

BEFORE THE COLORADO INDEPENDENT ETHICS COMMISSION

STATE OF COLORADO

Complaint Nos. 15-31, 15-32, 15-33, and 15-34

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Greg Giehl,

Complainant,

vs.

Todd Starr, Michael Whiting, Steve Wadley, and Clifford Lucero,

Respondents.

This matter comes before the Independent Ethics Commission (the “Commission”) on a complaint filed by Greg Giehl alleging ethical violations of “other standards of conduct and reporting requirements as provided by law” (“other Standards of Conduct” provision) of Article XXIX, sec. 5(3)(a), of the Colorado Constitution. The essence of the complaint is that the Archuleta County Commissioners accepted the resignation of the county attorney and rehired him on a private contractor basis in violation the code of ethics in Article 18 of Title 24, C.R.S., and in violation the ethical aspects of the Archuleta County Procurement Policy.

After Mr. Giehl filed the complaint, the Commission made an initial determination that the complaints were non-frivolous. The Respondents filed Answers to the complaints including a motion to dismiss, a motion for summary

judgment, and a motion to reconsider frivolousness. The Commission denied the requests, issued a Notice of Grounds for Hearing, and ordered the executive director to investigate the complaint.

The Commission's Notice of Grounds for Hearing gave notice to the parties that the Commission would consider Mr. Giehl's allegations under the following list of standards, pursuant to Colo. Const. Article XXIX, sec. 5(1) (other standards of conduct):

1. § 24-18-103(2), C.R.S. (breach of fiduciary duty);
2. § 24-18-104(1)(a), C.R.S. (use of confidential information);
3. § 24-18-105(3), C.R.S. (revolving door);
4. § 24-18-109(2)(b), C.R.S. (economic benefit);
5. § 24-18-201(1), C.R.S. (former employee contracts);
6. §§ 24-103-201, *et seq.*, C.R.S. (methods of source selection—competitive bidding);
7. Ethical Aspects of the Archuleta County Procurement Policy.

On August 10, 2016, the Commission held an evidentiary hearing and deliberated the merits of the case in public. The Commission hereby makes the following findings of fact and conclusions of law:

I. Findings of Fact

1. On September 21, 2015, Todd Starr, County Attorney for Archuleta County submitted his resignation to the Board of County Commissioners.
2. Mr. Starr was hired by a law firm with an office in Pagosa Springs.
3. On October 6, 2015, the Archuleta Board of County Commissioners ("BOCC") voted unanimously to agree to a contract for legal services submitted by Mr. Starr and his law firm.
4. Mr. Starr's duty of loyalty to his client was not adversely affected by the change in his employment status.
5. By hiring the law firm, the Archuleta BOCC expected to and has incurred a savings inasmuch as the BOCC will no longer have to pay a salary or benefits for a full time employee or assume legal liabilities for having full-time, in-house legal counsel.

II. Conclusions of Law

1. Todd Starr is a local government employee. The Archuleta County Commissioners, Michael Whiting, Clifford Lucero and Steve Wadley are local

government officials as defined by Colorado Constitution Article XXIX § 2(6), and subject to the Commission's jurisdiction.

2. The Commission does not substitute its judgement for that of local officials in connection with the merits of any procurement or budget decisions that do not raise ethical violations.

3. The Commission does not review decisions of county officials or elected officials, unless those decisions fall under the auspices of Article XXIX including other standards of conduct. Those officials are accountable to the voters in their districts, counties or cities.

4. The Commission does not have jurisdiction over attorney or judicial ethical violations not otherwise found in Article XXIX.

5. The Commission may find a violation if a government employee terminates employment with the government and takes a position adverse to his or her former employer with the knowledge obtained during the course of that employment. However, in this case, Mr. Starr took over the same duties he once handled while employed with the county as the county attorney. The duties to his client are exactly the same and there is no change of loyalty, duty, or obligation in Mr. Starr's new position compared to his status as a county employee.

6. The Commission finds the county has a right to hire an attorney of its own choosing, one whom the county is willing to rely on and put its trust and confidence in just as any other client. *See, e.g., Myers v. Porter*, 130 P.3d 1023 (Colo. 2006). The Commission does not have the right or authority to regulate the county's choice of legal counsel. In the context of the relationship between client and counsel, the Commission declines to interpret C.R.S. § 24-18-201(1) to mean that a government attorney cannot leave government employment and assume the same lawyerly duties and responsibilities as an attorney working in a law firm. The Commission will not intervene in a relationship regulated by the Office of Attorney Regulation Counsel. The people of Archuleta County continue to have the right to voice their opinion concerning this arrangement, both during public meetings of the BOCC and through the ballot box.

