and (6), these subsections only apply if the Press Release constitutes "political activity." As explained above, it does not. We reiterate that the Press Release was an essential and important aspect of Ms. Toulouse Oliver's job as County Clerk and provided important information to the voting public.

4. Anti-Donation Clause

Finally, the complaint alleges that the Press Release violates the anti-donation clause of the New Mexico Constitution. The Board does not have jurisdiction to consider this allegation. Section Section 2-133(c) of the Code of Conduct limits the Board's jurisdiction: "The jurisdiction of the review board is limited to acting within the scope of matters covered by this code."). This allegation, along with the rest of the complaint, should be summarily dismissed.

Nevertheless, the allegation that the Press Release violates the anti-donation clause is absurd. The anti-donation clause states:

Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation or in aid of any private enterprise for the construction of any railroad except as provided in Subsections A through G of this section.

N.M. Const. art. IX, § 14. The anti-donation clause was designed to prevent public money from being spent on private issues. *See Hotels of Distinction W., Inc. v. City Albuquerque*, 1988-NMSC-047, 107 N.M. 257, 259 (explaining that the anti-donation clause "has been construed by this Court to prohibit a municipality from aiding non-governmental enterprises"). As explained previously, the Press Release fell squarely within Ms. Toulouse Oliver's public duties as Bernalillo County Clerk. She received no financial or other gain from the issuance of the Press Release, which was designed to provide residents of Bernalillo County with important information and to correct false and inaccurate information that had been provided to the public

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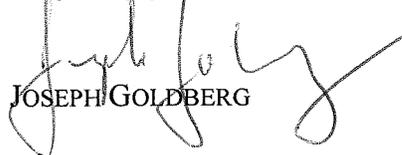
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by the Secretary of State's Office.

III. Conclusion

There is no basis in law or fact to sustain the complaint against Ms. Toulouse Oliver. The complaint fails to adequately describe the conduct that allegedly violates the Code of Conduct and contains no documentation to support its charges. In addition, what the complaint alleges to be an improper campaign ad is instead a Press Release containing important information related to the 2014 General Election. As Bernalillo County Clerk, one of Ms. Toulous Oliver's principle duties is to administer elections, ensure that elections run smoothly, and provide the public with the information that it needs and deserves. The September 21, 2104 Press Release was a link in a chain of public statements and discourse related to the issue of advisory questions being placed on the ballot, the legal proceedings and public debate surrounding the advisory questions, and the impact of any delay stemming from those legal proceedings on the timely provision of ballots to absentee voters overseas and in the military. It does not amount to "political activity" as defined in Section 2-129, was an attempt to provide information to the public regarding "governmental decisions and policy...made in [the] proper channels of the government structure," and helped to promote public "confidence in the integrity of its government." *See* Code of Conduct, Section 2-127. The Board should dismiss the complaint at the preliminary hearing as frivolous, groundless and brought solely for the purpose of harassment.

Very truly yours,



JOSEPH GOLDBERG

cc: Carolyn Freeman (Via Electronic Mail and First-Class Mail)
P.O. Box 220
Sandia Park, NM 87047
Email: cfreeman1254@msn.com