CITY OF ALBUQUERQUE

BOARD OF ETHICS AND CAMPAIGN PRACTICES

NERI HOLGUIN,

Complainant,

v. Case No. BOE 02-2021

MANUEL GONZALES, III,

Respondent.

RESPONDENT'S LEGAL BRIEF

The *Amended Complaint* in this case boils down to an allegation that Sheriff Manny Gonzales and his campaign turned in a number of qualifying contribution ("QC") forms in which the contributor did not sign the QC form or give the required $5 contribution. Although the Gonzales campaign has conceded that it has since discovered (following the initial complaint in *Holguin II*) that *some* (but certainly not all) of the alleged fraudulent QCs turned out to have been signed by someone other than the contributor, there is **absolutely no proof whatsoever** that Sheriff Gonzales *knew* of the problematic signatures during the qualifying period or when they were turned in to the Clerk's Office. In fact, he has been steadfast and adamant in his denials. In the same vein, there is **no proof** that Sheriff Gonzales *should have known* that there were issues with those signatures during the qualifying period or when they were turned in to the Clerk's Office. Because the Keller Campaign cannot prove that Sheriff Gonzales knew or should have known that some problematic QCs were turned into the Clerk's Office, the *Amended Complaint* fails and must be dismissed.

I. <u>There is woefully insufficient evidence of fraud under the relevant legal standard</u>.

It is well-established 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.[1] "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).[2] In this case, for the reasons that follow, there is not clear and convincing evidence to show that Sheriff Gonzales made a false representation with intent to deceive.[3]

II. The evidence fails to prove that fraudulent QCs were submitted, and that Sheriff <u>Gonzales knew or should have known of their fraudulence</u>.

The standard in question is as follows: "whether the Applicant Candidate has . . . been found to have submitted any fraudulent Qualifying Contributions [("QCs")] or any falsified acknowledgement forms for [QCs] . . . , where the Applicant ***Candidate knew or should have***

[1] *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.").

[2] *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").

[3] Moreover, the Gonzales Campaign maintains that even if the legal standard is preponderance of the evidence, the evidence in the *Amended Complaint* still does not establish that Sheriff Gonzales knew or should have known that the alleged problematic QCs were falsified or otherwise fraudulent.

known of the fraudulence or falsification." 2021 Regulations of the Albuquerque Clerk for the Open and Ethical Elections Code Part C(15)(a)(v) ("Clerk's OEEC Regs") (emphases added).

The Keller Campaign cannot, and will not, prove that Sheriff Gonzales personally knew that fraudulent QCs — for purposes of this hearing, QCs that were not signed by the contributor — were submitted to the Clerk's Office by members of his campaign. That is, there have been no allegations that Sheriff Gonzales personally forged or falsified any QC form.

Under Part C(15)(a)(v), the only other mens rea that satisfies the standard is that the candidate *should have known* of the fraudulent or falsified QCs. Sheriff Gonzales is the head man on a large campaign. He did not resign his current office to run for mayor and has thus been running this campaign while actively working as Sheriff of the state's largest county. There is no evidence that, as Sheriff Gonzales went through the qualifying period as a law-enforcement leader by day and candidate by night, he ever did anything that brought him into contact with information that should have given rise to him uncovering whatever fraud occurred.

Importantly, in terms of information about the QCs that Sheriff Gonzales could have reasonably learned, perhaps the most reliable would have come from the Clerk himself. That is, the Clerk's Office is required by the Clerk's own Regulations to verify each and every QC, including conducting a signature match against voter registration documents. *See* Clerk's OEEC Regs Part C(14). Sheriff Gonzales was entitled to presume that the Clerk's Office was complying with its legal obligations. And when the Gonzales campaign was never notified of any problematic QCs — i.e., QCs rejected or left pending for fraud or forgery — the Sheriff had no reason to believe that anything untoward was occurring with respect to the campaign's collection of QCs. In fact, such silence from the Clerk could reasonably have been taken as a positive sign for the

campaign and its QC collection program.[4] Combined with the fact that the Sheriff hired a campaign manager who had previous experience successfully running a campaign for a publicly financed city councilor, it is not reasonable to believe that Sheriff Gonzales should have known that there were problematic QCs being turned in to the Clerk's Office. Likewise, it is unclear what the Sheriff should have done differently under the circumstances.

In order to get around the fact that Sheriff Gonzales did not personally know of any fraudulent activity, and had no reason to believe that his paid campaign manager, Megan McMillan — who had previously, and successfully, run a publicly financed campaign — or his other campaign volunteers, including Michele Martinez, were engaging in any fraudulent activity (especially in light of the fact that the Clerk's Office did not make him aware of anything unusual or untoward with his campaign's QC gathering), the Complainant and the Clerk have put forth a novel proposition. That is, according to the Complainant, because so many of the questioned QCs had the names of two of the Gonzales' campaign's designated representatives listed on them as the collector (Martinez and McMillan), knowledge of their activities must be imputed to Sheriff Gonzales.

