

NEW MEXICO ETHICS COMMISSION
Commission Meeting Minutes of October 4, 2019

1. The meeting convened at approximately 9:00. The roll was called. All Commissioners were present or in attendance telephonically, including:

Hon. William Lang, Chair
Jeffrey Baker, Commissioner
Stuart Bluestone, Commissioner
Garrey Carruthers, Commissioner (telephonic attendance)
Ron Solimon, Commissioner
Dr. Judy Villanueva, Commissioner
Frances Williams, Commissioner (telephonic attendance)

2. Approval of Agenda: Commissioner Bluestone moved approval of the Agenda with Commissioner Carruthers seconding. The motion was approved unanimously.

3. Approval of Minutes from Meeting of September 13, 2019: Commissioner Bluestone moved for approval of the Minutes, with a second from Commissioner Solimon. Commissioner Williams queried Commissioners Solimon's and Baker's recusal from voting on the Minutes of the August 9, 2019 meeting. Commission Executive Director Jeremy Farris responded they were in attendance at that meeting as candidates for the vacant Commissioner positions only and, as such, recused from voting on the minutes of that meeting.

4. Approval of Posting of Draft Ethics Commission Rules with the New Mexico State Records Center and Archives for Publication and Public Comment: Mr. Farris presented on the agenda item, stating that the purpose was not to have a perfect set of rules, but rather to achieve the Commissioners' decision to publish draft rules for public comment. He then provided a description on each of the three rules: Part I, SEC General Rules; Part II, SEC Rules of Recusal; and, Part III, SEC Rules of Operation. He explained Part I provides for and governs the organization and administration of the Commission. Part II governs Commissioner disqualification from participation in proceedings, cases, and hearings before the Commission if a Commissioner had a real or perceived conflict of interest. Part III governs the procedures related to proceedings, cases, and hearings before the Commission. Each rule was then considered individually by the Commission, as detailed below:

4.1 Discussion of General Rules

- Commissioner Carruthers stated he had no problem with rule. Commissioner Williams stated she had no comments on Part I, and Commissioner Bluestone identified three typographical errors for correction.

- Chairman Lang told the Commission that a vote on all three rules would take place with one motion.
- Commissioner Williams stated that she had one general complaint with all the rules. Specifically, the rules are not easy to understand and wondered if the language could be made simpler.
 - Mr. Farris stated that the likely audience for the rules are attorneys that are representing regulated persons and the language was written with that in mind. Mr. Farris said that the drafting team, which has over 110 years of government experience, has worked to balance precision and readability in the rule drafting, but would want to hear any alternative language the Commission may have.
- Commissioner Carruthers stated that he understood, but also would understand the benefits of simpler rules. He noted that a simpler document, such as a brochure, should be developed at a future date.

4.2 Discussion of the Rules Governing Commissioner Recusal

- Commissioner Carruthers, Baker and Solimon said they had no recommendations and believed the rules were ready to be filed for public comment.
- Commissioner Villanueva suggested the definitions be alphabetized.
- Commissioner Bluestone stated that he likes the emphasis on Commissioner recusal for not only for a conflict, but also for the appearance of a conflict. He suggested adding a provision number 5 in Section 1.8.2.8. The other substantive item he noted was there should be an inclusion stating that a Commissioner recusing from a matter should send a notice in writing to the Executive Director.
 - Paul Biderman, the lead contractor retained to develop the rules, stated the new language would be inserted in the Rules as a new subparagraph 5, with a new subsection B. The other subsections would be renumbered accordingly.
- Commissioner Baker asked if there was any difference between the Judicial Code of Ethics and the prospective Ethics Commission rule regarding the recusal of Commissioners.
 - Mr. Biderman answered that it has a lot of the same sense, but is not identical.
- Chairman Lang suggested the catch-all that a judge must always avoid the appearance of impropriety.

