BEFORE THE INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO

COMPLAINT NO. 08-01

In the Matter of

MICHAEL COFFMAN

DECISION

The Colorado Independent Ethics Commission (the "IEC" or "Commission"), having heard the testimony and received evidence in the above matter, makes its findings and renders a decision as follows:

BACKGROUND

In November 2006, the voters of Colorado passed Amendment 41; the vote was certified by the Governor on December 31, 2006 and the Amendment became effective as Colo. Const. art. XXIX. Article XXIX created the IEC and delineated its powers. The purpose of the IEC "shall be to hear complaints...on ethics issues arising under this article and under any other standards of conduct..." *See, Colo. Const. art. XXIX, Section 5.* Subsequently, the IEC promulgated procedural rules and regulations.

On February 13, 2008, a Complaint (the "Complaint") was filed with the IEC by Colorado Ethics Watch ("CEW"). The Complaint alleges certain conduct by then-Secretary of State Michael Coffman ("Coffman") as being in violation of Colo. Const. art. XXIX and other state laws. The allegations refer to conduct of Coffman that occurred after December 31, 2006 and within a year of the filing of the Complaint. The IEC reviewed and investigated[1] the Complaint. On October 6, 2008, the Commission voted

[1] The nature and scope of an investigation shall be determined by the IEC. *See, IEC Rules of Procedure, Rule 7.G.*

that the allegations as set forth in the Complaint were not frivolous as a matter of law. The IEC made a determination that, if the allegations contained in the Complaint were true, the conduct may be in violation of state law, and set the Complaint for a public hearing. At the time of the vote, Commissioner Sally H. Hopper recused herself from participating in any proceeding regarding the Complaint. Commissioner Hopper has not participated in any decisions by the IEC relative to the Complaint.

The matter was initially scheduled for hearing on December 2, 2008. Coffman and CEW requested and were granted extensions of time for filing pleadings and for a continuance of the hearing date. The hearing was then set for January 14, 2009, and was subsequently rescheduled for March 6, 2009, at the request of counsel. The hearing was held on March 6, 2009 with both parties and counsel present.

PREHEARING MOTIONS AND ISSUES

Prehearing motions in hearings before the IEC are permitted only with the prior written approval of the IEC. *See, IEC Rules of Procedure, Rule 8.D.1.* Coffman filed a written request for the opportunity to file a number of prehearing motions. The IEC granted an Order authorizing Coffman to file a Motion to Dismiss, a Motion to Determine Evidentiary Standard and a Motion for Extension of Time. Coffman then filed three Motions: a) Motion to Dismiss; b) Motion to Determine Evidentiary Standard; c) Motion to Transfer to an Administrative Law Judge or, in the Alternative, Motion to Recuse Commissioner Wood. Although Coffman was not granted specific authority to file the Motion to Transfer to an Administrative Law Judge, the IEC accepted the Motion by rendering a decision thereon. CEW filed responses to all of the Motions. The IEC deliberated on all of the Motions and issued Orders which were served on Coffman and

CEW. These Orders are incorporated herein as if fully set forth and are included as part of the record in this matter.

An Amended Notice of Hearing was served on the parties on February 12, 2009, providing procedural information for the hearing. The parties were each given 3.5 hours to present evidence. Prehearing statements, including proposed exhibits, were filed by Coffman and CEW on February 13, 2009.

On February 12, 2009, Coffman filed a Complaint and an Emergency Motion for Stay in Denver District Court requesting judicial review of a number of prehearing determinations of the IEC, challenging its jurisdiction and alleging, *inter alia,* irreparable harm. The IEC filed a Response and Coffman filed a Reply. The Court denied the Emergency Motion as premature, stating that Coffman had failed to exhaust his administrative remedies. The decision of the District Court is incorporated herein and is also part of the record in this proceeding. *See, Coffman v. IEC, 09 CV 1650, dated February 27, 2009.*[2]

During the prehearing period, Commissioner Roy Wood determined that it was appropriate for him to recuse himself from further participation in the proceedings. He formally recused himself on January 14, 2009; the recusal was noted in the IEC's Order dated January 28, 2009. Commissioner Wood did not participate in any aspect of the case after his recusal. Three Commissioners, which constitutes a quorum, remained to hear the Complaint.

