

BEFORE THE INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO
Complaint No. 17-18

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF COMPLAINT 17-18,
VICKI MARBLE, Respondent

This matter comes before the Independent Ethics Commission (“Commission”) on a complaint filed by Sarah Mann (“Complainant”) alleging violations of both the statutory gift ban, section 24-6-203(3.5), C.R.S.; and the gift ban provisions of Section 3 of Article XXIX of the Colorado Constitution (“gift ban”). Complainant alleges that state Senator Vicki Marble (“Sen. Marble”) violated these provisions by allowing Extraction Oil & Gas (“Extraction”) to pay for an event that Sen. Marble hosted.

The Commission finds that Sen. Marble’s receipt of the gift constitutes an ethical violation under Article XXIX of the Colorado Constitution. Pursuant to section 6 of Article XXIX, the Commission assesses a penalty of double the cost of the event, or \$2,242.36.

Background

Complainant, a resident of Broomfield, attended an event regarding oil and gas development in Broomfield. Complainant believed the event was hosted by Sen. Marble. After the event, Complainant witnessed an Extraction representative pay for the event. Thereafter, she filed a complaint with the Commission. The Commission found the complaint non-frivolous and proceeded to investigate the complaint. In her written response to the complaint, Sen. Marble asserted that her only involvement in the event was to propose the original suggestion to Extraction for a community meeting and to moderate the meeting. Sen. Marble argued that it was in fact Extraction’s event, and that she merely agreed to host “in the hope that her presence ... would attract more attendees.”

The Commission's Notice of Issues for Hearing included potential violations of: (1) Section 3(2) of Article XXIX (gift ban); (2) Section 5(1) of Article XXIX (other standards of conduct and reporting requirements), specifically, section 24-6-203(3.5)(a) (prohibited gifts, loans, pledges, advances, guarantees, payments); and (3) Section 1(1)(a)-(c) of Article XXIX (justifiable impression of public trust violation). In its discretion, the IEC dismissed the third issue prior to hearing and the second issue after deliberations.¹

On January 8, 2018, the Commission held an evidentiary hearing. Thereafter, the parties submitted written closing arguments and the Commission spent multiple meetings holding deliberations. For the reasons set forth below, the Commission has determined that Extraction's payment for the costs of the event was a gift to Sen. Marble within the meaning of section 3(2) of Article XXIX, and that none of the enumerated exceptions apply.

I. Findings of Fact

1. Sen. Marble is a member of the Colorado General Assembly and represents District 23, which consists of Broomfield, Larimer, and western Weld counties.

2. At the time of the event, Extraction and the city of Broomfield were in negotiations regarding oil and gas development issues. The Broomfield City Council had considered a moratorium on oil and gas drilling, but a recent Colorado Supreme Court decision had held that local regulation of oil and gas drilling was preempted by state law.

3. Sen. Marble's office had been receiving a significant number of phone calls and emails from constituents concerned about fracking in or near the city of Broomfield. Her office had held meetings with groups representing those concerned constituents. Sen. Marble testified that some constituents had asked her to support a statewide ban on fracking. Her legislative aide, Sheryl Fernandez, testified that Sen. Marble's office was receiving about 100 emails a day from constituents concerned about fracking in Broomfield.

¹ With regards to the second issue, the Commission expressly finds that it does not have jurisdiction to impose criminal penalties. The Commission's jurisdiction is limited to imposing a civil penalty for any violation of section 24-6-203(3.5), C.R.S. In its discretion, the Commission dismissed the statutory violation because the penalty for such violation would be the same as that imposed under section 6 of Article XXIX for violation of the gift ban. *See* Colo. Const. art. XXIX, § 6.

4. On February 1, 2017, Sen. Marble held a meeting at her office with Extraction representatives and two Broomfield city councilmembers to discuss Extraction's drilling plan, which included portions of Broomfield.

5. Ms. Fernandez and Brian Cain, Extraction's public relations representative, were both in attendance at the February 1, 2017 meeting.

6. During the February 1, 2017 meeting, Sen. Marble suggested that Extraction hold a community meeting in Broomfield to provide the perspectives of other localities that had previously dealt with oil and gas drilling in their communities, as well as the perspectives of Extraction representatives.

