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STATE ETHICS COMMISSION

October 21, 2020

**COMPLAINT FILED ON:
9/14/2020**

State Ethics Commission
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Via Electronic Mail

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Complainant Pro Se

- and -

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Counsel for Respondent Rebecca Dow

Re: *Whitlock v. Dow*, No. 2020-031: notice of probable dismissal for lack of jurisdiction and referral of remaining claims to General Counsel

Dear parties:

I have reviewed Ms. Whitlock's complaint and attached exhibits (filed Sept. 14, 2020) and Ms. Dow's motion to dismiss (filed Sept. 29, 2020). Ms. Whitlock did not file a response to Ms. Dow's motion to dismiss. *See* 1.8.3.10(A)(2) NMAC (allowing a complainant to file a response to a motion to dismiss within 15 days from date of the motion). In her complaint, Ms. Whitlock alleged that Ms. Dow violated the Governmental Conduct Act, the Procurement Code, and the Financial Disclosure Act. *See* Compl. Description, at 2-7.

Under the Commission’s rules, a respondent may move to dismiss a claim for lack of jurisdiction, *see* 1.8.3.10(A)(1)(a)-(b) NMAC, or for failure to state a claim upon which relief can be granted, *see* 1.8.3.10(A)(1)(c) NMAC. Ms. Dow made both motions.¹ *See* Mot. to Dismiss, at 4-5. I start with Ms. Dow’s argument that the Commission lacks jurisdiction. Ms. Dow says the Commission does not have the power to review Ms. Whitlock’s complaint. In part, she is correct.

I. Probable dismissal of Ms. Whitlock’s Governmental Conduct Act and Procurement Code claims for lack of jurisdiction

The Commission lacks jurisdiction for any conduct occurring before July 1, 2019. *See* Laws 2019, ch. 86, § 40; 1.8.3.9(C) NMAC. In her complaint, Ms. Whitlock points the Commission to several contracts that Appletree Educational Center and state agencies executed before July 1, 2019. *See* Compl. Description, at 2-5; Exs. D-E, N-V. Ms. Whitlock alleges that Ms. Dow’s conduct related to the formation of these contracts violated Section 10-16-9(A) of the Governmental Conduct Act. The alleged conduct relating to these contracts occurred before July 1, 2019; therefore, the Commission lacks jurisdiction for any Governmental Conduct Act claims based on Ms. Dow’s pre-July 1, 2019 conduct. *See* Laws 2019, ch. 86, § 40; 1.8.3.9(C) NMAC.

Ms. Whitlock also specifically points the Commission to two contracts between the Children, Youth and Families Department (CYFD) and Appletree Educational Center and argues that, in the absence of a competitive sealed process, CYFD’s award of these contracts to Appletree Educational Center also violated Section 10-16-9(A) of the Governmental Conduct Act and the Procurement Code. *See* Compl. Description, at 5, & Compl., Exs. D-E. While Ms. Whitlock notes that CYFD dated its award letters to Appletree Educational Center on July 1, 2019, the CYFD Secretary (or the secretary’s designee) executed the contracts on June 17 and June 27, 2019, and the contracts became effective on those days. *See* Compl., Exs. D-E. Consequently, all the conduct related to the award and formation of these two CYFD contracts occurred before July 1, 2019. The Commission lacks jurisdiction for any Governmental Conduct Act or Procurement Code claims based on pre-July 1, 2019 conduct. *See* Laws 2019, ch. 86, § 40. Accordingly, the Commission will likely dismiss these Governmental Conduct Act and Procurement Code claims at the Commission’s next regularly held meeting on December 4, 2020. *See* 1.8.3.10(E) NMAC.

¹Because the complainant to this administrative matter is *pro se* (*i.e.*, is not represented by an attorney), I will explain the difference between these two kinds of legal arguments. The first kind of motion (for lack of jurisdiction) argues that the Commission is not in the business of reviewing the conduct a complainant alleges. The second kind of motion (for failure to state a claim), by contrast, does not contest the Commission’s jurisdiction; instead, its argument is that, even assuming all the complaint’s factual allegations are true, the facts don’t amount to a violation of law. Under the Commission’s rules, the director decides the first kind of motion; a hearing officer, after the General Counsel makes a recommendation, decides the second. These rules might appear like successive hurdles to jump. Even so, the Commission has them in place because the agency—which has personal jurisdiction over all executive-branch and legislative-branch officials, employees, and contractors—does not have the resources to conduct a full investigation for every complaint it receives.