[2] Preliminarily, Coffman challenged the jurisdiction of the IEC to hear the Complaint. The IEC considered his arguments and issued an Order determining that it did have jurisdiction. Coffman raised the same arguments in his Emergency Motion for Stay. The District Court found that the IEC had jurisdiction to hear the Complaint. The IEC Order and the District Court Order are incorporated herein and thus, there is no reason for any further determination on this issue.

Both parties requested that the IEC subpoena witnesses and documents for the hearing pursuant to Article XXIX Sec. (5)(4). These requests were granted in part, and denied in part. The Commission issued subpoenas for the following witnesses: Mike Ciletti, Michael Coffman, William Hobbs, Dan Kopelman, Jerry Kopelman, Abby Thomas, and Sean Tonner. The subpoenas were provided to counsel for the parties for service.

Both parties had previously requested that the IEC independently subpoena documents and conduct a more extensive investigation. The IEC has broad discretion in determining the scope of an investigation prior to a determination of whether a complaint is frivolous. *See, IEC Rules of Procedure, Rule 7.G.* In requesting a more extensive investigation, the only documents the parties requested that the Commission subpoena were the underlying documents reviewed by the State Auditor in its investigation and the investigative files of the Denver District Attorney. These documents are privileged as a matter of law. *See, C.R.S. §§1-3-103(3) and 24-72-(2)(a)(I).* Any subpoena issued for these documents would have been subject to a motion to quash and the documents would have been denied to the IEC. For that reason, the IEC declined to issue hearing subpoenas *duces tecum* to Mitch Morrissey, Denver District Attorney; Joseph Morales, Denver Deputy District Attorney; and Sally Symanski, State Auditor. The documents requested by the parties are not necessary for the IEC to reach its conclusions. The IEC also did not issue subpoenas to Chantell Taylor or Luis Toro, attorneys with CEW, because the Commission believed that these individuals would not provide information relevant to the allegations in the Complaint that would not otherwise be available to the Commission.

HEARING

Three witnesses testified at the hearing: Abby Thomas, Bill Hobbs, and Michael Coffman. Colorado Ethics Watch did not use all of its allotted time; Coffman did use his time. Both parties submitted written closing arguments on March 16, 2009. The Commission accepted all of the evidence presented.

FINDINGS OF FACT

Based on its review of the evidence and testimony, the IEC makes the following findings of fact:

1. In 1998, the voters of Colorado elected Coffman as the State Treasurer of Colorado.
2. In 2006, the voters of Colorado elected Coffman as the Colorado Secretary of State.
3. On November 4, 2008, the voters of the Sixth Congressional District elected Coffman to the United States House of Representatives.

The Kopelman Matter

4. Mr. Dan Kopelman ("Kopelman") was employed by the Colorado State Treasurer while Coffman was the State Treasurer. He had worked on Coffman's campaigns since 1994.
5. During October-November of 2006, Kopelman took a leave of absence from the State Treasurer's office to work on Coffman's campaign for Colorado Secretary of State. Kopelman was then hired as the Information Technology ("IT") manager for the Elections Division when Coffman became Secretary of State in

January 2007. Kopelman received a temporary pay differential when he transferred to the Secretary of State's Office from the Treasurer's office.

6. While employed in the Secretary of State's Office, Kopelman operated a side business, Political Live Wires, which maintained a website, and sent out emails about political events. Kopelman did not give notice of this business to any appointing authority and he did not have advance written approval to operate this business as required under the State Personnel Rules.
7. Coffman and/or his assistant, Abby Thomas, received emails from Political Live Wires at the Secretary of State's Office listing potential speaking engagements and appearances. Ms. Thomas was responsible for Coffman's daily itineraries. Coffman and Ms. Thomas reviewed speaking requests and determined the response or follow up.
8. Ms. Thomas did not know how she got on the Political Live Wires email distribution list. She also did not know if Kopelman and Coffman discussed political events of the nature found in the Political Live Wires emails.
9. All of the Kopelman emails appear to have been sent outside of regular business hours according to the recorded times on the exhibits, and from a non-state email address. The emails from Kopelman came from varying email addresses.
10. William Hobbs was appointed Deputy Secretary of State on August 1, 1999. When Coffman was elected Secretary of State, he asked Mr. Hobbs to stay on in his position. Mr. Hobbs was an appointing authority in his position as Deputy Secretary of State, and was responsible for reviewing and approving requests for outside employment.