7. Regarding C.R.S. § 24-18-103(2), the Commission finds that Mr. Starr's duty to his client is unchanged and he acted with complete candor in disclosing his departure date and employment with his new firm. The County Commissioners did not breach their fiduciary duty to the citizens of Archuleta County by hiring Mr. Starr as none of them received any benefit by rehiring Mr. Starr through his new

law firm. Rather, the BOCC saved the taxpayers of Archuleta County money by hiring Mr. Starr on an as-needed basis without paying the benefits he once accrued as a county employee.

8. With respect to C.R.S. § 24-18-104(1)(a), the Commission finds Mr. Starr did not use or misuse any confidential or inside information. In his new role, Mr. Starr has only used the information he gained in his capacity as the county attorney for the benefit of the County. Mr. Starr has used, is using, and will be duty bound to continue using that information for the benefit of his client, the county, and for no other.

9. The Commission finds there was no violation of C.R.S. § 24-18-105(3). This provision is for guidance only, and does not constitute prohibited conduct. *See* C.R.S. § 24-18-105(1). Section 105(3) suggests that a government employee within six months following the termination of his office or employment, should not obtain employment in which he will take direct advantage, unavailable to others, of matters with which he was directly involved during his term of employment. These “matters” include rules, other than rules of general application, which the government employee actively helped to formulate and applications, claims, or contested cases in the consideration of which he was an active. Mr. Starr did not “switch sides” or use information from his former employment in a manner adverse to his former employer. It would be counterproductive and strain credulity for the Commission to find that local governments are not able to take advantage of and hire a person with this knowledge and background. The Commission is inclined to rely on the position of the agency involved, given its superior understanding of the duties performed by the employee involved and potential conflicts of interest. *See* Letter Ruling 10-02.

10. The Commission finds no violation of C.R.S. § 24-18-109. The statute prohibits any government employee from performing 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. Mr. Starr did not perform an official act relative to his own employment by the BOCC. He did not, for instance, opine as to his own hiring nor did he approve his own hiring. This statute requires the official or employee to exercise official authority (such as by vote). Mr. Starr did not commit such an act in the course of his own retention. No evidence was presented that Mr. Starr, in advance of his departure from Archuleta County, directed work to or otherwise favored the firm he joined. Nor was there evidence presented of any connection between the firm and Archuleta County prior to Mr. Starr’s joining the

firm. Regarding the three county commissioners, they did commit an official act, however, there is no evidence that they had any personal financial interest in this decision or outcome. None had any interest in Mr. Starr's law firm that would inure as a personal financial benefit to any one of them.

11. The Commission finds no violation of C.R.S. § 24-18-201. This statutory section states that a former employee may not, within six months following the termination of his employment, contract with any local government involving matters with which he was directly involved during his employment. This statute recognizes the violation of the public trust when a former government employee acts in a manner that is adverse or potentially adverse to the interests of the government agency. Here, it is undisputed that Mr. Starr had significant knowledge about the county when he left its employ. That is one of the reasons the county commissioners re-hired him through Mr. Starr's new firm. Mr. Starr also is bound by the ethical duties of a lawyer and may not share that his knowledge and information with another, or use it himself, against the county's interests. It is not unethical for the county to hire an attorney who has the knowledge, information, skills, and expertise acquired by virtue of Mr. Starr's prior position, because doing so still requires Mr. Starr to operate within the constraints of the duties and obligations owed by an attorney to his client. It should be noted that the Commission is not saying this provision is never applicable to an attorney or to an attorney/client relationship, but under the facts present in this case, there is no ethical violation.

12. The Commission finds no violation of C.R.S. §§ 24-103-201, *et seq.*, nor of the ethical aspects of the Archuleta County Procurement Policy. The Commission finds the state procurement code is not applicable to a county; rather it is only applicable to the executive departments of the state. Even if it were applicable to Archuleta County or if the substance of the state procurement code has been adopted by Archuleta County, there has been no *ethical* violation of the provisions in the code. Moreover, whether or not there were violations of the County's Procurement Policy, none constituted an ethical violation. Mr. Starr did not violate any ethical standards by offering his services to the county as an outside attorney.

13. While the Commission notes this transaction may have been handled by posting the position for other candidates to apply for the county attorney position, the Commission finds that the agreement to rehire Mr. Starr as legal counsel does not present an ethical violation under Article XXIX.

THEREFORE, the Commission finds there was no violation of Article XXIX by any of the Respondents, Todd Starr, Michael Whiting, Steve Wadley, or Clifford Lucero, and dismisses Complaints 15-31, 15-32, 15-33 and 15-34.

The Independent Ethics Commission

William J. Leone, *Chair*

Bob Bacon, *Vice Chair*

April Jones, *Commissioner*

Matt Smith, *Commissioner*

Dated: September 13, 2016