7. On February 7, 2017, Sen. Marble sent a letter to Broomfield's city manager, Charles Ozaki, who had not been in attendance at the February 1, 2017 meeting. The letter outlined terms of a supplement to a Memorandum of Understanding ("MOU") between Broomfield and Extraction. Specifically, the letter contained Extraction's concessions for drilling near the city of Broomfield, in exchange for the Broomfield City Council voting no on a continued moratorium on oil and gas development.

8. In her February 7 communication with Mr. Ozaki, Sen. Marble expressed her desire to "gain as much information as possible from all stakeholders and work to come up with a compromise that works for our neighborhoods and industry, as oil and gas development plays an important part in our communities." Sen. Marble also referenced the fact that she had "received calls, emails and in-person visits from many residents in Broomfield, specifically in Anthem Ranch, Anthem Highlands, and Wildgrass."

9. After the February 1, 2017 meeting, Ms. Fernandez and Mr. Cain worked together to set up an event in Broomfield.

10. Ms. Fernandez checked Sen. Marble's calendar to determine Sen. Marble's availability.

11. Ms. Fernandez reported to Sen. Marble and to Mr. Cain that she had "booked" C.B. & Potts, a Broomfield restaurant, for February 15, 2017 at 6:00 p.m.²

² At hearing, Ms. Fernandez testified that she did not in fact book the event space, but instead confirmed availability, perhaps asked C.B. & Potts to "hold" the room, and then informed Mr. Cain that the space would be available on February 15, 2017. The Commission finds this discrepancy in the evidence to be immaterial.

12. On February 3, 2017, Mr. Cain emailed Ms. Fernandez, “Sheryl, would you like to touch base on this next week? What can or should I be doing to help this effort?”

13. On February 4, 2017, Ms. Fernandez emailed Mr. Cain, “how much do you want or can you spend? We can do drink tickets and food???” [sic].

14. On February 5, 2017, Ms. Fernandez emailed Sen. Marble, “Hey, can you send me the list of people you think would come to the town hall we discussed with Brian and Eric from Extraction? I have booked us CB & Potts in Broomfield on Wednesday, February 15th starting at 6pm. I want us to get all details to Extraction so they can get it advertised”.

15. Sen. Marble responded, “I will contact the people from Windsor and Weld to see if they can make the 15th”.

16. On February 6, 2017, Ms. Fernandez responded to an email from Mr. Cain suggesting that both Mr. Cain and Sen. Marble reach out to speakers, “She [Sen. Marble] is making calls right now to people...”

17. On February 7, 2017, Ms. Fernandez emailed Mr. Cain, “[p]lease let me know how you would like us to market this on our end. There is the ability for drink tickets and food.”

18. Ms. Fernandez testified that she created, and Sen. Marble approved, an invitation that read:

Senator Vicki Marble
hosts
“Been There Done That”
Wednesday, February 15, 2017
@
CB & Potts – Flatirons
555 Zang Street
Broomfield, CO 80020

Starting at 6:00pm

Join the Senator for a presentation of facts regarding the proposed oil and gas development in Broomfield, and how other communities in Colorado have addressed these important issues.

To RSVP Contact: Sheryl Fernandez at [REDACTED]-[REDACTED]-[REDACTED] or
[REDACTED]@[REDACTED].com

