

BEFORE THE COLORADO INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO

Complaint Nos. 16-02; 17-14

ORDER

IN THE MATTER OF MIKE DUNAFON,
Respondent

This matter comes before the Independent Ethics Commission (“Commission”) on two complaints, Nos. 16-02 and 17-14, filed by M.A.K. Investment Group, LLC (“Complainant”), alleging violations of sections 24-18-109 and 31-4-404, C.R.S. Complainant alleged that Mike Dunafon, mayor of the city of Glendale (“Mayor Dunafon”) violated “other standards of conduct” under Article XXIX, section 5(1) of the Colorado Constitution by voting on matters in which he had a financial interest. Before deciding the merits of the Complaint, the Commission asked the parties to brief the issue of whether the Commission has jurisdiction over Mayor Dunafon, given that the City of Glendale is organized as a home rule municipality under Article XX, section 6 of the Colorado Constitution. The City of Glendale also submitted briefing as an *amicus curiae*.

The Commission finds that it has jurisdiction over Mayor Dunafon. Complainant has presented sufficient evidence that the process provided by Glendale did not “address the matters” set forth in Article XXIX, section 5. Under section 7, a home rule municipality must adopt code provisions or other laws “address[ing] the matters” in Article XXIX in order to be exempt from the IEC’s jurisdiction. Colo. Const. art. XXIX, § 7. In its recent jurisdictional order in Complaint 17-28, *In Re: the Matter of Julie Cozad*, the Commission explained that, if a home rule locality fails to address a core component of Article XXIX, then the locality is not entitled to the exemption set forth in section 7.

There are procedural components to Article XXIX as well as substantive standards of conduct for covered individuals. *See* Colo. Const. art. XXIX, §5(1)-(3). In order to enforce substantive standards of conduct, a home rule locality that purports to exempt itself from the Commission’s jurisdiction must have, at a minimum, a process in place for reporting, investigating, and hearing complaints; as well as an independent decisionmaking body to hear

those complaints. These processes are core components of Article XXIX because, if Glendale has provisions in place prohibiting certain unethical conduct, but does not provide a meaningful and unbiased process for adjudicating complaints against public officials, its substantive ethical standards are toothless. *See Developmental Pathways v. Ritter*, 178 P.3d 524, 534, 534 n.8 (Colo. 2008) (The Commission must “adopt[] rules governing the complaint process before there is any enforcement or threat of enforcement of the provisions[]” of Article XXIX).

Here, the Commission is particularly concerned by the lack of independence of the body deciding the ethics complaint against Mayor Dunafon. Section 5 of Article XXIX provides a stringent framework to ensure the Commission’s independence. The Commission is mindful that home rule localities may not have the resources to create an independent decisionmaking body for the purpose of hearing ethics complaints. In a position statement, the Commission has expressed that the level of independence required for a home rule locality may be significantly lower than the standard to which the Commission is held. *See* Position Statement 16-01 (“[I]ndependence is a functional concept and does not necessarily depend on vesting ethics authority in a body that is distinct from, for example[,] a city council...”). However, to ensure due process, a decisionmaking body acting in a quasi-judicial capacity should be impartial and disinterested. *See City of Manassa v. Ruff*, 235 P.3d 1051, 1056-57 (Colo. 2010).

In considering whether the Glendale City Council was impartial and disinterested, the Commission considers both Glendale’s code provisions and their applicability to the pending complaints. The Glendale City Code provides a process for reporting, investigating, and enforcing complaints. *See* Glendale Code, Ch. 2.14, § 2.14.040(E), (F). Under the Glendale City Code, the City Council is the entity that “may hold a public hearing” and “render findings on nonfrivolous complaints orally or in writing”. *Id.* § 2.14.040(F). In this case, the City Council received a complaint from an entity called Ethics Watch alleging the same conduct complained of in Complaint 16-02—specifically, Mayor Dunafon’s failure to recuse himself from matters pending before the City Council in which Mayor Dunafon allegedly had a financial interest.¹ The city attorney hired an independent investigator to review the allegations. The

¹ Neither Ethics Watch nor Complainant filed a complaint with Glendale regarding the conduct complained of in Complaint 17-14, which alleged that Mayor Dunafon did not recuse himself from voting on a consent agenda item to renew the liquor license for a business which his wife owned.

investigator authored a report to the City Council, determining that the complaint should be dismissed. The City Council voted to dismiss the complaint as frivolous.

