

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 20-73

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF: TOM FLOWER

This matter comes before the Independent Ethics Commission (“Commission” or “IEC”) on a complaint filed by James McMahon (“Complainant”) against Tom Flower, a commissioner for the Custer County Board of Commissioners (“BOCC”). Complainant alleged various ethical violations surrounding Mr. Flower’s votes on official BOCC business that involved his wife’s employment. In an Order finding a portion of the complaint non-frivolous and a subsequent Notice of Issues for Hearing, the Commission narrowed the issues for hearing to an alleged conflict of interest under sections 24-18-103 and 24-18-109(3)(a), C.R.S., which the Commission has jurisdiction over pursuant to section 5(1) of Article XXIX of the Colorado Constitution.

On March 15, 2022, the Commission held an evidentiary hearing and considered legal arguments and evidence presented by the parties. For the reasons set forth below, the Commission finds that Mr. Flower violated section 24-18-109(3)(a), C.R.S., when he voted in favor of overtime pay for his wife, a county employee, and attempted to influence the decisions of other members of the governing body in voting on the matter. A majority of the Commission finds that a monetary penalty is warranted pursuant to Colo. Const. art. XXIX § 6.¹

I. Findings of Fact

1. Mr. Flower has served as a Custer County commissioner since November 2017.
2. The BOCC is the only entity that has the authority to set Custer County’s budget, or, if an agency or department has overspent their budget, determine whether that agency or department can be reimbursed.
3. In Custer County, the members of the BOCC also constitute the Custer County Board of Health (“BOH”), which oversees the Custer County Public Health Agency (“CCPHA”).

¹ Commissioner Mercer joins the majority as to Parts I, II(a), and II(b), and dissents as to part II(c) of this opinion.

4. Mr. Flower's wife, Cindi Flower, is an employee of the CCPHA, and was hired in July 2019 to be CCPHA's emergency planning and response coordinator. She is paid on an hourly basis.

5. CCPHA's role was relatively limited until the COVID-19 pandemic hit Custer County in 2020. With the pandemic, the workload and controversy over public health measures became overwhelming. As a result, the public health director resigned in summer 2020. Shortly before or concurrent with her resignation, the public health director requested overtime pay for CCPHA's three remaining employees.

6. On August 12, 2020, Mr. Flower emailed CCPHA employees Rhonda Martin and Ms. Flower, requesting that they "submit hours, by month, that you have worked on COVID issues since March 1, 2020."

7. At an August 28, 2020 BOCC meeting, Mr. Flower presented to the other two BOCC commissioners a proposal to pay the CCPHA employees, including Ms. Flower, for hours worked in response to the COVID-19 pandemic that exceeded CCPHA's previous budget from the county's general fund. The proposal included time-and-a-half pay for overtime.

8. There was significant discussion among the commissioners at the BOCC meeting about whether to submit CCPHA employees' overtime hours to the COVID Relief Fund Committee, a committee created to consider and approve requests for the federal CARES Act funding. According to Mr. Flower, the county could receive reimbursement in CARES Act dollars for COVID-related expenditures, including CCPHA employees' overtime.

9. The other two commissioners, Mr. Printz and Mr. Canda, expressed their opinions that the County should first seek payment of those overtime expenses through the COVID Relief Fund Committee before voting to take money out of the general fund.

10. Mr. Flower disagreed with the other commissioners, saying, "we're talking about paying county employees for work performed on behalf of the county—that's a county responsibility... Three people worked outside of their regular job, these are hours they worked and did not get paid for at all."

11. The other commissioners continued to disagree with Mr. Flower, citing concerns with: (1) verifying that the hours worked were COVID-related, (2) ensuring such hours merited overtime pay, and (3) asserting that if those hours were qualifying expenses under the CARES

Act, such hours were an additional financial burden that the CARES Act funding was intended to alleviate for Custer County.

12. Mr. Flower replied in part, “I don’t want the committee telling us you should or shouldn’t pay your county employees.” Mr. Flower took a firm position that it was the County’s responsibility to pay the CCPHA employees immediately, despite the objections from his fellow commissioners that the BOCC hadn’t verified that the hours in question were overtime hours above and beyond the employees’ regular job duties.