19. Ms. Fernandez coordinated with Mr. Cain to market the event, invite speakers, and create a list of invitees.

20. Ms. Fernandez published the event on Sen. Marble's campaign website.
21. Ms. Fernandez circulated an email to the Broomfield County GOP email listserv, with both the invitation and the text, "Sent on behalf of Senator Vicki Marble. You are invited to attend a townhall [sic] with Senator Marble on Wednesday February 15, 2017. Please see the invite below."
22. Sen. Marble, Ms. Fernandez, and Mr. Cain testified that the event was marketed using Sen. Marble's name in order to get opponents to attend and/or to draw more people in. Mr. Cain testified that Extraction had already held eight to nine community meetings in Broomfield to try to get the word out about its project, but felt that misinformation from anti-fracking activists was dominating the conversation.
23. The day before the event, Ms. Fernandez emailed Mr. Cain an agenda of the event, which reflected that the event would begin with Sen. Marble doing introductions and "set[ting] ground rules", proceed to a panel of local government officials and Extraction representatives moderated by Sen. Marble, and end with a question-and-answer session.
24. Sen. Marble testified that her involvement was limited to contacting one local government official, whom she believed would be a good panel speaker, and looking at the invitation that Ms. Fernandez drafted prior to its dissemination.
25. The event occurred in a meeting room at C.B. & Potts, and a buffet of appetizers and two drink tickets per attendee were provided.
26. The event was open to the public, and there was no charge to attend.
27. Approximately 75 people attended the event, including opponents of Extraction's drilling plans.
28. At the beginning of the event, Sen. Marble invited attendees to help themselves to food and drink.
29. There was no disclosure to attendees, either before or during the event, that Extraction was paying for the event.
30. Sen. Marble introduced the issues that would be addressed and introduced the members of the panel, which included the former mayors of Erie and Windsor, a representative of VITAL (a pro-fracking group), and a representative of Water Valley (a developer that had built a housing development in close proximity to fracked wells).

31. In-between speakers, Sen. Marble discussed news articles and studies regarding the safety of fracking.

32. During a question and answer period, attendees directed questions to Sen. Marble, as well as to the speakers and an Extraction executive.

33. Complainant discovered that Extraction paid for the event when she personally observed Mr. Cain provide a waitress with his credit card while Complainant was speaking with Mr. Cain and other Extraction representatives about an hour after the event had concluded.

34. Mr. Cain testified that he had paid for the event on Extraction's behalf and that Extraction had reimbursed his public relations firm, Hill & Knowlton, for the cost.

35. The cost of the event consisted of the room rental charge, food, drink, gratuity and tax; a total of \$1,121.18.

36. The preponderance of the evidence demonstrates that Sen. Marble was aware that there would be costs associated with the event. At the very least, Sen. Marble had constructive knowledge, given the customary costs associated with such events. Sen. Marble knew that Ms. Fernandez was working with Mr. Cain on planning the event and where it would be held. She also clearly had actual knowledge that food and drinks were provided. Sen. Marble invited attendees to help themselves to food and drinks at the beginning of the event.

37. The preponderance of the evidence also demonstrates that Sen. Marble had at least constructive knowledge that Extraction paid for the event. That evidence includes her knowledge that Ms. Fernandez was working with Mr. Cain to plan the event, the fact that her office did not pay for the event, and several emails between Ms. Fernandez, Sen. Marble, and Mr. Cain, including Ms. Fernandez's email to Mr. Cain inquiring as to how much Extraction could spend on food and drink.³

³ Our conclusion would be no different if Ms. Fernandez was the only person with actual or constructive knowledge that there would be costs and that Extraction was covering those costs. Ms. Fernandez was acting in her capacity as Sen. Marble's legislative aide, and Sen. Marble is responsible for her staff. Sen. Marble had authorized Ms. Fernandez to use her email account and knew that Ms. Fernandez was planning the event.

II. Conclusions of Law

a. Jurisdiction

38. Sen. Marble is a member of the General Assembly. The Commission has jurisdiction over Sen. Marble pursuant to Section 2(1) of Article XXIX. Colo. Const. art. XXIX, § 2(1).

39. Sen. Marble was subject to the Commission’s jurisdiction at the time of the events in question.

40. Sen. Marble is subject to the gift ban found in Section 3 of Article XXIX. Colo. Const. art. XXIX, § 3(2).

b. Gift Ban

41. Section 3 of Article XXIX prohibits covered individuals from soliciting, accepting, or receiving any gift or other thing of value worth more than \$50.00, adjusted to account for inflation to \$59.00, without providing lawful consideration of equal or greater value in return. Colo. Const. art. XXIX, § 3(2).

42. In Advisory Opinion 17-03, the Commission analyzed a two-part request from a state representative. The first part asked whether the state representative could attend, eat food at, and moderate a community meeting organized as a public forum, which was hosted by a private citizen. The second part asked whether Article XXIX prohibited the representative’s acceptance of a venue and snacks for town hall meetings in his official legislative capacity, if such meetings were paid for by a private citizen.

