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January 20, 2021

Colorado Independent Ethics Commission
Dino Ioannides, Executive Director
1300 Broadway, Suite 240
Denver CO 80203

Re: Ethics Complaint against Tom Flower (Complaint 20-73)

RESPONSE

To the Members of the Independent Ethics Commission:

County Commissioner Tom Flower has been accused of committing an ethical violation by voting on a motion to pay overtime to employees of the Custer County Public Health Agency, one of whom was his wife Cindi Flower. Under the particular circumstances of this matter, he does not believe his behavior was unethical.

Statement of Facts

The Custer County Board of Health came into being in 2009. The Board of County Commissioners (BOCC) that created the Board of Health at that time chose to designate itself to also sit as the Board of Health pursuant to §25-1-508 (1)(c), C.R.S., which allows a board of county commissioners in a rural county with a population of less than 100,000 to do so. Until the COVID-19 pandemic hit, the Board of Health had very little to do other than hear periodic reports from the Director of the Custer County Public Health Agency. These reports were so

routine that the BOCC didn't even bother to recess as such and reconvene as the Board of Health even though they are two separate and distinct political subdivisions of the State of Colorado. The Public Health Agency, which until just recently was run by a public health nurse serving as the Public Health Director, was a low-key, nearly invisible entity that generated very little interest and absolutely no controversy.

Things changed when the virus reached this country. The Public Health Agency—and the Public Health Director—were suddenly thrust to the forefront of the public's attention. There were those in this rural community who strongly supported the initial steps taken by the Public Health Agency as a flurry of executive orders were issued by the Governor and public health orders were issued just as fast by the Colorado Department of Public Health and Environment. There were also those in this community who resisted any attempts at governmental regulation to combat the virus. Public Health Agencies across the State of Colorado were being pushed and pulled in all directions—the only constant was the failure of the Governor and CDPHE to provide funding to implement all the orders.

The Custer County Public Health Director at the time of the pandemic outbreak was Elisa Livengood, a public health nurse. She had hired Cindi Flower in July of 2019 to be the EPR (Emergency Planning and Response) Coordinator. All personnel issues for the Public Health Agency, including the hiring and firing of employees, are the exclusive statutory purview of the Director. Mr. Flower played no role whatsoever in the decision to hire his wife, not as a member of the BOCC and not as a member of the Board of Health. He had no supervisory authority over his wife; Cindi Flower answered only to the Public Health Director.

When the pandemic suddenly exploded on the scene the amount of work for the Public Health Agency quickly became overwhelming. Ms. Livengood, a salaried employee, worked long hours, and her three employees, who were paid an hourly wage, also worked many hours of overtime.

The pressure on Ms. Livengood became so great that she resigned her position, but before she did she asked the BOCC to approve overtime pay for her staff. It was a package request; the commissioners were not asked to consider each employee individually. Further, at the time the request was made it was contemplated that Custer County would be reimbursed for this overtime through the Coronavirus Relief Fund, federal money being managed by the Colorado

Department of Local Affairs. It is still the expectation of the BOCC that such reimbursement will occur.

Attached to this Response is an excerpt from the Minutes of the BOCC meeting on August 28, 2020, where the commissioners voted to authorize overtime pay for the Public Health Agency employees [see bottom of page]. The motion that was presented by Commissioner Jay Printz was generic; that is, he moved "*to have the Public Health employees paid for hours worked above their regular workday, not to exceed \$2,300.*" A review of the video of that portion of the BOCC meeting shows that the commissioners never even mentioned the three employees by name. The motion was passed by a unanimous vote of Commissioners Canda, Printz and Flower. The commissioners then went on to talk about offering the same overtime pay to employees in other county departments who were being required to work additional hours because of the virus, and in fact such action was subsequently taken: an employee in the IT Department was also paid for all of his overtime hours.

The reason for the request from Ms. Livengood and the subsequent action taken by the BOCC were not about giving preferential treatment to certain employees but rather to assure that all county employees who were unselfishly working above and beyond their normal duties were properly compensated. Mr. Flower has stated to the county attorney that he did not give any thought or consideration to the fact that he was voting to pay overtime to a group of employees that included his wife. The primary focus of the discussion prior to the vote was whether the request for overtime pay should be submitted directly to the committee handling the Coronavirus Relief Fund monies funds or whether the county should go ahead and pay its employees and then seek reimbursement afterward. If you watch the video you will see that Commissioner Flower was adamant about the importance of *all* the employees being paid for the work they had done. Public comment is regularly allowed after a motion has been made but prior to the formal vote on the motion; the public was in attendance via Zoom for this meeting and nobody challenged Commissioner Flower's participation in the final vote.

