COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 23-02

ORDER REGARDING MOTION FOR SUMMARY JUDGMENT

IN THE MATTER OF: JUSTIN BROOKS

On February 6, 2023, Complainant Ryan Kenward filed a complaint against Respondent Justin Brooks. After deeming the complaint nonfrivolous, the IEC investigated pursuant to Section 5(3)(c) of Article XXIX. Based on the results of that investigation, Respondent filed a Motion for Summary Judgment ("Motion") on March 14, 2025. At its May 20, 2025, meeting, the Independent Ethics Commission ("IEC") heard oral argument on the Motion. For the reasons set forth below, Respondent's Motion is granted.

LEGAL STANDARDS

I. Summary Judgment Standard

The IEC applies the summary judgment standards in Colo. R. Civ. P. 56. Summary judgment is appropriate only where the pleadings and supporting documents show that no genuine issue as to any material fact exists, and the moving party is entitled to summary judgment as a matter of law. *Brodeur v. Am. Home Assur. Co.*, 169 P.3d 139, 146 (Colo. 2007). The movant bears the burden of establishing the nonexistence of a genuine issue of material fact. *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1218 (Colo. App. 2009). Once the moving party has met this burden, however, the burden shifts to the nonmoving party to establish that a triable

issue of material fact exists. *Id.* A material fact is one which "will affect the outcome of the case." *Dominguez Reservoir Corp. v. Feil*, 854 P.2d 791, 795 (Colo. 1993).

II. Conflict of Interest Standards

The statutory standards of conflict applicable to local government officials are set forth in section 24-18-109, C.R.S., and include the following:

> (2) A local government official or local government employee shall not:
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> (b) 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 …
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> * * *
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> (3)(a) A member of the governing body of a local government who has a personal or private interest in any matter proposed or pending before the governing body shall disclose such interest to the governing body and shall not vote thereon and shall refrain from attempting to influence the decisions of the other members of the governing body in voting on the matter.
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> * * *
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> (5)(a) Notwithstanding any other provision of this article 18, it is neither a conflict of interest nor a breach of fiduciary duty of the public trust for a local government official who is a member of the governing body of a local government to serve on a board of directors of a nonprofit entity and, when serving on the governing body, to vote on matters that may pertain to or benefit the nonprofit entity.

UNDISPUTED MATERIAL FACTS

Respondent was the mayor of Erie, Colorado. Prior to that, and at all times relevant to this Complaint, Respondent was a town trustee. While a town trustee, Respondent was the liaison between the Board of Trustees and the town's Diversity, Equity and Inclusion Advisory

Board ("DEI Board").[1] DEI Board members were appointed by the town trustees. According to the town code, the liaison from the Board of Trustees to the DEI Board was not a member of the DEI Board and was not entitled to vote. At the time, Respondent was also a board member of Being Better Neighbors ("BBN"), a nonprofit. The action at issue in this case occurred during an April 7, 2022, meeting of the DEI Board. Complainant submitted a transcript of the meeting, and that transcript is consistent with an audio recording of the meeting reviewed by the Commission's investigator. No disputed issue of material fact exists regarding what took place at the April 7, 2022, meeting.

At the April 7, 2022, meeting, the DEI Board discussed the Board's participation in events in Erie, among other matters. Prior to addressing their agenda items, the DEI Board discussed that their appointments would end in three weeks. Specifically, they expressed uncertainty over whether to move forward with agenda items, for reasons that are unclear from the transcript. Respondent stated, "I think you should … I think you should do your work while it's your work still … We don't want there to be any gap in this. So, I would ask you to please continue until you're notified otherwise, if you're willing to."

Following that discussion, the DEI Board voted to participate in Arbor Day, voted to participate in the Town Fair, discussed marketing and communications, made budgetary allocations to Juneteenth and Pride events, voted to participate in the farmer's market, and approved a grant for a business incubator. BBN hosted the Pride event. The DEI Board voted to allocate $2,000 to participate in the Pride event, which was paid directly to BBN.