13. Mr. Flower ultimately convinced his fellow commissioners that they should approve the submitted expenses, pay those expenses out of the general fund, and seek reimbursement from the COVID Relief Fund Committee at some later date. The BOCC passed a unanimous motion approving up to \$2,300 in overtime pay for the CCPHA employees.

14. While there was no disagreement among the commissioners that CCPHA employees should ultimately be paid for overtime worked, they did not review or verify the hours submitted on a per-employee basis. Mr. Flower presented the reimbursement request to the BOCC as a lump-sum proposal.

15. Of the \$2,131.08 in overtime ultimately paid from the Custer County general fund to Ms. Flower and two other CCPHA employees, \$1,434.38 was paid to Ms. Flower.

II. Conclusions of Law

a. Jurisdiction

16. Mr. Flower is a Custer County commissioner and thus, a “local government official” within the meaning of Section 2 of Article XXIX of the Colorado Constitution. The Commission has jurisdiction over Mr. Flower pursuant to Section 5(1) of Article XXIX.

17. Mr. Flower was subject to the Commission’s jurisdiction at the time of the events in question.

18. Mr. Flower is subject to the standards of conduct set forth in sections 24-18-103 and 24-18-109(3)(a), C.R.S. *See* Colo. Const. art. XXIX § 5(1).

19. The Commission has jurisdiction over ethical “standards of conduct”, which the Colorado Supreme Court has defined as those standards of conduct which “relat[e] to activities that could allow covered individuals to improperly benefit financially from their public employment,” including those set forth in part 1 of article 18. *Gessler v. Smith*, 419 P.3d 964, 972, 975 (Colo. 2018).

b. Conflict of interest violation

20. Section 24-18-109(3)(a), C.R.S., provides that a member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon, and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.

21. Violation of any act enumerated in section 24-18-109, C.R.S., constitutes a breach of the public trust, as set forth in section 24-18-103, C.R.S. § 24-18-109(1), C.R.S.

22. Mr. Flower conceded that his participation was not necessary for the BOCC to act or to achieve a quorum, and thus the exception to § 24-18-109(3)(a) did not apply. *See* § 24-18-109(3)(b), C.R.S.

23. Although section 24-18-109, C.R.S., imposes criminal liability for proof of a violation beyond a reasonable doubt, the Commission applies a preponderance of the evidence standard of proof for ethical violations unless it determines that a higher standard is warranted. Colo. Const. art. XXIX, § 5(3)(e).

24. The Commission finds that a preponderance of the evidence standard is warranted in this case.

25. The Commission finds that, at the time of the August 28, 2020 BOCC meeting, Mr. Flower had a “personal or private interest” in the payment of his wife’s overtime hours, based on their spousal relationship and the fact that Mr. Flower stood to benefit financially from approval of that overtime pay.

26. Mr. Flower failed to disclose his personal or private interest in the matter, in violation of § 24-18-109(3)(a), C.R.S. Contrary to Mr. Flower’s argument at hearing, disclosure of one’s personal or private interest in a matter is not discretionary under the statute. “Shall disclose” is mandatory. § 24-18-109(3)(a), C.R.S. Mr. Flower was required to disclose both that one of the CCPHA employees was his spouse and how he would benefit from the vote. He did neither.

27. The Commission finds unconvincing Mr. Flower’s defense that the other commissioners knew Ms. Flower was one of the CCPHA employees. As Complainant noted at hearing, the disclosure requirement is not merely for the benefit of other voting members of the

body. The disclosure requirement benefits the public and serves the public interest in informing voters as to the interests of their elected representatives in the public business before them.

28. Mr. Flower failed to recuse himself from consideration of the matter, in violation of § 24-18-109(3)(a), C.R.S. It is undisputed that Mr. Flower voted on approving the overtime pay for the CCPHA employees. His wife was the primary beneficiary of that vote.