There has been a small but very vocal group of people in Custer County who have taken exception to the decisions made by Commissioner Flower with respect to how the pandemic should be addressed in Custer County. They have been very outspoken, which is their constitutional right. They have even talked about recalling him, which is also their constitutional

right to attempt if they wish. It is this group whose signatures appear on the letter submitted to this Commission as Attachment 2. As is readily apparent from the various allegations contained in the Complaint filed by Mr. McMahon, they are grasping at anything that might be used against Commissioner Flower. The only allegation made in the Complaint that was determined by the IEC to be non-frivolous is the one that is being addressed in this Response.

THE LAW AND LEGAL ARGUMENT

The Complaint filed by Mr. McMahon on October 16 is based on §24-18-109 (3)(a), C.R.S., which reads as follows:

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 other members of the governing body in voting on the matter.

The Complaint then goes on to erroneously allege that Commissioner Flower “has never recused himself from discussing or voting on Ms. Flower’s compensation and the terms of her employment.” This statement is absolutely false. As pointed out above, the decision to hire employees for the Public Health Agency is, by statute, vested solely in the Public Health Director. It was Ms. Livengood’s sole prerogative to hire Ms. Flower, to specify the terms of her employment, and to determine her compensation. Neither Commissioner Flower nor the other two commissioners had any voice in these decisions.

The Complaint further alleges that at the BOCC meeting of August 28, 2020, a motion was made to increase all CCPHA [Custer County Public Health Agency] employees’ pay, and that Commissioner Flower voted for the increased pay. Once again, this allegation is not only incorrect; it is intentionally specious. Using the term “increase in pay” strongly and unmistakably suggests a permanent pay raise, which most certainly was not the issue before the BOCC or the basis of the motion that was voted upon and approved. The commissioners were only voting to approve compensation for hours that had already been worked by the employees of the Public Health Agency.

Attachment 2 to the Complaint is a letter addressed to Bill Canda, the Chairman of the Board of Health. It contains the printed names of the Complainant, Jim McMahon, along with the printed names of approximately 90 other people. There are no signatures on this letter and it adds nothing to the matter now before this Commission. However, to the extent that it may be considered, it has no evidentiary value. The letter contains this statement: "We request that Tom Flower recuse himself from any discussion about his wife's position up to and including her pay . . ." First, Commissioner Flower has never discussed his wife's pay. At the risk of being repetitive on this point, her pay was determined by the Public Health Director, not the Board of County Commissioners or the Board of Health. Second, the use of the word "We" appears three times on page 2 of Attachment 2. Are all these individuals—the "We"—now joining as Complainants? If not, then Attachment 2 is not only meaningless but defective as well for the reason that it is not signed by Mr. McMahon, and it should be disregarded by the IEC.

Getting back to the language of §24-18-109 (3)(a), C.R.S., Commissioner Flower did not formally disclose at the August 28 BOCC meeting that his wife was one of the employees of the Public Health Agency for whom compensation was being requested. He did not need to; the three commissioners had worked together for nearly three years at the time of said meeting and the other two were well aware of Cindi Flower's employment status.

Further, Commissioner Flower did not have a personal or private interest in the matter being discussed, nor did he attempt to influence the other two commissioners with respect to how they should vote. He acknowledges that he voted on the matter, but he did not have a conflict of interest in doing so. If the question had been raised at the time and I had been asked for my legal opinion as the county attorney, I would have advised the Board that they were being asked to treat three employees equally for work they had done, that the employees were all clearly entitled to be compensated, that it was obvious there was no disagreement on the issue, and that under these specific circumstances Commissioner Flower did not have a personal stake in the outcome of the vote that would have disqualified him from participating.

To paraphrase the Purposes and Findings provision set forth in Section 1 of Article XXIX of the Constitution of Colorado, the conduct of local elected officials must hold the respect and confidence of the people, and said elected officials must carry out their duties for the benefit of

the people of the state. These officials must avoid conduct that is in violation of the public trust. Any effort to realize personal financial gain through public office is a violation of that trust.

It is obvious from the facts set forth above that Commissioner Flower was never motivated in the slightest by a desire to realize any financial gain for himself or for his wife. No public trust was violated. His decision was based on his recognition of the fact that three employees of the Public Health Agency had been working many hours of overtime and should be paid for that work. No reasonable person would come to the conclusion that he was giving his wife special treatment or that he was trying to line his own pockets.