11. On or about May 3, 2007, Kopelman's outside business came to the attention of Deputy Secretary of State Hobbs. Mr. Hobbs immediately discussed the matter with Kopelman and directed him to take down the website. Kopelman did so.
12. Mr. Hobbs commenced an investigation which included reviewing documents provided by Kopelman and determining what access Kopelman had to the Secretary of State's voter registration database.
13. Mr. Hobbs spoke with Coffman about the situation on the same or the following day that Mr. Hobbs learned of the situation.
14. Mr. Hobbs consulted the Colorado Attorney General during his investigation. Coffman asked the Office of the Attorney General to conduct an investigation of the Kopelman matter, but that office declined to conduct any investigation.
15. Mr. Hobbs did not get any indication that Coffman had previously been aware of the website. Coffman did not limit or interfere with Mr. Hobbs' investigation.
16. Mr. Hobbs' investigation determined that Kopelman did not have access to the state's voter registration data. As far as the investigation could determine, Kopelman neither purchased voter registration data nor sold voter registration data.
17. As a result of the investigation, Kopelman received formal disciplinary action, including a formal corrective action letter, a transfer out of the Elections Division, a loss of supervisory responsibilities, and he was ordered not to operate any independent business. His temporary pay increase was also terminated.
18. On May 11, 2007, Coffman launched a review of the Secretary of State's policy regarding outside employment. He consulted with ethics experts and the

Attorney General's Office regarding proposed policies. Coffman was personally involved in the drafting of a revised policy requiring employees to affirmatively acknowledge their understanding of the rules regarding outside employment, which was put into place by May 17, 2007.

19. Both CEW and Coffman requested that the State Auditor review the Kopelman matter. An ongoing audit of the Secretary of State's Office by the State Auditor was expanded to include a review of the Kopelman matter. The State Auditor released a report in November 2007, and found, *inter alia* that Kopelman "appears to have violated state statute and State Personnel Board Rules related to conflicts of interest and outside employment...The Secretary of State, as the appointing authority, shares responsibility for these apparent violations and should adopt a more proactive approach to addressing outside employment and conflicts of interest relative to Department employees."

20. The audit also recommended additional steps for the Secretary of State's Office to take to enhance and enforce its personnel policies regarding outside businesses. The Secretary of State's Office agreed to the recommendations in its official response to the audit and implemented the suggested changes.

The Premier/Phase Line Matter

21. In 2006, there was a lawsuit concerning the certification of voting machines. As a result of that lawsuit, Conroy v. Dennis, the Secretary of State's Office was required to issue a new rule regarding certification, and retest voting equipment under the new rule.

22. The new rule, Rule 45, promulgated between January and March, 2007, contained revised procedures for testing voting machines. As a result of the new procedures, an independent testing board consisting of five people with broad collective expertise relating to information technology was impaneled. The testing board conducted thousands of tests during the summer and fall of 2007. The testing board operated independently of the Secretary of State's Office. The testing board was required to apply a strict compliance standard in evaluating the voting systems.

23. There were four major factors which had to be addressed in order for a voting system to be completely certified: software, optical scan system at the precinct level and at the central level, and direct recording electronics ("DRE"). Other factors were also considered.

24. Four vendors, Diebold Election Systems, Inc., now known as Premier Election Systems & Software, Inc. ("Premier"), Election Systems & Software ("ES&S"), Hart Intercivic ("Hart"), and Sequoia Voting Systems ("Sequoia") submitted their systems for re-testing.