43. In addressing the first part of the representative’s request, the Commission found that his attendance at, and participation in, the community meeting would not constitute a gift under section 3(3)(e) of Article XXIX. That exception exempts from the gift ban “[a]dmission to, and the cost of food or beverages consumed at, a reception, meal, or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program”. Colo. Const. art. XXIX, § 3(3)(e).

44. Specifically, the Commission relied on the facts that the representative was one of many participants and, “[e]ven if the [representative] declines the invitation to the meeting, the meeting could nonetheless continue with the other civic leaders in attendance and with a different moderator.”

45. Further, on the invitation to the event submitted with the advisory opinion request, the actual sponsor of the event—the private citizen—is clearly listed as the host.

46. In addressing the second part of the representative’s request, the Commission determined that it *would* be a violation of the gift ban for the representative to accept payment from a private citizen for a venue and snacks for a town hall meeting if the cost of the event were greater than the gift ban limit of \$59.00. Such event would not fall under the Section 3(3)(e) exception.

47. Although advisory opinions are not binding precedent, Advisory Opinion 17-03 provides a helpful framework for distinguishing between (1) a meeting in which a covered individual appears to speak as part of a scheduled program, which would fall within the exception in Section 3(3)(e) of Article XXIX; and (2) the more generic category of meetings in which a covered individual serves as a host but outsources the cost of the meeting to a third party. As set forth below, the Commission finds that the event in this case falls within the latter category.

c. Whether the Event Was a Gift to Sen. Marble

48. Under section 3(2) of Article XXIX, a member of the General Assembly may not be the “beneficiary of a gift or thing of value” over the \$59.00 limit.

49. An event may constitute a gift when a private party pays for the event on behalf of a covered individual. *See* Advisory Opinion 17-03.

50. Throughout these proceedings, Sen. Marble has argued that the event was not a “thing of value” because she received no benefit from hosting the event. She argued that Extraction and/or the public were instead the beneficiaries of the event.

51. The Commission finds that the public will likely always benefit from meetings regarding issues of public importance that are open to the public. The Commission’s inquiry into whether an event constitutes a gift does not end merely because there was a public benefit.

52. Similarly, any public relations benefit obtained by Extraction does not foreclose the conclusion that the event was a gift to Sen. Marble. More than one party may benefit from an event.

53. Sen. Marble benefitted from the event by receiving a forum, free of charge, at which she was able to address her constituents regarding oil and gas drilling in their community. The issue was germane to her role as a senator—indeed, she was receiving around 100 emails a

day from constituents regarding fracking in Broomfield, and she had been asked to introduce legislation to ban fracking by several constituents. She received food and drinks, free of charge, to provide to her constituents. Sen. Marble spent a substantial amount of time at the event presenting her views on fracking, Sen. Marble's legislative aide spent a substantial amount of time planning the event, and Sen. Marble's name was the central draw of the event. Further, the event was published on Sen. Marble's campaign website, she was listed as a host on the invitation, and she presided as the host during the event.

54. The preponderance of the evidence demonstrates that Sen. Marble was, as the host, a necessary party to the event and that she was slated to moderate. This evidence includes the emails preceding the event, the plain language of the invitation flyer and the email to the Broomfield County GOP listserv, and the central role Sen. Marble played during the event, as evidenced by a video recording of the event. Both Ms. Fernandez and Mr. Cain testified that Sen. Marble was the central draw to the event, and the invitation supports that testimony. The fact that Sen. Marble was a necessary party reinforces that it was Sen. Marble's event.

55. The testimony that Ms. Fernandez was acting outside her role as legislative aide to Sen. Marble in planning the event was not credible. The preponderance of the evidence demonstrates that Ms. Fernandez was acting as a legislative aide to Sen. Marble during her planning activities. That evidence includes Ms. Fernandez's attendance at the February 1, 2017 meeting, the substance of emails preceding the February 15, 2017 event, the fact that Ms. Fernandez was using Sen. Marble's email address, [REDACTED]@[REDACTED].com; and the fact that Ms. Fernandez signed all emails "*Sheryl Fernandez*[,] Aide for Senator Marble". Sen. Marble was kept informed as to Ms. Fernandez's planning, and she reviewed the event invitation before it was sent out. Ms. Fernandez was clearly acting within her capacity as legislative aide and was planning the event with Sen. Marble's knowledge and approval. This evidence further supports our finding that the event was Sen. Marble's event.