On April 8, 2022, BBN submitted a grant application to the Town of Erie for $7,500. That grant application was also for the Pride event. At its April 26, 2022, meeting, the Town

[1] The DEI Board no longer exists in Erie.

Council voted to approve BBN's grant application. Respondent disclosed his interest, recused from the vote, and did not attempt to influence his fellow trustees regarding the vote.

In April 2022, Respondent had no financial interest in BBN. Respondent was not compensated for serving on BBN's board. Respondent paid a $300.00 expense on BBN's behalf on one occasion, and BBN reimbursed that expense to him.

LEGAL ANALYSIS

Respondent argues that the undisputed material facts fail to demonstrate a violation of section 24-18-109, C.R.S. Specifically, Respondent argues: (1) his actions at the DEI Board meeting did not constitute an "official act" within section 24-18-109(2)(a); and (2) the DEI Board is not the "local governing body" of Erie within section 24-18-109(3)(a). Respondent is correct on each count. We also find that, even if Respondent's actions constituted a conflict within section 24-18-109, subsection (5)(a)'s exemption for nonprofit-entity board members applies.

In his response, Complainant argues that disputed facts exist but fails to establish a triable issue of material fact. To defeat a motion for summary judgment, disputed facts must be material. Complainant does not allege facts that, if taken as true, are material to whether Respondent violated the statutory standards of conduct.

I. The Undisputed Facts Demonstrate That Respondent's Actions Were Not Official Acts.

Section 24-18-109(2)(a) provides that a local government official may 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." An "official act" is "any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary

authority." § 24-18-102(7), C.R.S. "Discretionary" means "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 (12th ed. 2024).

The undisputed facts demonstrate that Respondent's conduct did not constitute an "official act," nor did it "directly and substantially" affect BBN to its economic benefit.[2] For subsection -109(2)(a) to apply, a local government official must act within their "official" capacity. The IEC previously held that *only* a public official's actions in their capacity as a voting member of the public body fall within the ambit of -109(2)(a). *See* Complaint 20-18, at 8. And this is consistent with a plain reading of the statutory language. The definition of "official act" includes "any vote" and like action that involves the use of discretionary authority. § 24-18-102(7), C.R.S. To exercise discretionary authority, the public official must first have the authority to act as a member of the public body. Undisputedly, Respondent was not a DEI Board member, and Respondent had no discretionary authority to act as a DEI Board member. Respondent was present at the DEI Board meeting as a liaison from the Town Council.[3] Respondent's actions at a DEI Board meeting cannot constitute an "official act" because he lacked the authority to officially act as a DEI Board member.[4]

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[2] Construing the facts in the light most favorable to Complainant, we assume that Respondent was engaged as a representative or agent of BBN.

[3] Construing the facts in the light most favorable to Complainant, we assume that Respondent attended the DEI Board meeting in his official capacity. However, attending a meeting in his official capacity does not, without more, render his conduct an "official act" pursuant to § 24-18-102(7), C.R.S.

[4] Defining "official act" to include speech in forums where the public official has no discretionary authority to act also presents First Amendment concerns. *See People v. Graves*, 368 P.3d 317, 324 (Colo. 2016) (statutes should be construed to avoid overbreadth problems). Even if the statute could be construed to apply to acts that do not involve the exercise of discretionary authority, such a construction would be inappropriate.

There is no allegation that Respondent failed to recuse from BBN matters that came before the Erie Town Council, the entity with which Respondent had discretionary authority to officially act. To the contrary, he stated his interest to the Town Council and recused from the BBN grant request at the April 26, 2022, meeting.

Respondent is also correct that the alleged "official act"—telling the DEI Board they should proceed with considering their agenda items—was not one which directly and substantially affected BBN to its economic benefit. Respondent's recommendation was procedural in nature, and the DEI Board's agenda included several items. Respondent did not advocate for a certain outcome related to the DEI Board's participation in the Pride event generally, nor did he advocate for the DEI Board to award a grant to BBN specifically.