25. In light of Conroy v. Dennis, the Secretary of State's Office took steps to ensure there was no possibility of undue influence on the testing process. County Clerks, vendors and lobbyists were specifically excluded from the process.

26. On August 20, 2007, Phase Line, Inc. entered into an agreement with Premier for consulting services with regard to the certification process in Colorado. Mike Ciletti was the only consultant affiliated with Phase Line who provided services to Premier under the agreement. Phase Line, Inc. was a registered lobbyist for

Premier. By affidavit, Mr. Ciletti stated that the scope of his services was limited to helping Premier understand how the certification process worked, attending public meetings and reviewing public documents.

27. On September 28, 2007, Mr. Ciletti sent an email to Jacque Ponder, the Secretary of State's Chief of Staff, requesting that vendors and County Clerks have an opportunity to meet with representatives of the Secretary of State's Office. That request was denied by Deputy Secretary of State Hobbs on October 3, 2007 as "inappropriate." A separate request was made by Mr. Ciletti asking the Secretary of State's Office to participate in a survey. Although Mr. Hobbs stated that the survey was a generic kind of survey that was not related to a particular vendor, Coffman questioned whether the Secretary of State's Office should respond at all to the survey. The Office did, ultimately, respond to the survey. There were no other contacts between the Secretary of State's Office and Mr. Ciletti.

28. In October 2007, Coffman contacted Sean Tonner, President and owner of Phase Line, Inc., regarding his candidacy for Congress in the Sixth Congressional District. Mr. Tonner and Coffman had a personal and professional relationship dating back to 1998. They had first discussed Mr. Tonner's assisting Coffman in his candidacy for Congress in 2005. Mr. Tonner was not involved in the voting machine certification process or in the representation of Premier.

29. The testing board made recommendations to Coffman regarding which vendors' machines should be certified. Although the testing board was required to use a

strict compliance standard, the Secretary of State had the discretion to apply a substantial compliance standard.

30. Coffman sought advice from the Office of the Attorney General and members of his own staff regarding the substantial compliance standard and the certification process before determining the certification.

31. As a result of this testing process and applying a substantial compliance standard, on December 17, 2007, Coffman conditionally certified both the DRE and the optical scan for the voting machines sold by Premier, decertified both components of ES&S; for Sequoia, the DRE was certified, and the optical scan components were certified with conditions; with respect to Hart, the optical scan components were decertified and the DRE was certified with conditions.

32. The decision made by Coffman and the recommendations of the testing board differed with respect to the decertification of Hart.

33. After December 17, 2007, Coffman approached members of the Colorado General Assembly seeking legislation that would provide him with more time and flexibility in the certification process. This result was achieved when the General Assembly passed HB 1155 in February 2008.

34. All of the voting machines were eventually certified.

DISCUSSION

Pursuant to Article XXIX Sec. (5)(3)(e), the burden of proof in IEC hearings is preponderance of the evidence, unless the Commission determines that the circumstances warrant a heightened standard. In this Complaint, there are allegations of criminal misconduct. While the IEC does not have jurisdiction over alleged criminal

conduct and cannot enforce criminal statutes, it does have jurisdiction over conduct as it applies to ethical standards of conduct. The IEC determined that where the standard of conduct being complained of is derived from a criminal statute in Title 18, the clear and convincing standard would be employed because the IEC is not a criminal tribunal. For complaints alleging violations outside of Title 18, the IEC determined that it would apply the preponderance of the evidence standard, unless it determined that a heightened standard of proof were appropriate. *See, Order, dated February 5, 2009.*

A. Allegations regarding Dan Kopelman

1. First Claim for Relief

The First Claim for Relief alleges violations of C.R.S. §24-50-101(3)(d) and 4 CCR §801, Rule 1-11. This statute provides that "heads of principal departments ...shall be held responsible and accountable for the actual operation and management of the state personnel system for their respective departments." State Personnel Rule 1-11 provides that "[a]ll appointing authorities, managers, and supervisors are accountable for compliance with these rules and state and federal law, and for reasonable business decisions, including implementation of other policy directives and executive orders."