- Commissioner Villanueva asked whether a Commissioner who recuses on a matter can hear a matter on appeal.
 - Mr. Farris responded that where a Commissioner serves as a hearing officer on a matter, the Commissioner would need to recuse on the appeal.
- Commissioner Villanueva stated that it should be delineated or make reference to Section 1.8.2.10, which is the provision for temporary appointment of a Commissioner.
- Chairman Lang noted that the rules as draft might already contain the necessary references.
- Mr. Farris summarized the comments the Commissioners had provided before moving on to Part III.

4.3 Discussion of Rules of Procedure

- Commissioner Carruthers had one comment and two questions: 1. The complaint may be electronic, which precludes notarizing the complaint; 2. Are we making up the blackout process; and, 3. What happens if complaint alleges violations of statutes over which the Commission does not have jurisdiction?
 - Mr. Farris responded that the rule mirrors the statute and as such the statute would need to be amended to remove the notarization language, that the blackout period is a statutory requirement and the rules effectively name it, and a complaint over which the Commission has no jurisdiction would be referred to the appropriate agency.
- Commissioner Carruthers asked what the Commission's role would be if the action was not illegal, but is unethical.
 - Mr. Farris responded that the Commission is constrained by the jurisdiction provided in the statute.
 - Mr. Biderman added that all the Commission has is an opportunity for persuasion, as opposed to adjudication and enforcement, for matters beyond the statutes over which the Commission has jurisdiction.
- Commissioner Williams referenced recent appeals involving the Governmental Conduct Act, stating that the Attorney General says he is being deluged by appeals. She then offered the following comments and questions:
 - Can a complaint be farmed out to another agency during the blackout period?

- Do the rules cover any city or county, and can the Commission take action in a matter related to those entities?
 - Can the Complainant be represented by a non-attorney?
 - Section 1.8.3.9 (A) 5 (which refers a two-year limitation on time to file a complaint) is confusing.
 - Who decides if a complaint is frivolous?
 - The seven-day time period is too short. She recommends 12 days.
 - Noted a concern with Risk Management providing representation to state employees as respondents to complaints.
 - Does the public hearing before a hearing officer have to be public?
 - The wording of the rules throughout needs to be easier to understand.
- Mr. Farris responded that everybody embraces the idea of a simple-to-read brochure. He then responded to Commissioner Williams's questions and comments, as follows:
 - The Governmental Conduct Act appeals do not affect the Commission's jurisdiction.
 - During the blackout period, the Commission may refer to the Attorney General or other agency.
 - The Commission has no jurisdiction over cities, counties or other political entities. A complaint would be dismissed for lack of jurisdiction.
 - A Complainant may only be represented by an attorney.
 - The time periods specified in the rules are unlikely to deter a complainant from filing a complaint.
 - Risk Management representation of some respondents is provided by the statute.
- Mr. Biderman commented that some of the language in the rules must be legalese in nature.
- Mr. Farris added that the Commission is the caretaker of the statutes going forward, and has a duty to report to the legislature on changes it deems needed in the statutes.
- Commissioner Solimon reiterated Commissioner Williams's question regarding when the complaint becomes public.
 - Mr. Farris responded, explaining by statute and rule the complaint ordinarily becomes public thirty days after the Commission's approval of the General Counsel's recommendation that the complaint is supported by probable cause and notice of that determination to the respondent, unless making the complaint public may harm a potential or ongoing criminal investigation.