II. Referral of Ms. Whitlock’s 2020 financial disclosure claims and Ms. Dow’s motion to dismiss to the General Counsel

Ms. Whitlock also claims that Ms. Dow violated the Financial Disclosure Act because Ms. Dow’s financial disclosure statements from 2017 to 2020 were allegedly deficient. *See* Compl. Description, at 6; Exs. J-K. In particular, Ms. Whitlock claims that Ms. Dow violated the Financial Disclosure Act because Ms. Dow’s financial disclosure statements failed to report: (i) income derived from Appletree Educational Center; (ii) “areas of interest that might affect a legislator’s official acts;” (iii) membership on for-profit boards; and (iv) state agencies either to which Appletree sold services or before which Ms. Dow represented or assisted Appletree in connection with Appletree’s business. *See* Compl. Description, at 6; Exs. J-K. While the Commission lacks jurisdiction to review conduct occurring before July 1, 2019 (and so cannot adjudicate claims based on Ms. Dow’s 2017, 2018, and 2019 financial disclosure statements), Ms. Dow signed her 2020 financial disclosure statement on January 30, 2020, and filed it the following day. *See* Compl., Ex. J. Consequently, the Commission has jurisdiction for Ms. Whitlock’s claim that Ms. Dow violated Section 10-16A-3 of the Financial Disclosure Act because her 2020 financial disclosure statement was allegedly deficient. *See* NMSA 1978, § 10-16G-9(A) (providing the scope of the Commission’s jurisdiction).²

Ms. Dow contests this allegation, arguing that Ms. Whitlock’s “complaint fails to state a cause of action.” *See* Mot. to Dismiss, at 5. Under the State Ethics Commission Act and the Commission’s rules of procedure, motions to dismiss for failure to state a claim are reviewed by the State Ethics Commission’s General Counsel and ultimately decided by a hearing officer. *See* 1.8.3.10(C) & 1.8.3.11(A)-(B) NMAC; *see also* NMSA 1978, § 10-16G-10(D)-(E). Accordingly, I am referring to the General Counsel both: (i) Ms. Whitlock’s claims that Ms. Dow violated Section 10-16A-3 of the Financial Disclosure Act and Section 10-16-3 of the Governmental Conduct Act because her 2020 financial disclosure statement was allegedly deficient; and (ii) Ms. Dow’s motion to dismiss those claims. *See id.*

This is what happens next: The General Counsel will review Ms. Dow’s motion to dismiss the 2020 financial disclosure claims and make a recommendation on the motion to a Commission hearing officer. *See* 1.8.3.11(B) NMAC. Based on the General Counsel’s recommendation, the hearing officer may grant the motion and dismiss Ms. Whitlock’s claims, or deny the motion, in which case the General Counsel shall proceed with an investigation. *See id.* All parties will be informed of the hearing officer’s action.

²In her complaint, Ms. Whitlock also alleges that Ms. Dow’s failure to make adequate disclosures on her 2020 financial disclosure statement establishes a violation of not only Section 10-16A-3 of the Financial Disclosure Act but also Section 10-16-3 of the Governmental Conduct Act. *See* Compl. Description, at 6-7. The Commission also has jurisdiction for this tag-along Governmental Conduct Act claim based on Ms. Dow’s alleged “fail[ure] to disclose requirement information.” Compl. Description, at 7; *see* NMSA 1978, § 10-16G-9(A) (providing the scope of the Commission’s power to adjudicate administrative complaints).

III. Ms. Dow's allegations that Ms. Whitlock and others violated the Campaign Reporting Act in relation to the administrative complaint

Last, in her motion to dismiss, Ms. Dow alleges several violations of the Campaign Reporting Act by her political opponents. *See* Mot. to Dismiss, at 6-10. First, Ms. Dow alleges that Ms. Whitlock violated the Campaign Reporting Act for failing to disclose contributions to her campaign from Grindstone Research, LLP, the organization that allegedly submitted Inspection of Public Records Act requests to state agencies for documents relating to contracts awarded to Appletree Educational Center. *See* Mot. to Dismiss, at 7-9. Second, Ms. Dow alleges that although the New Mexico Senate Democrats reported \$12,000 in expenditures to Grindstone Research, neither the Senate Democrats nor Ms. Whitlock reported any contributions from the Senate Democrats to Ms. Whitlock. *Id.* at 9. Third, Ms. Dow alleges that, although Ms. Whitlock's campaign reported \$3,527.52 from the Egolf Speaker Fund, the Brian Egolf Speaker Fund did not report any contributions to Ms. Whitlock. *Id.* Ms. Dow therefore asserts that, "from the circumstances surrounding her planned late ethics complaint . . . Karen Whitlock is the one who has violated the law." *Id.* After alleging these violations in her motion to dismiss, Ms. Dow asks the Commission to "initiate a proceeding to address . . . undisclosed expenditures and contributions." *Id.* at 10.

A respondent's allegations, made in a motion to dismiss, that the *complainant* violated the law neither constitute a separate administrative complaint nor guarantee the Commission's investigation. The Commission does not have a rule of procedure that allows respondents to file counterclaims, much less in the vehicle of a motion to dismiss. *See* 1.8.3 NMAC. Under the State Ethics Commission Act and the Commission's rules of procedure, any person (including a respondent to a pending complaint) may file a sworn and notarized complaint with the Commission. *See* NMSA 1978, § 10-16G-10(A)-(B); 1.8.3.9 NMAC. The filing of a sworn and notarized complaint through the Commission's proceedings portal is the proper way to initiate an administrative proceeding before the State Ethics Commission. *See id.*

For information on the Commission's upcoming meeting and instructions on how to attend, please consult www.sec.state.nm.us/transparency. Thank you for contacting the State Ethics Commission.

Very truly yours,

/s/ Jeremy Farris
Jeremy D. Farris
Executive Director
State Ethics Commission

cc: Walker Boyd, General Counsel, State Ethics Commission, via email:
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