COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 19-25

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IN THE MATTER OF: ROBBIE LEVALLEY

This matter comes before the Independent Ethics Commission ("IEC") pursuant to a complaint filed by JoAnn Kalenak ("Complainant") against Robbie LeValley, the county administrator in Delta County. Complainant alleged that Ms. LeValley violated statutory conflict of interest provisions when she signed two purchase orders, and used her county-issued credit card, to buy meat from a Delta County distributor in which her family ranch had a financial interest. The IEC issued a Notice of Issues for Hearing notifying Ms. LeValley that it would consider the allegations against her under the following statutory standards: (1) § 24-18-103, C.R.S. (fiduciary duty – violation of the public trust); and (2) § 24-18-109(2)(b), C.R.S. (official act to economically benefit a business in which one has a substantial financial interest).[1]

On July 20, 2021, the IEC held an evidentiary hearing to determine whether Ms. LeValley violated the statutory provisions set forth in the Notice of Issues for Hearing. For the reasons set forth below, the IEC finds that Ms. LeValley's conduct did not violate the statutory standards of conduct.[2] Specifically, the IEC finds that Ms. LeValley's conduct was more administrative than discretionary, and thus did not cross the line into an "official act" within the meaning of § 24-18-102(7), C.R.S.

[1] At hearing, for the first time, Complainant alleged that Ms. LeValley violated the Delta County procurement policy and thus violated her fiduciary duty pursuant to § 24-18-103, C.R.S. That allegation was not included in the Complaint against Ms. LeValley, nor was it included in the Notice of Issues for Hearing. The IEC therefore does not consider whether Delta County's procurement policy is an "other standard[] of conduct" over which it has jurisdiction pursuant to Colo. Const. art. XXIX, § 5(1).

[2] A majority of commissioners did not find by a preponderance of the evidence that Ms. LeValley violated the statutory standards of conduct. Because the decision is split 2-2, the IEC finds no violation and assesses no fines.

I. FINDINGS OF FACT

a. Jurisdiction

1. In July and August 2019, Ms. LeValley was the County Administrator for Delta County. The County Administrator is the highest non-elected office in Delta County, and Ms. LeValley is appointed and supervised by the Delta County Board of Commissioners ("Board").

2. As an appointee of the Board, Ms. LeValley is a "local government official" pursuant to Colo. Const. art. XXIX, § 2(3).

3. Ms. LeValley is also a "local government official" as defined by § 24-18-102(6), C.R.S.

b. Delta County Fair

4. In January 2019, Darnell Place-Wise, Delta County's Public Information Officer, proposed to the Board that the county host a "community night" at the Delta County Fair in August 2019.

5. The Board approved Ms. Place-Wise's suggestion, and Ms. Place-Wise thereafter worked with Commissioner Don Suppes, the Board chair, to plan the event.

6. The community night was essentially a BBQ dinner hosted by the Board at the County Fair for members of the public.

7. On July 2, 2019, the County Fair Board asked the Board if Delta County would also donate meals at the fair for fair board members and judges, and the Board agreed to do so.

c. Homestead Meats

8. Ms. LeValley's husband is part-owner of LeValley Ranch. The other two owners are Ms. LeValley's sons. LeValley Ranch owns one-sixth of Homestead Meats ("Homestead"), a meat processor and distributor that processes and sells meat from a consortium of six ranches and feedlots.

9. Ms. LeValley testified that she, personally, has no ownership interest in Homestead.

10. Ms. LeValley is active in management and public relations for LeValley Ranch.

11. Ms. LeValley and her husband have combined finances.

12. Ms. LeValley testified that she provides "technical advice" to Homestead. Evidence presented at hearing included instances of Ms. LeValley representing Homestead in the media. Multiple witnesses testified that it is well known in Delta County government that Ms.

LeValley is affiliated with Homestead. Mark Roeber, a co-owner of Homestead, testified that Ms. LeValley is a representative of Homestead.

13. Homestead is one of two USDA-approved beef distributors in Delta County. Homestead is the only USDA-approved distributor in Delta County that guarantees its meat products come exclusively from local ranches and feedlots.

d. Delta County Purchases from Homestead for Delta County Fair

14. Ms. LeValley was one of only a "few" people who held a county credit card in 2019.

15. In 2019, only Ms. LeValley and the county commissioners could approve purchase orders in amounts over $200.

16. Purchases on county-issued credit cards are subject to final approval by the Board.

17. At Board work sessions in July 2019, Commissioner Suppes and Ms. Place-Wise discussed local vendors providing meat for the community night. Ms. Place-Wise researched Homestead and Callaway Packing, the other USDA-approved beef distributor in Delta County.

18. Commissioner Suppes decided that the county should purchase hamburgers from Homestead, based on its guarantee that its meat was from local ranches and feedlots, and should purchase other supplies from Callaway.