- Commissioner Villanueva suggested that the following definitions be added to the rule:
 - Appearance
 - Blackout Period
 - Primary and General Election
 - Ethics Violation
 - Proceeding and Standing Orders
- Commissioner Villanueva also stated that a Commissioner sitting as a hearing officer should recuse themselves from voting on that issue.
 - Mr. Farris noted that if the recusal affects the quorum needed for Commission action, a temporary Commissioner would have to be appointed.
- Commissioner Villanueva asked if that can be added to the rule. Mr. Farris responded in the affirmative. Commissioner Villanueva then identified certain typographical errors she had found while reading the draft rule.
- Commissioner Bluestone stated that a notarized complaint may be taken by e-mail, but the proceeding's clock should not begin until a hard copy is received by the Commission. He then referenced Section 1.8.2.10 (F), as related to the anti-donation clause, and asked if the rule means that the Commission will not review such a complaint.
 - Mr. Farris responded that the Commission likely does not have jurisdiction to adjudicate constitutional claims.
- Commissioner Bluestone stated that we need to give more thought to this. He then asked, as related to Section 1.8.3.11(F), what occurs if the Commission does not agree with the General Counsel's decision about probable cause. Mr. Farris responded that this issue needs to be given additional consideration during the public comment period.
- Commissioner Bluestone then referred to Section 1.8.3.12 D (2), which states that all costs and expenses of mediation shall be paid by the Respondent. He suggested that there be joint payment by the Complainant and the Respondent. Chairman Lang responded that is not a typical procedure, but is based on governmental entities who do not have funding. He further stated that he doesn't expect it to be an issue, but would like further consideration on this point. Commissioner Williams asked why the state doesn't pay. Chairman Lang responded that it is not a statutory requirement and not part of the budget. It is considered a boutique item. Chairman Lang also noted that mediation would be between the parties, with staff in attendance. Commissioner Bluestone reiterated

that there may be a need to add this as an option to be considered, referring to his initial comment about joint payment.

- Commissioner Bluestone stated that the Commission might want to consider at some point adopting different levels of determinations if a violation of the statutes is found, perhaps something like a warning, a reprimand, or a censure. He said he was not prepared to make a recommendation at this time, but wanted the Commission to keep it in mind.
- Chairman Lang stated that review of the rules by the Commission had concluded.
- Commissioner Carruthers moved to approve rules for comment as amended.
- Commissioner Bluestone seconded, and the motion was passed by a unanimous vote. Mr. Biderman noted that only the notice of the availability of the rule for review and comment would be published, directing the public to contact the Commission for the actual three rules.

5. Approval of Location of Ethics Commission Office: Mr. Farris asked the Commission for a motion approving the Science and Technology Park as the location for the Commission offices. He noted the reasonable cost, central location for the Commissioners and easy access to the location. Commissioner Carruthers stated he liked the location and the ease of parking. Commissioner Bluestone moved to approve the location. Commissioner Solimon seconded the motion and it was passed unanimously.

6 Approval of Budget Request: Mr. Farris presented the request, beginning the presentation by noting that the original request for \$700,000 was a placeholder until DFA staff were freed up to do additional analysis, which included similar programs in other jurisdictions. Based on that analysis, the budget request has been increased to \$1,140,000. Mr. Farris, joined by Commissioner Carruthers, is scheduled to present to the Legislative Finance Committee during the afternoon of October 30, 2019. Commissioner Carruthers stated that it would be appreciated if staff would bring requests before the Commission prior to submitting to the legislature. He noted that Mr. Farris has been very accommodating. Commissioner Carruthers moved to approve the request. Commissioner Bluestone seconded the motion. Commissioner Bluestone stated that he hoped Mr. Farris could meet soon with Speaker Egoff, House Appropriations and Finance Committee Chairman Lungstrom and Senate Finance Committee Chairman Smith. He asked Mr. Farris if \$708,000 is budgeted for six positions in FY 21, if contractual monies will be used for hearing officers, if \$132,000 is budgeted for operational activities, and \$60,000 for leased space. Mr. Farris responded in the affirmative to the queries. Commissioner Bluestone noted that the Commission may have savings in some of the budget categories. The Commission adopted the motion unanimously.

7 Public Comment: Tony Ortiz from New Mexico Ethics Watch asked if the Commission would have a supplemental request in the upcoming legislative session. Mr.

Farris responded in the affirmative. The timeline is to complete internally on October 18, 2019. DFA will then put together the final supplemental request, which will be transmitted to the LFC in November. Commissioner Bluestone noted that it would be helpful if NMSU Edge was included for training. Mr. Farris said the Secretary of State's Office will offer a presentation regarding certain statutes that the Secretary of State's Office administers to the Commission members at a meeting on October 30, 2019.

The meeting was then adjourned.