

CITY OF ALBUQUERQUE

BOARD OF ETHICS AND CAMPAIGN PRACTICES

NERI HOLGUIN,

Complainant,

v.

Case No. BOE 01-2021

MANUEL GONZALES, III,

Respondent.

RESPONDENT'S UPDATED BRIEF OF LEGAL AUTHORITIES

The Complainant cannot prove wrongful conduct on the part of Sheriff Manuel Gonzales, let alone fraud. At most, it appears that Sheriff Gonzales may have committed excusable neglect when collecting Qualifying Contributions at the Salvation Army Advisory Board Meeting. The additional allegations made in the *Amended* Complaint are vague and unsubstantiated. The Complaint should therefore be dismissed.

I. There is woefully insufficient evidence of fraud under the relevant legal standard.

The substantive section that the Sheriff is alleged to have violated is:

All \$5 Qualifying Contributions must be paid by the contributor; *if the funds are provided by any person other than the contributor who is listed on the receipt*, the Qualifying Contribution will be deemed fraudulent. *The City Clerk shall not certify Qualifying Contributions toward the required number of Qualified Contributions necessary to qualify* an Applicant Candidate as a Participating Candidate that do not meet the requirements of this paragraph.

2021 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code, Part C(6), at 8 (“Clerk’s OEEC Regulations”) (emphases added).¹

¹ Although this section clearly covers the allegations in the Amended Complaint, Complainant has attempted to turn a single interaction into several different violations. *See Complainant’s Amended List of Issues to be Considered by the Board of Ethics and Campaign Practices*, ¶¶ 2-5.

It is well-established, of course, that fraud, somewhat unusually among accusations made outside of the criminal context, must be proven by clear and convincing evidence, rather than a mere preponderance of the evidence.² “Fraud requires a false representation with intent to deceive, and this must be established by clear and convincing evidence.” *Harlow v. Fibron Corp.*, 1983-NMCA-117, ¶ 30 (citation omitted). “The clear and convincing evidence standard means that the evidence should be ‘clear’ in the sense that it is certain, plain to the understanding, unambiguous, and ‘convincing’ in the sense that it is so reasonable and persuasive as to cause the jury to believe it.” *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1509 n.27 (D. Kan. 1990).³ The so-called fraud here occurred in a split-second, ambiguous, and easily misunderstandable statement that went uncorroborated by the other individuals.

II. At most, Complainant has demonstrated excusable neglect on the part of Sheriff Gonzales.

According to the Board of Ethics Rules, the Board may dismiss a complaint after hearing evidence if it finds that the Respondent committed the violation “due to excusable neglect.” BOE Rules § 4(F)(2)(g), at 11. As will be demonstrated at the hearing, at most, the circumstances of the Salvation Army Advisory Board meeting of May 27, 2021, will reveal a fast-moving meeting replete with potential for confusion and miscommunication.

In his one-page unsworn statement, Dean Zantow describes Sheriff Gonzales and two other campaign officials (his two Undersheriffs) being invited to speak at a meeting of the Salvation

² See *Mason v. Salomon*, 1957-NMSC-043, ¶ 11 (“The rule is that transactions are presumed to be fair and honest until the contrary is proved by clear and convincing evidence [T]he burden is upon the party alleging fraud to establish its existence by clear and convincing evidence.” (citations omitted)); *Steadman v. Turner*, 1973-NMCA-033, ¶ 5 (“Each element of fraud must be established by clear and convincing evidence.”).

³ See also *Black’s Law Dictionary* (11th ed. 2019) (defining “clear and convincing evidence” as “[e]vidence indicating that the thing to be proved is highly probable or reasonably certain. • This is a greater burden than preponderance of the evidence”); II Stephen Michael Sheppard, *Bouvier Law Dictionary* 2221 (desk ed. 2012) (defining “clear and convincing evidence” as “requir[ing] more evidence than a proof by a preponderance of the evidence but not quite so much as proof beyond a reasonable doubt”).

Army Advisory Board, of which Zantow is a member, on May 27. According to Zantow, the Sheriff spoke for a bit, passed around nominating petitions and QC books, and, while the QC books were being circulated, answered the question from Zantow “Am I supposed to give you \$5?” with the response “No, that’s OK, we’ll cover that.” As a result, Zantow’s statement reports that he filled out a QC receipt but did not personally give \$5. Zantow’s statement is silent on whether another Salvation Army Board member covered the money for him, and it in no way suggests that he saw the Sheriff or anyone else attach \$5 to the book in his name, or that he overheard similar conversations with any of the other Board members or observed QCs being improperly paid for them.

