DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock St., Room 203 Denver, CO 80202	DATE FILED: June 28, 2019 3:16 PM CASE NUMBER: 2018CV32433
Plaintiff–Appellant: VICKI MARBLE, individually and in her capacity as a Colorado State Senator, **v.** **Defendants–Appellees:** APRIL JONES, WILLIAM LEONE, MATT SMITH, and JO ANN SORENSEN, in their official capacities as members of the Independent Ethics Commission; and the INDEPENDENT ETHICS COMMISSION, and independent agency	▲**COURT USE ONLY**▲ Case Number: **18CV32433** Courtroom: **203**
ORDER ON APPEAL	

THIS MATTER is before the Court on the Plaintiff-Appellant Vicki Marble's appeal from a final decision of the Colorado Independent Ethics Commission. The Court has reviewed the briefs, the applicable law, and the record below. For the following reasons, the decision of the IEC is REVERSED.

I. PROCEDURAL HISTORY

On May 1, 2017, Sarah Mann filed a complaint against Senator Vicki Marble ("Sen. Marble" or "Appellant") with the Independent Ethics Commission (the "IEC") alleging violations of (1) the gift ban provisions of the Colorado Constitution, Article XXIX, § 3; (2) the statutory gift ban, Colorado Revised Statutes § 24-6-203(3.5); and (3) the justifiable impression of public trust pursuant to Article XXIX § 1(1)(a)-(c). The complaint alleged that Sen. Marble violated these provisions by allowing Extraction Oil & Gas ("Extraction") to pay for an event that Sen. Marble hosted without disclosing Extraction's role as the sponsor of the event. The IEC found the complaint to be non-frivolous and proceeded to investigate. Prior to the hearing, the IEC dismissed Complainant's third claim.

An evidentiary hearing was held on January 8, 2018, and public deliberations took place during the IEC's monthly meetings on February 12, 2018; March 5, 2018; April 9, 2018; May 7, 2018; and June 4, 2018. Deliberations concluded at the April 9th meeting, where the IEC dismissed the second claim[1] and took a voice vote on the remaining claim. The five

[1] With regard to the second claim, the IEC expressly found that it does not have jurisdiction to impose criminal penalties. The IEC's jurisdiction is limited to imposing a civil penalty for any violation of C.R.S. § 24-6-203(3.5).

commissioners of the IEC concluded that Sen. Marble accepted a gift in violation of the Colorado Constitution, Article XXIX, § 3(2) by a voice vote of 3-2 at the April 9th meeting. The IEC issued a written decision on June 4, 2018. Pursuant to the Colorado Constitution, Article XXIX, § 6, Sen. Marble was ordered to pay a penalty of double the cost of the event,[2] $2,242.36. Although Commissioner Reiff participated in the decision and voted to find a violation and assess a penalty at the Commission's April 9th meeting, he retired prior to adopting the written decision. This timely appeal follows.

II. STATEMENT OF FACTS

Sen. Marble is a member of the Colorado General Assembly and represents District 23, which consists of Broomfield, Larimer, and western Weld counties. At and around the time of the event, Extraction and the city of Broomfield were in negotiations to resolve issues surrounding the development of oil and gas. The Broomfield City Council had considered a moratorium on oil and gas drilling but a recent Colorado Supreme Court decision held that local regulation of oil and gas drilling was preempted by state law. Sen. Marble's office was frequently contacted by her constituents, who were requesting that she support a statewide ban on fracking.

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. At the meeting, Sen. Marble suggested a community meeting be held where Extraction representatives and representatives of localities that had successfully dealt with oil and gas drilling in their communities could present their perspectives to the citizens of Broomfield. Sen. Marble's legislative aide, Sherry Fernandez, was also in attendance at the meeting. Ms. Fernandez's responsibilities included scheduling meetings, reviewing emails sent to Sen. Marble in her official capacity, replying to those emails, drafting other correspondence, and assisting Sen. Marble in her review of legislative bills.