In most circumstances, the Commission would likely find that the process set forth in the Glendale City Code is sufficient to ensure that Glendale has “addressed the matters” in Article XXIX. The City Council certainly would be a sufficiently independent body to adjudicate complaints against most covered individuals in Glendale. However, in the case at bar, Mayor Dunafon was the presiding officer of, and a member of, the City Council. *See* § 31-4-207.5, C.R.S. The members of the City Council were Mayor Dunafon’s colleagues. His longtime partner’s (now his wife) daughter-in-law was a councilmember. And, although the City Attorney hired an independent investigator, it was the City Council that made the final determination to dismiss the complaint.

The Commission agrees with Mayor Dunafon that nothing in Article XXIX requires Glendale to create “from whole cloth” a separate ethics tribunal. However, the Commission does not agree that Mayor Dunafon’s recusal from the matter was sufficient to ensure that the City Council’s consideration of the complaint against him was impartial and disinterested. The Commission need not inquire into the motives or opinions of the councilmembers to determine that, under the circumstances present here, the Glendale City Council is not sufficiently independent to satisfy the constitutional standard.

Furthermore, in dismissing the complaint against Mayor Dunafon, the City Council was effectively reviewing a complaint regarding action that it, as a body, had taken; including allegations of improper influence exercised by Mayor Dunafon on his fellow councilmembers. Specifically, the undisputed facts² demonstrate that: The City Council had voted on a Development Plan and Special Use Permit for a business which Mayor Dunafon’s long-time partner owned; the vote had been split 3-3; Mayor Dunafon had cast the deciding vote as the tiebreaker to make the vote 4-3; and, when a re-vote was called several weeks later, two city councilmembers had changed their votes to result in a 5-1 vote approving the plan and permit. Because of the re-vote issue, the allegations against Mayor Dunafon—whether true or not—

² Although numerous disputed allegations in M.A.K.’s complaint are relevant to whether the Glendale City Council constituted an independent decisionmaking body, but the Commission finds that the undisputed facts set forth in Mayor Dunafon’s response to M.A.K.’s complaint are sufficient to decide the limited jurisdictional issue presented here.

necessarily implicated the actions of the City Council itself, the City Council was not a sufficiently independent body to decide the complaint.

Therefore, Glendale's procedures for reporting, investigating, and hearing complaints fell short of addressing the matters in section 5 of Article XXIX because the City Council was not an impartial and disinterested decisionmaker. Similarly, the Commission finds that Glendale did not address a core component of Article XXIX when it failed to provide an independent decisionmaking body to adjudicate Complaint 16-02. Accordingly, the Commission finds that it has jurisdiction over Complaint 16-02.

The allegations in Complaint 17-14 are similar to those in Complaint 16-02, specifically; that Mayor Dunafon improperly voted on a matter pending before the City Council in which his wife had a financial interest. Although Complaint 17-14 lacks the allegations of improper influence set forth in Complaint 16-02, the Commission finds that the City Council is not a sufficiently independent decisionmaking body to adjudicate an ethics complaint against Mayor Dunafon based on the rationales set forth above.

Section 7 of Article XXIX empowers the Commission to decide whether a home rule entity has "address[ed] the matters" in Article XXIX and, if not; to assert jurisdiction over the complaint. Any adjudication of the merits of the underlying complaints should occur at an evidentiary hearing. *See* IEC Rule of Procedure 8.A.

THEREFORE, the Commission finds that it has jurisdiction over Complaints 16-02 and 17-14. Further proceedings will be scheduled by oral order.

The Independent Ethics Commission

April Jones, *Chair*

Jo Ann Sorensen, *Vice Chair*

Bill Leone, *Commissioner*

Matt Smith, *Commissioner*

DATED: July 11, 2018