The IEC agrees that Coffman, as the head of the agency, was responsible and accountable for the overall management of the Secretary of State's Office. However, it does not believe that this necessarily means that he can be held personally responsible under ethical standards for every activity of each individual employee. Coffman reasonably relied on Mr. Hobbs and other managers in his department to oversee the daily operations of the office. Mr. Hobbs testified that he was responsible for reviewing

and approving requests for outside businesses of employees. Mr. Hobbs was also an appointing authority. The State Personnel Rules impose an affirmative duty on the employee to request approval to engage in any outside business, and Kopelman had not done so. Further, there was no evidence that Mr. Hobbs had had any knowledge of Kopelman's outside business.

Once Coffman and his management staff were made aware of the problem, they immediately undertook an investigation to assure the integrity of information at the Secretary of State's Office, and disciplined Kopelman. This discipline included a demotion, loss of pay differential and transfer out of the Elections Division. Coffman also requested investigations by the Colorado Attorney General and the State Auditor, and accepted the Auditor's recommendation that oversight of this issue needed strengthening. There is no evidence that Coffman attempted to conceal the incident from the public. The IEC finds that although there may have been a technical violation of state law, this was mitigated by the vigorous and immediate remedial action taken by both Coffman and Mr. Hobbs.

As pled in the complaint, in order to find Coffman in violation of an ethical standard, the Commission must find, by a preponderance of the evidence, that Coffman knew or should have known that Kopelman was operating an outside political business, that Coffman obtained a personal benefit from Kopelman's business, or that he knowingly ignored the situation in order to benefit either himself or Kopelman.

The facts before the IEC do not support a finding under the preponderance of the evidence standard that Coffman knew or should have known about the outside business being conducted by Kopelman. The testimony from Ms. Thomas indicated that she and

Coffman together reviewed numerous emails from a number of sources to determine his itinerary. The receipt of emails from the Political Live Wires email address is insufficient evidence that Coffman was aware of an ongoing business by Kopelman. It is unclear if Coffman paid any attention to the addresses on the emails or had any knowledge of the scope of Kopelman's activities.

There was no testimony or evidence that Coffman personally benefited from Kopelman's outside business; neither was evidence presented that Coffman encouraged Kopelman to engage in an outside business. Further, there is no evidence that Coffman allowed Kopelman to use state time or resources to run his business.[3]

Although the IEC has jurisdiction over standards of ethical conduct which may overlap with the State Personnel Rules, it does not have the authority to enforce State Personnel Rules. That authority is granted to the State Personnel Board. *Colorado Constitution art. XII, section 14.* The IEC further notes that while the elected head of a department is responsible for the running of the department, as a general rule, only classified employees are subject to the state personnel rules and regulations. *See, Colorado Constitution, art. XII, section 13(1).* Therefore, Coffman may or may not be under the jurisdiction of the State Personnel Board, but that is not within the IEC's authority to determine.

2. Second Claim for Relief

The second claim for relief cites two criminal statutes, C.R.S. §§18-8-404 and 405 (First and Second Degree Official Misconduct). In order to prove first degree official misconduct, CEW must show, by clear and convincing evidence, that Coffman, with

[3] There is also insufficient evidence that Kopelman actually used state time or resources to run his outside business.

intent to benefit himself or Kopelman, knowingly allowed Kopelman to engage in his outside business. In order to prove second degree official misconduct, CEW must show, by clear and convincing evidence, that Coffman knowingly, arbitrarily and capriciously allowed Kopelman to engage in his outside business. As discussed above, the evidence does not support either of these claims by clear and convincing evidence, or even by a preponderance of the evidence.