After the February 1 meeting, Ms. Fernandez collaborated with Brian Cain, an Extraction representative present at the meeting, to organize the event in Broomfield. Ms. Fernandez checked Sen. Marble's calendar to determine dates where she was available; Ms. Fernandez reported to Sen. Marble and Mr. Cain that she had "booked" C.B. & Potts, a Broomfield restaurant, for February 15, 2017 at 6:00 p.m.; Ms. Fernandez corresponded with Mr. Cain via email to discuss the distribution of preparation responsibilities, potential speakers, marketing of the event, invitees, and limitations on costs; Ms. Fernandez emailed Sen. Marble requesting a list of potential speakers; Ms. Fernandez created, and Sen. Marble approved, an invitation to the event; Ms. Fernandez published the event on Sen. Marble's campaign website; and Ms. Fernandez circulated an invitation to the Broomfield County GOP email listserv.

The event was advertised as a "townhall" with Sen. Marble. Specifically, the invitation read:

The IEC thus dismissed the statutory violation because the penalty for such a violation would be the same as that imposed under the Colorado Constitution, Article XXIX, § 6 for violation of the gift ban.

[2] The total costs for the event were $1,121.18, including the venue, food, and drinks.

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[3] 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 303-859-1421 or
sherylannfernandez@gmail.com

Sen. Marble, Ms. Fernandez, and Mr. Cain testified that the event was advertised using Sen. Marble's name to draw more people in and that the event would have taken place regardless of Sen. Marble's attendance. Sen. Marble further testified that her involvement was limited to contacting a single local government official to potentially speak on the panel and looking at the invitation that Ms. Fernandez drafted prior to its dispersal. Additionally, Sen. Marble stated that she had originally only intended to attend the event as an audience member until the day of the event, when Ms. Fernandez requested that Sen. Marble moderate the event. Despite Sen. Marble's testimony, a schedule of the event emailed from Ms. Fernandez to Mr. Cain the day before the event reflected that Sen. Marble would begin the event with introductions, set ground rules, and moderate the panel of local government officials and Extraction representatives.

The event took place on February 15, 2018, in a meeting room at C.B. & Potts. A buffet of appetizers and two drink tickets per attendee were provided. The event was open to the public at no charge. Approximately 75 people attended, including opponents of Extraction's drilling plans. A video of the event shows Sen. Marble inviting the attendees to partake in food and drink, introducing the issues to be addressed and the members of the panel, and discussing news articles and studies regarding the safety of fracking. During the question and answer period, questions were directed towards Sen. Marble, as well as to the panel speakers. At the conclusion of the event, Ms. Mann observed Mr. Cain paying for the event on behalf of Extraction. The cost of the event, including renting the meeting room, food, drink, tax, and gratuity, totaled $1,121.18. At no point was it disclosed to the attendees that Extraction was paying for the event.

III. STANDARD OF REVIEW

The district court for the city and county of Denver have exclusive jurisdiction to review final actions of the Independent Ethics Commission (IEC). COLO. REV. STAT. § 234-

[3] Emphasis in the original invitation.

18.5-101(9) (2017). However, C.R.S. § 24-18.5-101 fails to provide a standard of review for IEC decisions upon appeal. As such, Appellant urges the Court to determine whether jurisdiction also exists under the Administrative Procedures Act, C.R.S. §§ 24-4-101–108 (2018), or under C.R.C.P. Rule 106(a)(4), which both provide standards of review.

The APA permits judicial review of final agency action. COLO. REV. STAT. § 24-4-106(2) (2018) ("Final agency action under this or any other law shall be subject to judicial review."). "Agency" is defined as "any board, bureau, commission, department, institution, division, section, or officer of the state, except those in the legislative branch or judicial branch." COLO. REV. STAT. § 24-4-102(3) (2018). Appellant asserts that the "IEC falls squarely within that definition." Opening Brief of Vicki Marble at 3 (Oct. 9, 2018). However, Appellant overlooks C.R.S. § 24-18.5-101(2)(a), which states that the "independent ethics commission, originally established in the office of administrative courts in the department of personnel created in section 24-30-1001, is hereby transferred to and established in the *judicial department* as an independent agency, effective on June 10, 2010." COLO. REV. STAT. § 24-18.5-101(2)(a) (2017) (emphasis added). The explicit transfer of the IEC from the office of administrative courts into the judicial department demonstrates a legislative intent to reestablish the IEC as an independent agency within the judicial branch. Furthermore, the designation of the IEC as a part of the judicial department is supported by a 2016 opinion by the Colorado Supreme Court where the Court observed that the IEC "is not an executive agency," but "is instead an independent, constitutionally created commission that is 'separate and distinct from both the executive and legislative branches.'" Colorado Ethics Watch v. Indep. Ethics Comm'n, 369 P.3d 270, 272 (Colo. 2016) (quoting Developmental Pathways, 178 P.3d at 532). Thus, the IEC falls within the judiciary exception to the APA's definition of "agency."

