

**CITY OF ALBUQUERQUE  
BOARD OF ETHICS AND CAMPAIGN PRACTICE**

**JASON KATZ,**

**Complainant,**

v.

**Case No. BOE 06-2021**

**TIM KELLER,**

**Respondent.**

**RESPONSE TO MOTION TO DISMISS**

COMES NOW Complainant Jason Katz, through counsel Kenneth H. Stalter, Stalter Law LLC, and responds to Respondent's Motion to Dismiss as follows:

- I. Because the BOE rules do not permit a motion to dismiss in lieu of an answer, Respondent failed to answer the complaint and is deemed to have admitted the allegations.**

Section 4(D) of this Board's Rules state:

Respondent's answer to a complaint shall include a response to each allegation in the complaint and shall be filed with the City Clerk by a Respondent within 10 days after Respondent receives notice from the City Clerk that the complaint has been set for a hearing.

*Rules and Regulations of the Board of Ethics and Campaign Practices Relating to the Election Code, the Open and Ethical Election Code, and the Code of Ethics of the City Charter ("BOE Rules"), at § 4(D).*

In this case, Respondent failed to file an answer responding to each allegation in the complaint. Respondent elected instead to file only a motion to dismiss.

Filing a motion in lieu of an answer may be permissible in a civil lawsuit filed in district court. The Rules of Civil Procedure applicable to litigation in the district courts, however, do not apply to administrative proceedings such as this Board's consideration of an ethics complaint.

*Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 21, 137 N.M. 161, 108 P.3d 1019 (“The technical rules of evidence and procedure often do not apply in an administrative hearing.”). Accordingly, Respondent cannot rely on the Rules of Civil Procedure to excuse his failure to file an answer.

This Board’s Rules contain no provision permitting a motion in lieu of an answer. Instead, Section 4(D) requires an answer after the City Clerk has made an initial determination that the Complaint is sufficient under Section 4(A). Because Respondent failed to file a proper answer under the Rules, he should be deemed to have admitted the allegations.

**II. Respondent’s motion is improper because it attempts to argue the merits of the complaint through contrary evidence.**

Section 4(F) of this Board’s rules enumerate the grounds for the Board to dismiss a complaint. That section does not contain any provisions authorizing a motion to dismiss by the Respondent. Even if Respondent may file a motion in lieu of an answer and may file a motion to dismiss, Respondent ignores the standard governing dismissal under the Board’s Rules.

Respondent invokes two provision of Section 4(F)(2), neither of which apply to this case. First, Respondent relies on Section 4(F)(2)(c), which permits the Board to dismiss a complaint when “[t]he conduct alleged in the complaint, if true, would not constitute a violation of the Codes.”

In considering this provision, the Board should take as true all allegations in the complaint and all reasonable inferences from them. Although, as discussed above, the Rules of Civil Procedure do not apply to an administrative proceeding, those rules “and the Rules of Evidence are made inapplicable in administrative proceedings not to restrict the discovery and presentation of evidence but to facilitate it.” *Redman v. Bd. of Regents*, 1984-NMCA-117, ¶ 12, 102 N.M. 234, 693 P.2d 1266. Therefore, case law regarding New Mexico’s liberal notice

pleading standards may provide guidance. Generally, “New Mexico is a notice-pleading state, requiring only that the plaintiff allege facts sufficient to put the defendant on notice of his claims.” *Madrid v. Vill. of Chama*, 2012-NMCA-071, ¶ 17, 283 P.3d 871. In considering a motion to dismiss, courts take all factual allegations as true and “resolve all doubts in favor of the sufficiency of the complaint.” *Id.* ¶ 18. This standard is well-established in litigation and because it is consistent with the text of Section 4(F)(2)(c), should apply here as well.

Given the text of Section 4(F)(2)(c) and New Mexico’s notice-pleading approach, Respondent’s motion lacks merit. Respondent attempts to defeat the complaint by presenting evidence which, according to Respondent, shows the falsity of the complaint. For purposes of a motion to dismiss, however, the allegations must be taken as “true.” § 4(F)(2)(c). Further, given the detail with which Respondent discusses the allegations and attempts to contest them, the complaint passes the notice-pleading threshold. There is no doubt that Respondent has adequate notice of the claims.

Even if the motion to dismiss were permitted, any contrary evidence advanced by the Respondent would be disregarded. To the extent that issues of fact or credibility exist, these issues must be resolved at a hearing on the merits, where the Board as factfinder may hear testimony and receive exhibits.

### **III. The conduct alleged in the complaint, if true, constitutes a violation of the Codes.**

The complaint first alleges that Justin Cheney, acting on behalf of the Keller campaign, solicited qualifying contributions on city property and offered to pay the \$5 campaign contribution for others. The declaration of Shawn McDonald, made under penalty of perjury and attached as Exhibit 1 to the complaint, establishes these facts. This conduct violated Sections 6 and 7 of the City Ethics Code, which generally prohibit the use of city employees and city property for campaign purposes.