19. On August 7, 2019, Ms. LeValley used her county-issued credit card to purchase hamburger patties from Homestead at a $0.36/patty discount, for a total of $573.30.

20. On August 9, 2019, Ms. LeValley signed the purchase order for the $573.30 purchase from Homestead in her capacity as County Administrator, on the signature line labeled "Authorizing Officer."

21. The evidence presented at hearing failed to establish the origination of the idea to use Homestead for the free meals for fair board members and judges. Commissioner Suppes recalled "a conversation" with Ms. LeValley regarding purchasing brisket from Homestead for that purpose. Commissioner Suppes believed that he had already made the decision to use locally sourced beef, of which Homestead was the only distributor, and it was implied that there were no additional conversations necessary. It was unclear whether any other type of meal was considered.

22. Ms. LeValley testified that she contacted Homestead, via phone, regarding purchasing brisket on behalf of the County.

23. On August 7, 2019, Ms. LeValley used her county-issued credit card to purchase brisket from Homestead at a $0.10/lb. discount, for a total of $232.19.

24. On August 9, 2019, Ms. LeValley signed the purchase order for the $232.19 brisket purchase in her capacity as County Administrator, on the signature line labeled "Authorizing Officer."

25. Homestead's net profit from the $805.49 sale was not clear from the evidence presented at hearing. Ms. LeValley testified that the hamburger was purchased at wholesale and the brisket was purchased at a slight discount.

26. The evidence at hearing, however, did establish that Homestead benefitted from Delta County's purchase of meat for the County Fair. While the exact amount of its net profit was not clear, Homestead also benefitted from the free marketing it received at the County Fair. The purpose of the community night, according to Ms. LeValley and Ms. Place-Wise, was to showcase local products. Ms. LeValley's response to the complaint described the community night as "intended to acknowledge and celebrate Delta County agriculture." The overall focus of the County Fair was as an "agricultural event," which hundreds of people attended.

27. Numerous individuals testified that Ms. LeValley was not the only individual who could have made purchases and signed purchase orders on Delta County's behalf.

28. Ms. LeValley had discretion to decline to sign the purchase orders.

II. CONCLUSIONS OF LAW

29. Section 5 of Article XXIX grants the IEC jurisdiction over "ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX, § 5(1).

30. The Colorado Supreme Court has interpreted "other standards of conduct… as provided by law" to mean "ethical standards of conduct concerning activities that could allow covered individuals to improperly benefit financially from their public employment." *Gessler v. Smith*, 419 P.3d 964, 971 (Colo. 2018). The Court found that § 24-18-103, C.R.S., falls within that category. Section 24-18-109 similarly falls within the statutory Code of Ethics and is directed at activities that could allow covered individuals to improperly benefit financially from their public employment.

31. Section 24-18-103, C.R.S., provides that the holding of public office or employment is a public trust, local government officials or employees have a fiduciary duty to the people of the state to carry out their duties for the benefit of the people of the state, and violation of that fiduciary duty is a violation of the public trust.

32. Section 24-18-109(1), C.R.S., provides that "proof … of commission of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust."[3]

33. Section 24-18-109(2)(b), C.R.S., provides that a local government official or employee shall not "perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent."

34. Section 24-18-102(7), C.R.S., defines "official act" as "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."

35. The IEC finds that the purchase of goods from Homestead directly and substantially affected Homestead to its economic benefit, whether by virtue of the amount of the sale or by virtue of the free advertising Homestead received as a vendor supplying meals at community night at the County Fair.

36. Ms. LeValley was a consultant, representative, or agent of Homestead, based on her role in publicly representing and promoting Homestead.

37. Ms. LeValley's use of her credit card and her signing of the purchase orders as the stated "Authorizing Officer" for the Homestead purchases was not an "official act" within the meaning of § 24-18-102(7), C.R.S. Commissioner Suppes was the individual with the authority to make a decision regarding the use of vendors for the County Fair, and it was his official decision to select Homestead as one vendor for part of the purchases. LeValley merely followed through in effectuating that decision when she made the purchases and signed the purchase orders.

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[3] The standard of proof for violations of § 24-18-109, C.R.S., where such charges are brought by a district attorney, is beyond a reasonable doubt. *See id.*; § 24-18-103(2), C.R.S. However, the IEC applies a preponderance of the evidence standard, "unless the commission determines that the circumstances warrant a heightened standard." Colo. Const. art. XXIX, § 5(3)(e).