Importantly, this finding does not conflict with the Court of Appeals' decision in *Gessler v. Grossman*, or the Colorado Supreme Court's decision in *Gessler v. Smith*. In *Grossman*, the Court of Appeals did not determine whether the APA applies to IEC decisions. Instead, the appellate court relied on the finding by the lower court that the IEC was an agency as defined within the APA, and dutifully applied the same standard of review as the district court as required. Gessler v. Grossman 2015 WL 2190666 at *2 (Colo. App. 2015) ("On appeal from a district court's review of a final agency action, we apply the same standard of review as the district court"); *see also* COLO. REV. STAT. § 42-4-106(11)(e) (2018) ("Whenever judicial review of any agency action is directed to the court of appeals…the standard for review as set forth in subsection (7) of this section shall apply to appeals brought under this subsection"). Furthermore, the Colorado Supreme Court has explicitly reserved judgment on whether APA provisions apply to the IEC's adjudicatory proceedings. Gessler v. Smith, 419 P.3d 964, 974 (Colo. 2018) ("our opinion in Developmental Pathways calls into question whether APA provisions apply to the IEC's adjudicatory proceedings…we need not resolve that question here").

Jurisdiction under C.R.C.P. Rule 106(a)(4) is proper. Court review under C.R.C.P. Rule 106(a)(4) is limited to determination of whether a governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions, in this case the IEC, has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer. *See* City of Commerce City v. Enclave W., Inc., 185 P.3d 174, 178 (Colo. 2008). An administrative agency has abused its discretion if the agency acted arbitrarily or capriciously, made a decision that is unsupported by the record, erroneously

interpreted the law, or exceeded its authority. *See* Nixon v. City & Cty. of Denver, 343 P.3d 1051, 1054 (Colo. App. 2014).

Under Rule 106(a)(4), a reviewing court exercises no independent fact-finding authority. *See* Canyon Area Residents for the Env't v. Bd. of Cty. Comm'rs, 172 P.3d 905, 907 (Colo. App. 2006). Findings of fact must be accepted unless they are so clearly erroneous as not to find support in the record. *See* Dep't. of Human Servs. v. State Pers. Bd., 371 P.3d 748, 752 (Colo. App. 2016). A finding of fact by an administrative agency is not an abuse of discretion when the reasonableness of the agency's finding is open to a fair difference of opinion, or if there is room for more than one opinion. *See* Bennett v. Price, 446 P.2d 419, 420-21 (Colo. 1968).

A reviewing court may also determine whether there is an abuse of discretion by considering whether the lower tribunal misconstrued or misapplied the applicable law. *See* Roalstad v. City of Lafayette, 363 P.3d 790, 793 (Colo. App. 2015). If there is a reasonable basis for an administrative body's interpretation of the law, then a court may not set aside the decision. *See* City and Cty. of Denver v. Bd. of Adjustment for City and Cty. of Denver, 55 P.3d 252, 254 (Colo. App. 2002). All reasonable doubts as to the correctness of the administrative body's ruling must be resolved in its favor. *See Dep't. of Human Servs.*, 371 P.3d at 752.

IV. ANALYSIS

Appellant was found to have accepted a gift in violation of the Gift Ban pursuant to the Colorado Constitution, Article XXIX, § 3(2). and ordered to pay a penalty of double the costs of the event: $2,242.36. The Gift Ban states in relevant part:

> (2) No public officer, member of the general assembly, local government official, or government employee…shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars ($50)[4] in any calendar year…

COLO. CONST. art. XXIX, § 3(2). Appellant argues that the IEC abused its discretion and exceeded its jurisdiction by rendering a decision that (1) was procedurally invalid, (2) improperly construed Article XXIX and violated Appellant's right to engage in political speech, and (3) erroneously ascribed a disclosure requirement to its Gift Ban Analysis.