B. Premier/Phase Line Allegations

1. Second Claim for Relief

The second claim for relief also alleges that Coffman violated state personnel rules and C.R.S. §24-50-117, by failing to disclose an alleged conflict with Premier by way of their mutual engagement of Phase Line. In addition, CEW alleges second degree official misconduct (C.R.S. §18-8-405), which requires a showing, by clear and convincing evidence, that Coffman knowingly, arbitrarily and capriciously refrained from performing a duty imposed upon him by law or violated any statute, rule or regulation relating to his office. It is not clear from the complaint or the evidence which statutes, rules or regulations relating to the Office of the Secretary of State were allegedly violated. Previous litigation had set a very high standard for the certification and testing process for electronic voting equipment. The Secretary of State's Office endeavored to establish a system that was fair and unbiased for all vendors. There was no or only minimal contact by Coffman with the testing panel or vendors during the time period at issue.

According to the affidavit of Mr. Ciletti, the engagement of Phase Line on behalf of Premier was limited to understanding the certification and testing process and

reviewing publicly available information. There were two contacts between Mr. Ciletti and the Secretary of State's Office – one was a request for a public meeting that was rebuffed, the other to complete a generic survey. Coffman had no role in the first contact, and his only role in the second contact was to question whether it should be answered at all. There was no evidence that Phase Line or Mr. Ciletti lobbied or spoke to Coffman about the certification process. Other than the two contacts described above, Phase Line and Mr. Ciletti did not have any contact with the Secretary of State's Office during this period, with regard to the certification process.

Sean Tonner, the principal of Phase Line, was engaged to help Coffman on his campaign for the U.S. House of Representatives. Mr. Tonner, through affidavit, testified that he had no contact with anyone regarding the Premier electronic voting machines and the certification process.

Given the totality of the circumstances, there is insufficient evidence to meet a clear and convincing standard that Coffman had any conflict with Premier by way of their each having engaged Phase Line. Further, there is no evidence that Coffman "knowingly, arbitrarily and capriciously" violated any statute, rule or regulation relating to his office, or refrained from performing any duty imposed upon him by law. The IEC also finds that the evidence presented on this claim does not meet a preponderance of the evidence burden of proof.

2. Third Claim for Relief

The third claim for relief alleges that Coffman failed to discharge his duties under the Uniform Election Code of 1992 (the "Code"), in violation of §1-13-107, C.R.S., which provides:

> Any public officer, election official, or any other person upon whom any duty is imposed by this code who violates, neglects or fails to perform such duty or is guilty of corrupt conduct in the discharge of the same...is guilty of a misdemeanor.

CEW alleges only that Coffman engaged in "corrupt conduct" in the discharge of his duties under the Election Code when he authorized the certification of Premier's voting system against the recommendations of the expert panel, when a conflict existed between him and Premier's lobbying firm. The Commission rejects this claim on two grounds:

First, there is ample evidence before the Commission that there was no involvement by Mr. Ciletti in Coffman's campaign and there was no contact between the campaign and the certification process. There is no evidence that Mr. Ciletti lobbied Coffman or in any way influenced the eventual outcome regarding certification. Therefore, the Commission finds no conflict between Coffman and Premier by way of their each having engaged Phase Line.

Second, the Secretary of State's Office took a number of measures to assure that the testing and certification process was fair and impartial. Contact with the testing panel and the vendors was limited to solicitation of and/or transmitting information. The Secretary of State sought legal advice from the Attorney General's Office and input from internal personnel to assure that the process was appropriate and credible.

The standards for the testing panel and for the Secretary of State were different. The testing panel applied a strict standard of pass or fail. The Secretary of State had the more flexible standard of substantial compliance. Eventually, all of the vendors received certification and there has been no subsequent litigation regarding the certification process. There is insufficient evidence before the IEC to support a finding

that there was undue influence by anyone in the certification and testing process, or that Coffman engaged in "corrupt conduct" in the discharge of his duties under the Election Code.

CONCLUSION

Based upon the above findings of fact and analysis, the IEC finds insufficient evidence under either a clear and convincing standard of proof or a preponderance of the evidence standard of proof to find that Coffman violated any standard of ethical conduct.[4] Accordingly, this Complaint is dismissed.

Dated this 13th day of April, 2009

Commissioner

Commissioner

Commissioner

[4] Coffman, through counsel, presented a Motion to Dismiss at the conclusion of the hearing. Based on the findings in this decision, that Motion is deemed moot.