The term "designated representative" appears all of two times in the Clerk's OEEC Regs: each campaign is required to send either the candidate or a designated representatives to a training class with the Clerk, *see* Clerk's OEEC Regs Part B(4)(a), at 4; and the Clerk will only hand out QC books to the candidate or his designated representative, *see id.* Part C(4)(b), at 7. In practice, the Clerk will also take filings from designated representatives of a campaign and treat them as

[4] There has been no evidence presented, at any time, that Sheriff Gonzales attempted in any way to avoid negative information about the conduct of his campaign or to ignore obvious fraudulent activity; for instance, evidence that the Sheriff refused to return calls from the Clerk's Office that he thought may include bad information or ignored pleas from campaign volunteers or workers trying to reveal fraudulent campaign practices. No evidence of this type was presented because none exists.

submissions by the candidate, which the Clerk would obviously not do if it were some random person off the street purporting to submit a document for a candidate. The designated-representative form itself states that the designated-representative status is "for the purposes of submitting materials to, or picking up materials up from, the City Clerk's Office." *Complainant's Ex. 176*. Reliance upon the designated-representative form simply misses the point of the designated-representative role and allows the form to effectively erase the "knew or should have known" standard and to basically create a strict liability standard.

Instead, the actual law of imputation of subordinates' acts should govern. That is, the operative question is "whether the employer knew or should have known of circumstances in the employee's background which create an unreasonable risk of injury to the persons with whom the employee could be reasonably expected to interact." *Grassie v. Roswell Hosp. Corp.*, 2011-NMCA-024, ¶ 78. Here, Sheriff Gonzales had no knowledge of circumstances in either Mrs. Martinez's or Ms. McMillan's backgrounds that created an unreasonable risk of fraudulent or criminal behavior. For good reason. Neither Mrs. Martinez nor Ms. McMillan have anything in their backgrounds that would have, or should have, put Sheriff Gonzales on notice that either would engage in any fraudulent or dishonest behavior.

Moreover, it is nowhere near true that all the challenged QCs are forgeries. To the extent that the Keller campaign has submitted alleged forged QCs — without a corresponding statement from the contributor acknowledging the forgery — all this Board has in front of it is amateur signature matching. Such 'evidence' is typically inadmissible when presented testimonially, *see* Rule 11-901(B)(2) & (3) NMRA (allowing both "[a] nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation," and "comparison with an authenticated specimen by an expert"), and no competent handwriting expert

can give an opinion based on a single exemplar of a person's actual known signature, *see, e.g.*, Joe Nickell, *Detecting Forgery* 34 (1996) ("Several signatures should always be obtained, if possible, before any final decision is rendered, five signatures always constituting a more satisfactory basis for an opinion than one and ten being better than five."); Heidi H. Harralson & Larry S. Miller, *Huber and Headrick's Handwriting Identification: Facts and Fundamentals* § 10.2, at 238-39 (2d ed. 2018) ("[F]ive or six pages of continuous writing should be adequate for comparison with questioned extended writings, and 20 or more separate signatures should be adequate for comparison with questioned signatures. Others have suggested fewer, perhaps only half those numbers."). Therefore, Sheriff Gonzales requests that any alleged forged QC supported only by amateur signature matching be disregarded by this Board.

III. If Sheriff Gonzales's conduct warrants a sanction, he should, at most, be fined.

In addition to a fine and reprimand, Complainant's *Amended Issues List* requests that this Board consider issuing findings relevant to denial of public financing and to revocation of public financing. This would be unprecedented and is unwarranted both by the circumstances and this Board's past practices.

Importantly, in this Board's prior decision in *Padilla v. Benavidez*, BOE 02-2017, a case virtually on-point with the present case, 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).[5] This Board did not consider revoking Benavidez's public financing, as was requested by the

[5] 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.

complainant in that case. This is notable in that without the 19 QCs that were proven to be violative of the OEEC, Benavidez actually fell below the number of QCs required to qualify for public financing (which is emphatically not the case here). And yet, the Board did not go to the extreme length of revoking Benavidez's public financing.

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 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)).

CONCLUSION

Sheriff Gonzales respectfully requests that this Board dismiss the complaint in its entirety because the Keller Campaign cannot prove that the Sheriff knew or should have known of fraudulent or falsified QCs turned in by members of his campaign. In the alternative, should this Board find a violation, Sheriff Gonzales should, at most, be fined.

Respectfully submitted,

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This Filing Has No Exhibits

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September 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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