56. The fact that Extraction was not disclosed as the entity paying the costs of the event reinforces that Sen. Marble was the recipient of a gift: She received a forum to address the public without deterring the public's attendance by disclosing the presence and sponsorship of the event by Extraction. The preponderance of the evidence demonstrates that Extraction's payment of the costs of the event were a gift to Sen. Marble.

57. Payments for the cost of an event are a “thing of value” within the meaning of section 3(2) of Article XXIX. Here, the event provided Sen. Marble the opportunity to interface with constituents and address concerns by providing a pro-oil and gas development perspective to her constituents. As demonstrated by her letter to Mr. Ozaki, Sen. Marble had a vested interest in brokering the MOU between Broomfield and Extraction. Her office had been fielding a significant number of communications from concerned citizens. The event was advertised as a “townhall with Senator Marble”. Regardless of whether Extraction and/or the public also benefitted from the event, Sen. Marble was able to hold an event for her constituents and get her message out to her constituents, all without paying for the costs of the event she hosted. Section 3 of Article XXIX prohibits outsourcing the costs of such events to private donors.

58. The fact that Sen. Marble is term-limited and will not be seeking reelection does not preclude our finding that payment of the costs of the event was a gift to Sen. Marble. Members of the General Assembly are subject to the gift ban regardless of whether they are seeking reelection. Conducting events in one’s legislative capacity for one’s constituents provides a benefit to the elected official, regardless of whether the official will be seeking those constituents’ votes during the next election cycle.

59. Sen. Marble raised concerns regarding whether there would be a chilling effect on the ability of public officials to interface with constituents if the event was found to violate the gift ban. Even if the Commission were charged with taking such concerns into account, the Commission holds that the exception found in Section 3(3)(e) of Article XXIX contemplates, and addresses, that concern. Under Section 3(3)(e), public officials may participate in public discussion—and even accept free admission and meals—at events hosted by private parties. In those scenarios, the sponsor is clearly disclosed and the public official is a speaker at the event. Events that fit within the Section 3(3)(e) exception do not present the same concerns as those where a public official outsources to a third party the costs of an event that they are holding for their constituents.

THEREFORE, the Commission finds by a preponderance of the evidence that Sen. Marble accepted a gift in violation of Section 3(2) of Article XXIX. Pursuant to Section 6 of Article XXIX, Sen. Marble is ordered to pay a penalty of double the costs of the event, or \$2,242.36.

The Independent Ethics Commission

Jo Ann Sorensen, *Vice Chair*

Matt Smith, *Commissioner*

April Jones, *Chair, dissenting*

William Leone, *Commissioner, dissenting*

DATED: June 4, 2018

Commissioner Gary Reiff participated in the decision and voted to find a violation and assess a penalty at the Commission's April 9, 2018, meeting, but did not participate in adopting the written opinion.

Commissioner Bill Leone, DISSENTING. Chairwoman April Jones joins in the dissent.

I respectfully dissent from the majority opinion in this case for the following reasons.

First, the majority departs from precedent that is not controlling, but is persuasive. In Advisory Opinion 17-03 we dealt with a similar issue involving, ironically, the renewable energy industry. There, we found that it would not be a violation of the gift ban for a private party sympathetic to the renewable energy industry to pay for an event at which a state representative appeared and spoke as the moderator. There, like here, the event was preceded by a flyer that announced that the representative would moderate the event. There, like here, the representative received all the intangible benefits of hosting an event that discussed an issue of importance to his constituents, being seen as actively working towards a solution, and advocating a point of view that was likely well received by his constituents.

Our decision in Advisory Opinion 17-03 was driven by the view that absolutely nothing in Article XXIX prevents interested citizens from holding public meetings, even when there is a cost involved. Nor does Article XXIX prevent such citizens from inviting public officials to speak at those meetings. It is hard to imagine a better or more appropriate form of political participation. Amendment XXIX explicitly allows a covered individual to attend events where food is to be served and partake of the food as long as he or she is scheduled to speak as part of the event. We reached that decision despite the fact that a third party paid for the room and the food, advertised the event using the representative's name, and had a clear point of view that he wished to convey to the public.