Finally, Complainant's allegation that "money is fungible" does not establish a triable issue of material fact. Complainant has failed to connect the dots between a single reimbursement from BBN to Respondent to the alleged official act in this case. An official act must "*directly and substantially*" economically benefit an organization of which the public official is a representative to fall within the statute. § 24-18-109(2)(a), C.R.S. (emphasis added). The fact that BBN reimbursed Respondent for a one-time expense is unrelated to the DEI Board's vote regarding the Pride event. Complainant failed to establish that a triable issue of material fact exists that Respondent engaged in conduct which constitutes an "official act" and also that such act conferred a direct and substantial economic benefit upon either BBN or Respondent.

II. Respondent Did Not Vote On, Or Attempt To Influence Other Members To Vote On, A Matter Pending Before The Local Governing Body of Erie.

Section 24-18-109(3)(a), C.R.S., provides that a member of a local government's governing body, who has a personal or private interest in any matter proposed or pending before

the governing body, shall disclose such interest to the governing body and shall not vote thereon, and shall refrain from attempting to influence the other members' votes on the matter.[5] For subsection -109(3)(a) to apply, the matter must be before "the governing body of a local government."[6] "Local government" is defined as "the government of any county, city and county, city, town, special district, or school district." § 24-18-102(5), C.R.S. As the DEI Board was not the governing body of a county, city and county, city, town, special district, or school district, it does not fall within subsection -109(3)(a). Erie's "governing body" is the Erie Town Council. *See* Erie Town Charter, § 2.04. Again, there is no allegation that Respondent failed to recuse from BBN matters that came before the Town Council. Nor is there an allegation that Respondent sought to influence other Town Council members regarding BBN matters.

Additionally, subsection -109(3)(a) applies only to the body to which the voting member belongs. It prohibits the "member of the governing body" from voting on or attempting to influence decisions on matters "*before* the governing body." § 24-18-109(3)(a), C.R.S. (emphasis added). As set forth above, Respondent did not vote on or attempt to influence decisions on matters pending before the body of which he was a member.

III. Even If Respondent Had Acted On Matters Involving BBN, Such Action Would Not Have Constituted A Violation Because BBN Was A Nonprofit Entity.

Section 24-18-109(5)(a) provides that it is neither a conflict of interest nor a breach of fiduciary duty of the public trust for a local government official to serve on a board of directors

[5] Construing the facts in the light most favorable to Complainant, we assume that Respondent had a "personal or private interest" in the award of a grant to BBN.

[6] Throughout the Colorado Revised Statutes, "local governing body" is used to refer to the body with decision-making authority over a locality. *See, e.g.,* §§ 35-5.5-111, 31-25-107, 36-1-107.5, 32-7-111, 44-10-301, 30-31-109, 43-2-135, 43-2-135, C.R.S. Complainant provides no legal authority to the contrary.

of a nonprofit entity and, when serving on the governing body, to vote on matters that may pertain to or benefit the nonprofit entity. The public official need only "publicly announce his or her relationship with the nonprofit entity before voting on a matter that provides a direct and substantial economic benefit to the nonprofit entity." § 24-18-109(5)(b)(II), C.R.S. Surprisingly, neither party discusses this statutory exemption to the other provisions of Section 109, although Respondent raised it in his response to the complaint.

The exemption provides an independent basis for granting Respondent's Motion. Respondent provided the Articles of Incorporation for BBN with its Motion, and Complainant does not allege that BBN is a for-profit entity. It is also undisputed that Respondent served on BBN's Board of Directors. Therefore, even if Respondent had voted on matters involving BBN, or attempted to influence his fellow Town Council members' decisions, such actions would not have violated section 109.

WHEREFORE, the Motion is GRANTED and Complaint 23-02 is DISMISSED with prejudice.

SO ORDERED this 27th day of June, 2025,

The Independent Ethics Commission
Sarah Mercer, *Chair*
Daniel Wolf, *Vice-Chair*
Elizabeth Espinosa Krupa, *Commissioner*
Lori Laske, *Commissioner*
Cole Wist, *Commissioner*