29. Additionally, Mr. Flower attempted to influence the decisions of the other BOCC members in voting on the matter, also in violation of § 24-18-109(3)(a), C.R.S. Indeed, Mr. Flower *did* influence his fellow commissioners' votes. Initially, the other commissioners sought to submit the overtime request to the COVID Relief Fund Committee, not only for reimbursement, but also for verification. Mr. Flower's strong advocacy was the deciding factor in bringing the overtime request directly and immediately to the BOCC, as well as the BOCC's decision to approve that request without further scrutiny.

30. Whether or not the CCPHA employees were entitled to overtime pay is not a consideration under the statutory provisions. The statutory standards of conduct that apply to Mr. Flower require recusal if a member of the governing body has a personal or private interest in a matter pending before the governing body, regardless of the legitimacy of the matter.

31. Mr. Flower violated § 24-18-109(3)(a), C.R.S., in multiple respects: By failing to disclose his personal or private interest in the matter, by failing to recuse himself from the matter, and by attempting to influence his fellow commissioners in voting on the matter. Mr. Flower's actions constitute a breach of the public trust for private gain pursuant to § 24-18-103, C.R.S.

c. Penalty

32. The penalty for breach of the public trust for private gain pursuant to Section 6 of Article XXIX is "double the amount of the financial equivalent of any benefits obtained by such actions." Colo. Const. art. XXIX, § 6.

33. To assess a penalty, the Commission must find that: (1) Mr. Flower's actions constituted a breach of the public trust for private gain; and (2) the benefit to Mr. Flower was "obtained by such actions." *Id.*

34. As discussed above, Mr. Flower's violation of § 24-18-109(3)(a), C.R.S. constituted a breach of the public trust for private gain.

35. Under the second part of the penalty provision, the words “obtained by such actions” are determinative in deciding to assess a penalty. In Complaint 18-08, a county commissioner voted on a consent agenda that included reimbursement to herself for legal fees she incurred while defending another ethics complaint before this Commission. In declining to assess a penalty, the Commission noted: (1) the Weld County Board of County Commissioners had already agreed to pay her legal fees (with her recused); (2) Weld County had an interest in the litigation as a county body and had advocated payment of her legal fees on that basis; and (3) the consent agenda would have passed, even without the commissioner’s involvement. Complaint 18-08 at 6. The Commission concluded, “In short, there is an insufficient causal relationship between Ms. Cozad’s breach of trust and the payment of her legal fees.” Similarly, in Complaint 17-31, the Commission found no penalty when a town trustee voted in favor of his wife’s bonus, but his vote had no effect because the bonus had previously been approved prior to his tenure.

36. This case is distinguishable, specifically because of the causal connection between Mr. Flower’s actions and the benefit to his spouse. Unlike in Complaint 18-08, it appears the vote *would not* have passed, but-for Mr. Flower’s involvement. And, unlike in Complaint 17-31, Mr. Flower’s vote and advocacy undoubtedly had an effect. Mr. Flower brought the matter of overtime pay for CCPHA employees to the BOCC. Mr. Flower advocated for payment of that overtime pay by the BOCC. And, but-for Mr. Flower’s actions, the matter would have gone to the COVID Relief Fund Committee, which may or may not have approved (or recommended) payment of the overtime pay at the rates and for the amounts requested. Whether those overtime hours would have ultimately been reimbursed without scrutiny or modification is purely speculative. And, certainly, the Flowers obtained a benefit in Ms. Flower being paid immediately, rather than at some unknown point in the future.

37. Accordingly, the Commission finds that the benefit to Ms. Flower of receiving \$1,434.38 in overtime pay was obtained by Mr. Flower’s actions, and imposition of a penalty of \$2,868.76 is therefore mandatory under § 6 of Article XXIX.

THEREFORE, the Commission finds by a preponderance of the evidence that Mr. Flower violated section 24-18-109(3)(a), C.R.S. The Commission finds that a penalty of \$2,868.76 is warranted.

THE INDEPENDENT ETHICS COMMISSION

Elizabeth Espinosa Krupa, *Chair*

Selina Baschiera, *Vice-Chair*

Annie Kao, *Commissioner*

Sarah Mercer, *Commissioner*, joining as to Parts I, II.a., and II.b., and dissenting as to Part II.c.

DATED: May 16, 2022