The Court finds that the IEC abused its discretion and exceeded its jurisdiction by rendering a procedurally invalid decision, and thus REVERSES the IEC decision without ruling on the merits of Appellant second and third arguments.

i. The IEC decision was procedurally invalid

Appellant argues that the final decision suffers from one of two fatal procedural errors: either it was joined in by less than a majority or alternatively, that the decision was joined by a former commissioner who had resigned prior to the adoption of the final decision. Appellant's argument rests on the proposition that the order was finalized on the date the

[4] $59 to account for inflation

written decision was signed and issued: June 4, 2018. Appellee opposes Appellant's assertion that the IEC decision suffers from fatal errors and suggests that the IEC's determination was final on April 9, 2018, the date the IEC voted 3-2 to find a violation.

a. IEC's final action was entering of the written decision on June 4, 2018

Before determining whether the final decision is procedurally invalid, it is necessary to determine when the decision rendered by the IEC became final. Appellant argues that the decision was finalized by the written decision on June 4, 2018. To support her argument, Appellant relies on IEC Rules of Procedure ("IEC Rules") 8(H)(3) which specifically addresses finality. Appellee contends that the IEC adheres to Robert's Rules of Order and, absent agency action to amend or appeal the voice vote, the Court should consider the voice vote of April 9, 2018 to be the final action.

As a general rule, government bodies can adopt the codes, standards, guidelines, or rules adopted or published by another nationally recognized organization or association by reference. *See*, *e.g.*, Colorado Republican Party Independent Expenditure Committee, Rule 19 ("The rules in the current edition of Robert's Rules of Order, Newly Revised shall govern the IEC in all cases to which they are applicable and not inconsistent with these Standing Rules, any special rules of order adopted by the management committee, the Bylaws of the Colorado Republican State Central Committee or the laws of the State of Colorado.") Thus, the IEC is free to adopt Robert's Rules of Order, which purportedly binds the IEC to their voice vote unless the vote is properly amended or rescinded. However, the IEC Rules contains no reference to "Robert's Rules of Order." *See generally* IEC Rules. Even if the Court accepted Appellee's argument that Robert's Rules were implicitly adopted by the IEC, any conflicting IEC Rules would preempt those found in Robert's Rules. Here, IEC Rule 8(H)(3) specifically addresses finality: a "decision is final for appeal purposes when the IEC written decision is entered." Thus, whether the IEC has implicitly adopted Robert's Rules is irrelevant; the IEC Rule on finality preempts any competing provision in Robert's Rules.

Additionally, Appellee asserts that the voice vote should be considered the IEC's final act because the written decision mirrors the voice vote and Robert's Rules binds the IEC to any vote it takes unless that vote is properly amended or rescinded. The Court need not readdress whether Robert's Rule is applicable or not. However, evidence that the final written decision mirrored the voice vote does not make the voice vote the final decision. Finality is "concerned with whether the initial decisionmaker has arrived at a definitive position on the issue." Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 193 (1985). The United States Supreme Court's Opinion in *Bennett v. Spear* provides a test to determine whether an agency's action is final.

> First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.[5]

[5] While this Court has determined that the IEC does not qualify as an "agency" for purposes of APA review, the Supreme Court's test remains instructive on the issue of when the initial decisionmaker has come to a definitive position.

Bennett v. Spear, 117 U.S. 1154 (1997). Appellee admits that "the IEC could have amended, rescinded, or reconsidered [their 3-2 voice vote], but it did not." Defendant's Answer Brief at 14 (Nov. 13, 2018). In the interim between the voice vote and the written decision, the Commissioners retained the ability to change their stance. Therefore, the voice vote was an interlocutory action taken by the Commission leading up to the adoption of the written decision.

For these reasons, the Court finds that the final action taken by the IEC was the written decision issued on June 4, 2018.

b. The decision was joined by less than a majority

The written decision, IEC's Findings of Fact and Conclusions of Law in the Matter of Complaint 17-18, Vicki Marble, was signed:

> **The Independent Ethics Commission**
> Jo Ann Sorenson, *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 access a penalty at the Commission's April 9, 2018, meeting, but did not participate in adopting the written opinion.*

Vicki Marble, IEC 00276 (2018). Based on the signature of the IEC, Appellant argues that the IEC's decision was either unlawfully joined by a former Commissioner who resigned from the IEC several months before it was issued, or it was rendered by less than a majority of IEC Commissioners.