Let's consider the absurdity of the alternative. There were three employees for whom the Public Health Agency was seeking *equal* treatment—pay each of them for the time they spent on the job over and above their regular hours. It would be ridiculous for Commissioner Flower to have said “Wait, we will have to vote on each employee individually; I can vote on two of them but I will have to recuse myself on the third one.” It was clear from the BOCC's discussion of the request that all three commissioners were in agreement prior to voting. There was never a suggestion of reluctance on the part of the other two commissioners about approving the overtime; Commissioner Flower did not have to twist arms or lobby his fellow commissioners to persuade them to approve the request. Commissioner Flower did not initiate the request that overtime be paid to the three employees; he was merely acting on a legitimate request from the Public Health Agency. Even if he had recused with respect to his wife the outcome would have been the same; there would have been a 2-0 vote to pay Cindi Flower and a 3-0 vote to pay the two others.

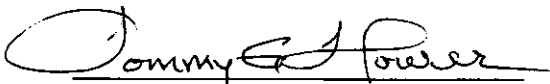
Finally, and most importantly, this Commission needs to consider the issues of intent and burden of proof. The statute relied upon by the Complainant clearly implies a requirement of intent. The member of the local governing body has to have a personal or private interest and has to intentionally conceal that interest from the other members of the governing body and from the public.

Further, the issue of burden of proof is not implied, it is right there in the statute in black and white. §24-18-109 (1), C.R.S., says “Proof beyond a reasonable doubt of any act enumerated in this section is proof that the actor has breached his fiduciary duty and the public trust.” Proof beyond a reasonable doubt is the highest standard of proof recognized by the laws of the United

States and the laws of the State of Colorado. Does the accusation made by Mr. McMahon and the egregious misstatement of facts relied upon by him in his Complaint rise to the level of proof beyond a reasonable doubt? Absolutely not. Your attention is once again directed to the language cited above from the Purposes and Findings provision of Article XXIX: Any effort to realize a personal financial gain through public office is a violation of the public trust. An “effort to realize a personal financial gain” necessarily requires an intent to do so. Where is the proof of that intent? There is none. The Complainant has proved nothing beyond a reasonable doubt. He has proved nothing by any standard of proof.

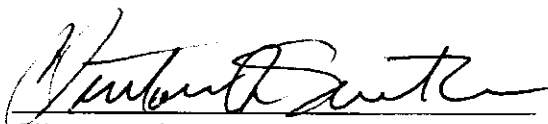
There is a legal principle which is applicable to this Complaint: *De minimus non curat Lex*. The law does not concern itself with trifles. This alleged violation is such a trifling matter that it is not worthy of any disciplinary action. The Complaint should be dismissed.

I, Tommy G. Flower, state that to the best of my knowledge, information and belief the statements set forth in this Response are true.


Tommy G. Flower

Date: Jan. 20, 2021

Respectfully submitted:


Clinton A. Smith, County Attorney
Attorney Registration No. 2508

PUBLIC COMMENT

There was public comment by Nita Lynch.

UNFINISHED BUSINESS

None

NEW BUSINESS

VOUCHERS

MOTION by Commissioner Canda, to approve the vouchers for August 2020. Motion carried unanimously.

County payroll and accounts payable were:

| | |
|-------------------------|---------------------|
| County General | \$321,305.35 |
| Road & Bridge | \$175,525.22 |
| Emergency Services | \$ 3,447.54 |
| Human Services | \$ 30,332.19 |
| Self-Insurance | \$ 5,606.82 |
| Capital Improvement | \$ 50,020.75 |
| Airport | \$ 9,211.74 |
| Conservation Trust Fund | \$ 10,000.00 |
| Tourism | <u>\$ 3,284.56</u> |
| TOTAL | \$608,734.17 |

BOARD OF HEALTH – SEATING A NEW BOARD WITH NON-ELECTED CITIZENS

Mary Ellen Lesage met with the BOCC to discuss the members of the Board of Health. Currently, the commissioners sit as the Board of Health. Mary Ellen stated that she felt the Board of Health should be made up of professionals with a medical background. County Attorney, Clint Smith, stated that this should be a discussion held at a Board of Health meeting instead of a BOCC meeting. If the BOCC decided to move forward with this, it would be done in a BOCC meeting. The board discussed postponing this item until it can be discussed further in a Board of Health meeting.

MOTION by Commissioner Flower, to postpone this item of business until the September 16th BOCC meeting. Motion carried unanimously.

COVID COMPENSATION FOR PUBLIC HEALTH WORKERS

The board discussed paying the Public Health employees for time spent on COVID issues above what their regular job duties are. The dollar amount would be approximately \$2,200.00. If paid, the County could then possibly be reimbursed through CARES Act funds.

MOTION by Commissioner Printz, to have the Public Health employees paid for hours worked above their regular workday, not to exceed \$2,300. Motion carried unanimously.