The only material difference between the event considered in Advisory Opinion 17-03 and this case is that, there, the "host" of the event was clearly disclosed to be Mr. Szabo, a concerned citizen. In contrast, here, Senator Marble was listed as the "host" of

the event and there was no public disclosure that Extraction would be paying for the event. I share the majority's view that disclosure would have been better. Perhaps adoption of such a rule would even fall within this Commission's authority. However, to date, we have never announced or adopted such a rule. Amendment XXIX is silent about disclosure. Elected officials have had no notice that the Commission would apply such a standard. And, the disclosure or failure to disclose the identity of the person paying for the event does not convert the event into a gift. This is obvious when we look at the second reason that I dissent.⁴

Second, the language of the exception found in Section (3)(3)(e) of Article XXIX undermines the majority's ruling. In that exception, there is no gift to a covered official if the official attends an event sponsored by a for profit organization and consumes food and beverages, as long as the official is scheduled to speak as part of the event. Here, if we were analyzing Senator Marble's own consumption under the gift ban, we would readily find that she was part of a scheduled event and satisfied the requirements of the exception. If it is permissible for an official to consume on his or her own behalf at an event paid for by a for-profit organization where the official is scheduled to speak, why would it violate the Amendment because others attended and consumed food and beverages? It would be anomalous to prohibit indirectly what is authorized directly by Article XXIX. It is not an answer to say that the gift was a gift of the meeting itself. In virtually every case where a for-profit entity schedules an event, the elected official in attendance will receive many indirect benefits from speaking. These benefits include public recognition, the opportunity to influence voters, exposure to potential campaign contributors, and/or recruitment of volunteers. In virtually all of these events, the total cost of the event will exceed the dollar limit for gifts under Article XXIX. However, Article XXIX clearly does not prohibit receipt of the ordinary fruits of public appearances or treat them as gifts. To the contrary, we have often approved of attendance to speak at events that likely cost millions of dollars to stage, or where participation is limited to those who can pay as much as \$250,000 for a seat at the table. In none of those cases have we required disclosure of the name of the person paying for the event. That is because Amendment XXIX was not intended to chill public participation in important issues of the day. Nor was it intended to make it more difficult for elected officials to do their job of outreach, debate, discussion, information gathering, and leadership. The majority's decision creates a distinction between attendance to speak, attendance to host, and

⁴ To be sure, an advisory opinion and a complaint are different things. In the case of an advisory opinion we do not conduct a full investigation; there is no adversarial process, cross examination or briefing as we had here; the tenure of the interaction in an advisory opinion is constructive and consultative. The Commission's function is different. As we have noted on many occasions, the IEC wears many hats including rule maker, regulator, legislator and adjudicator. Therefore, there are risks in treating a decision in one capacity as binding in another. However, here, the principles that underlay Advisory Opinion 17-03 are persuasive and constructive, and following them avoids the appearance that the Commission is result-oriented. The bipartisan composition of both the majority and the dissent convinces me that there is no partisan agenda here.

attendance to moderate that is arbitrary and capricious and bears no relationship to anything in Amendment XXIX. The majority simply grafts onto Amendment XXIX something that is not there and creates confusion about what conduct is permitted or prohibited.

Third, I fear that the majority allowed its disdain for the credibility of certain witnesses to color its view of the case. I share the majority's concern that certain witnesses lacked credibility. However, neither I nor the majority have or could question Senator Marble's personal credibility. Although she is responsible for the activities of her staff, there is no doubt that she was attempting in good faith to try to bring parties with extremely disparate points of view together and was acting in the best traditions of the citizen legislator. She likely had a point of view about fracking and the event can hardly be described as anything other than an event in which industry members, and friendly elected officials, sought to communicate a way to compromise on the issues in a way that would permit continued development of oil and gas resources. But, there is nothing wrong with any of that and Amendment XXIX was not intended to prohibit elected officials from having a point of view or communicating it. Even if I accept every fact recited by the majority as true, which I do, there was not a violation of the "gift" ban. At most, this was an industry sponsored event that leveraged Senator Marble's name and position to attract people to an event where it and she could attempt to persuade them of their point of view.