Appellant relies on the judiciary's treatment of a judge or justice's retirement or resignation from the bench to support her argument that a former IEC commissioner who resigns before the final decision is issued is not part of the commission, and is not authorized to render findings, assess penalties, or otherwise participate in the decision. In response, Appellee argues that Appellant's comparison of the IEC to the judiciary should be disregarded because the IEC's process is inherently different from the judiciary process, specifically pointing out the private nature of the judiciary's decision-making.

The Court finds the judiciary's treatment of a judge's or justice's retirement or resignation to be instructive. As indicated in the Standard of Review section, *supra*, "the independent ethics commission…[was] transferred to and established in the judicial department as an independent agency" in 2010. COLO. REV. STAT. § 24-18.5-101(2)(a) (2017). As an agency that exists in the judicial department, the judiciary's treatment of a presiding judicial officer who retires from their adjudicatory role cannot be dismissed without consideration.

Appellant directs the Court to numerous examples illustrating the principle that a former or deceased judicial officer may not participate in rendering a decision. Opening Brief

of Vicki Marble at 25-26 (citing U.S. v. Allied Stevedoring Corp., 241 F.2d 925, 927 (2d Cir. 1957); Altera Corp. v. Comm'r of Internal Revenue, 2018 WL 3542989 (9th Cir. 2018); Vidinski v. Lynch, 840 F.3d 912, (7th Cir. 2016); *In re* Vertrue, Inc. Mktg. & Sales Practices Litig., 719 F.3d 474 (6th Cir. 2013); Cal. Med. Ass'n v. Fed. Election Comm'n, 641 F.2d 619 (10th Cir. 1980); St. Joseph Hosp. v. Wolff, 94 S.W.3d 513 (Tex. 2002)). However, Appellee suggests that discounting a retired or deceased judicial officer's decision is appropriate in the judiciary because, unlike a public body such as the IEC, the court's written decision is the only formal action taken. The Court disagrees. As demonstrated in *United States v. Allied Stevedoring Corp.*, even when a judge makes his position known, his conclusions are disregarded if he has vacated his position at the time the written decision is issued. *See Allied Stevedoring Corp.*, 241 F.2d at 927 (where the deceased judge's final conclusions were disregarded despite clearly stating his conclusions in detail upon the points involved in a memorandum). The Court therefore ascribes the judiciary's treatment of a judge's or justice's retirement or resignation to the IEC and finds that, if former Commissioner Reiff's vote was counted in the IEC's decision, it was done so in error.[6]

Furthermore, the Court finds that without former Commissioner Reiff's vote, a majority could not have been achieved in this case. As a commissioner, Mr. Reiff voiced his vote in favor of finding that a violation had occurred. Therefore, without his participation in the adoption of the Findings of Fact and Conclusions of Law, the IEC incorrectly relied on a tied vote (2-2) to find that Sen. Marble violated the Gift Ban. As the IEC failed to adopt the final decision by a majority, the decision was unlawfully issued.

V. CONCLUSION

After reviewing the record, the Court cannot conclude that the facts as found by the Commission were clearly erroneous. However, whether the Commission reached a correct finding of facts is irrelevant in light of the procedural error. The Court finds that the IEC abused its discretion by rendering a final decision without a majority.

For the foregoing reasons, the IEC's finding that Sen. Marble violated the Gift Ban of the Colorado Constitution, Article XXIX, § 3 is REVERSED.

SO ORDERED this 28th day of June, 2019.

BY THE COURT:

Brian R. Whitney
District Court Judge

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[6] Appellee also argues that the mental process privilege prevents Courts from entertaining challenges based on an agency's reasoning. While Appellee is correct in her statement of the law, she incorrectly applies it to Appellant's appeal. Appellant is not challenging the IEC's decision based on the commission's reasoning, but challenging the validity of its decision. Gilpin Cty. Bd. of Equalization v. Russell, 941 P.2d 257, 264 (Colo. 1997) ("the court's function is to review the decision, not the reasoning underlying it.").