On the other hand, Sheriff Gonzales and his two Undersheriffs (Sid Covington and Larry Koren) were the three campaign representatives present at the Salvation Army Advisory Board meeting, and none of them recall anything untoward or unusual happening at that meeting. While the interaction with Zantow was unmemorable to the Sheriff, he recalls that he was dealing with several people and two documents — nominating petitions and QC books, circulating at the same time — and the line “don’t worry about that” is the line he commonly uses to quickly and politely inform donors not to try to fill out the campaign-supplied fields, most commonly the candidate-name field, which most donors will ‘mess up’ if left to their own devices. Moreover, the campaign has subsequently obtained audio-recorded interviews of two other Salvation Army Advisory Board members who had sat next to Zantow at the meeting and who did not recall the putative exchange nor observe anything amiss about the Gonzales campaign’s activities at the meeting. To the extent that the exchange between Sheriff Gonzales and Zantow may have resulted in miscommunication or confusion, it was clearly unintentional and at most, constituted neglect on the part of the Sheriff, not fraud.

In an attempt to bolster Zantow's story, Complainant is now making additional allegations regarding other QCs from the Salvation Army meeting. *See Statement of Allegations* (attached to *Amended Complaint*), ¶¶ 14-15 (referencing "[o]ther individuals"). However, Complainant does not name the "other individuals" or quantify the allegations in any way. Nor are there any new percipient witnesses included on Complainant's *Amended Witness List*. Presumably, then, the new allegations are drawn solely from the Inspector General's Report. However, the IG's Report references interviews with only two individuals who were present at the Salvation Army meeting. The first, referred to only as ORG-1, never alleges that he signed a QC form and did not provide \$5, nor does he allege that he witnessed anything. He states only that there were "many miscommunications" about what happened at the meeting. The second individual, referred to as ORG-2, did state that he signed a QC, but did not give \$5. However, he does not provide any detail about his interaction (including who he provided the QC to). In fact, the most detail he provides is his statement that "the meeting was busy and lots of different things happened during this time." These kinds of anonymous statements, without more, simply cannot bolster Zantow's claims, and certainly do not establish the kind of pattern Complainant has alleged.

Perhaps recognizing this, Complainant also makes allegations regarding Sheriff Gonzales collecting QCs without the \$5 on *other occasions*. *See Statement of Allegations* (attached to *Amended Complaint*), ¶ 16 (referencing "[o]ther occasions"). This allegation is as vague as it gets. Presumably, the allegation is based on a portion of IG report, which states that Sheriff Gonzales collected 4 QCs where a person signed but did not give \$5 (or where the person signed but could not recall if they gave the \$5). Without further amplification, this vague allegation should fail.

III. If Sheriff Gonzales’s conduct warrants a sanction, the Qualifying Contribution at issue should be subtracted from his total QCs and he should, at most, be fined.

During the hearing held before the Board of Ethics on July 23, 2021, Complainant made it clear that all the Keller Campaign was looking for at that time was a “reprimand and a fine.” <https://www.youtube.com/watch?v=BrJOgG6j22s&t=1699s> at 23:11 – 23:17. The Complainant indicated that whether the Keller Campaign would change its requested remedies would depend on the IG’s investigation. *See id.* at 23:17 – 23:45. There is clearly not anything in the IGs report that should change the scope of the remedies on the table — reprimand and fine.

Importantly, in this Board’s prior decision in *Padilla v. Benavidez*, BOE 02-2017, the Board found “that nineteen (19) violations of Article XVI of the City Charter (OPEN AND ETHICAL ELECTIONS CODE) occurred for which Respondent Javier Benavidez is ultimately responsible,” but nonetheless simply issued at \$100-per-violation fine against him. *Benavidez* Decision ¶¶ 1-2, at 2-3 (filed Sept. 19, 2017).⁴ This decision was animated, rightly, by the same principles that should govern here, which are also the principles that guide our state courts to aggressively shoot down nominating-petition challenges at the legislative, statewide judicial and executive, and gubernatorial level: the *voters* chose to give the Sheriff public financing, and the Sheriff’s ability to compete with public financial support is an electoral outcome, not unlike winning a primary or obtaining ballot access. *See, e.g., Charley v. Johnson*, 2010-NMSC-024, ¶¶ 10-11 (“[I]t was not just [the nominee’s] interests that were at stake, but also the right of the citizens to nominate and vote for the candidate of their choice [E]very precaution must be taken to protect the right of New Mexico citizens to vote for the candidate of their choice.” (citations omitted)); *Gunaji v. Macias*, 2001-NMSC-028, ¶ 29 (“[A]n election is only ‘free and

⁴ The BOE Rules, which were signed and approved by the current Clerk, provide that “[p]rior decisions by the Board on the same issue will generally be followed and the parties are urged to refer to prior rulings on identical or similar issues.” BOE Rules § 4(E)(4)(e), at 8.

equal' if the ballot allows the voter to choose between the lawful candidates for that office");
id. ¶ 26 (“The omission of a candidate’s name from the ballot has deprived some voters of that
choice, thereby, strictly speaking, compromising the validity of the election.” (citation omitted)).

Respectfully submitted,

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Exhibit List / This Filing Has No Exhibits

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August 2021, I submitted the foregoing Respondent's Updated Brief of Legal Authorities via email to the Albuquerque City Clerk (ewatson@cabq.gov), Deputy City Clerk (mdiemer@cabq.gov), the Board of Ethics and Campaign Practices (aschultz@rodey.com), and to the following counsel of record:

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