38. The IEC finds that Ms. LeValley's actions in making the purchases from Homestead and signing the purchase orders did not involve a use of discretionary authority. Black's Law Dictionary defines "discretionary" as "involving an exercise of judgment and choice, not an implementation of a hard-and-fast rule exercisable at one's own will or judgment." Black's Law Dictionary (11th ed. 2019). Ms. LeValley did not exercise her judgment and choice in completing the routine tasks necessary to effectuate a decision that had already been made. While Ms. LeValley could have declined to use her county-issued credit card or sign the purchase orders, the fact that someone else could have completed these perfunctory tasks demonstrates her lack of discretionary authority over the ultimate decision, which was ordering from Homestead.[4]

39. For the same reasons as set forth above, Ms. LeValley's conduct did not constitute a violation of her fiduciary duty to the citizens of Delta County pursuant to § 24-18-103, C.R.S. There is no indication that Ms. LeValley's actions here constituted a failure to carry out her duties for the benefit of the people of Delta County.

40. The IEC cautions that slightly different facts could result in a different outcome. If Ms. LeValley had been the individual exercising discretion regarding which meat supplier to utilize, that exercise of discretion may have been a violation of §§ 24-18-103 and/or 24-18-109, C.R.S. The IEC does not seek to discourage localities from utilizing local goods and services and supporting local businesses. But government officials and employees who also have private business interests in the community have a responsibility to taxpayers, enshrined in the statutory Code of Ethics, to avoid conflicts between their public employment and private business interests.

41. Complainant also alleged at hearing that Ms. LeValley's conduct in picking up meat from Homestead for transport to the County Fair was a separate violation of §§ 24-18-103 and/or 24-18-109, C.R.S. But picking up the meat for transport, standing alone, was not an act that directly and substantially affected Homestead to its economic benefit within the meaning of § 24-18-109(2)(b).

[4] Recently, the IEC treated a city mayor's action in signing a resolution already approved by the City Council as more ministerial in nature then the "official act" contemplated by § 24-18-102(7), C.R.S. *See* Complaint 20-21, *In the Matter of P.T. Wood*. Here, the IEC is similarly unwilling to treat every action required to effectuate an official act as a separate official act.

THEREFORE, the IEC finds that Ms. LeValley did not violate §§ 24-18-103 or 24-18-109, C.R.S. No penalty is warranted.

THE INDEPENDENT ETHICS COMMISSION

Elizabeth Espinosa Krupa, *Chair*

Selina Baschiera, *Vice-Chair*, dissenting

Annie Kao, *Commissioner*, dissenting

Cole Wist, *Commissioner*

DATED: August 6, 2021

BASCHIERA, SELINA and KAO, ANNIE, dissenting.

We agree with the majority's Findings of Fact #1-28, and Conclusions of Law #1-36 and 41, but disagree with Conclusions of Law #37-40. We would find a violation of §§ 24-18-103 and 24-18-109, C.R.S., based on our conclusion that Ms. LeValley's purchases on her county-issued credit card and approval of the purchase orders as the explicit "Authorizing Officer" constituted "official acts" within the meaning of § 24-18-102(7), C.R.S. The definition of "official act" is broad, and includes not only the underlying "decision," but also "approval[s]" and "other action[s]" that involve the use of discretion. *Id.*

Ms. LeValley's actions in this case in her high-ranking role as the County Administrator fit within that definition. She both made the credit card transactions and approved the purchase orders as an exercise of her judgment and choice. She did not have to use her county credit card or sign the purchase orders when others could have done so without her involvement, and she exercised her discretion in performing both of those acts. Evidence showed that subsequent purchases of Homestead Meats products in 2020 were signed by Commissioner Suppes, demonstrating an alternate choice could have been made for the purchases at issue in this decision. Purchase orders exist specifically to create accountability within the government for the person authorizing the purchase as a valid use of taxpayer funds. They are not merely a formality or ministerial in nature.[5] Similarly, although credit card transactions in Delta County are subject to the final approval of the Board, the choice of whether to make the payment herself in the first place was made by Ms. LeValley.

Ms. LeValley did not testify that she felt compelled or pressured to make those purchases by any County agent in a role of authority. In fact, no evidence was presented that Commissioner Suppes even asked Ms. LeValley to effectuate the purchases. Ms. LeValley knew she had a conflict, and regardless of whether Homestead was already the selected vendor to provide meat for the County Fair's community night, the onus was on her to recognize the conflict and request that someone else effectuate the purchase from her family ranch's meat distributor. It is particularly compelling to us that it would have been simple for Ms. LeValley to note the conflict and for Ms. Place-Wise to secure another method of payment and approval. Public officials and employees must recognize conflicts of interest when they arise and take steps to avoid them. Contrary to Ms. LeValley's suggestion in her answer to the complaint, this interpretation of the statutory Code of Ethics does not "create an impenetrable wall between public service and any level of family participation in the business community." Ms. LeValley may participate in the business community in Delta County all she likes. But when those business interests arise in the course of her public employment, she must recuse herself from taking official actions that benefit her interests.

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[5] *See* Delta County Purchasing Policy Manual, § 1.3: "County officials are accountable for their use and distribution of public funds, and, therefore, must remain cognizant of their responsibilities to the public and of the availability of proper records for inspection by the public."