Respondent argues that Cheney's conduct cannot be attributed to Respondent. The complaint, however, alleges that Cheney was "[a]cting on behalf of Mayor Keller," an allegation which should be taken as true for purposes of the motion to dismiss. Exhibit A to Complaint, at 2. Exhibit 2 to the complaint contains 25 receipts signed by Cheney, in which he identifies himself as a "Representative" of Respondent.

In his application for certification as a participating candidate, Respondent acknowledged that all qualifying contributions he submitted were received by him or his "representatives." *Application for Certification as a Participating Candidate, attached as Exhibit 1*. Additionally, the candidate guide specifies that the City Clerk will provide books of qualifying contribution receipts only to candidates or authorized representatives of candidates. *2021 Candidate Guide, relevant excerpts attached as Exhibit 2, at 19-20*. Therefore, Cheney could only have received the receipts he used from Respondent's campaign. The rules simply do not provide for the solicitation of qualifying contributions by persons who are not acting on behalf of the candidate. The facts alleged therefore establish that Cheney was acting as an agent of Respondent in soliciting contributions. Additionally, the complaint alleges that Cheney's union is a client of Respondent's campaign manager, further supporting the reasonable inference that Cheney was acting in coordination and consultation with Respondent's campaign.

Respondent also argues that Sections 6 and 7 of the Code of Ethics apply only to the personal conduct of an official and not to actions taken through agents. Memorandum, at 7. This argument must be rejected because it is contrary to the legal principles of agency. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 42, 143 N.M. 142, 173 P.3d 749 (A "central feature of an agency relationship is that the principal is responsible for the acts of the agent."). Respondent's reading of the Code would lead to an absurd result, permitting campaign representatives to

violate the Codes while insulating the candidate who certifies compliance. This is not the result intended when the City adopted the Codes.

Respondent also falsely states that Cheney is an agent only of his Union, not of the City. *Respondent's Memorandum of Law in Support of Motion to Dismiss*, at 6 (“Mr Katz appears to believe that Mr. Cheney is paid by the City. He is not. As the President of the Albuquerque Fire Fighters Union, IAFF Local 244, Mr. Cheney is paid by the Union.”). Respondent’s own exhibits belie this assertion. Cheney is an employee of the City of Albuquerque, as shown by Respondent’s exhibit 1, a notice from the City that Cheney is under investigation for violation of the City personnel rules.

Based on the foregoing, the complaint gives Respondent adequate notice of the claims against him and the allegations contained in the complaint, if true, constitute a violation. Respondent’s factual arguments in opposition to the allegations are for a hearing on the merits, not on a motion to dismiss.

The complaint also alleged that Respondent violated the 2021 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code, Part B(5) which require candidates to properly report seed money contributions, including the contributor’s name, street address, phone number, occupation, employer and employer’s address. As shown in the complaint, Respondent made false statements with respect to a donation made by Nyika Allen and allowed those statements to remain through an amended filing until finally changing them in a second amendment. Respondent admits the basic facts but argues that somehow, he should not be penalized for submitting false information. This argument should be rejected. In any event, the threshold of notice pleading has been met and this issue should be heard at hearing on the merits.

Finally, the complaint alleged that Respondent violated the 2021 Regulations of the Albuquerque City Clerk for the Open and Ethical Elections Code, Part C(6), which state that:

All \$5 Qualifying Contributions must be paid by the contributor; if the funds are provided by any other person other than the contributor who is listed on the receipt, the Qualifying Contribution will be deemed fraudulent.

The regulations further provide that “the contributor himself or herself must sign the receipt.”

The regulations contain no exceptions to these rules. One person may not donate and sign for another, even with permission.

In response, Respondent admits that the receipts at issue were signed by persons other than the ostensible donor. Arguing that these incidents were perpetrated by “friends or family members,” Respondent attempts to create an exception where none exists. The text of the regulation is clear, however: the contribution must “be deemed fraudulent.” Regulations, Part C(6). Each of the receipts was also signed by a person who identified themselves as a “representative” of the Keller campaign. This leads to the reasonable inference that they were acting as campaign representatives. Yet Respondent argues that these were “individuals with no direct connection to the Keller Campaign.” But that begs the questions: how did they obtain the receipt booklets? Why did they identify themselves as campaign representatives? These are questions of fact that must be answered at a hearing on the merits.

Additionally, in another matter arising from this election, the City of Albuquerque Hearing Office wrote:

I endorse the view that it is the duty of candidates to manage and oversee their campaigns in a way that assures that fraud and falsifications do not occur. . . .

[Fraud] should not happen in any campaign, and I reject the corollary notion that some level of fraud and falsification is tolerable or ok. In my view, the Clerk has the right and the duty to deny participating candidate certification whenever fraud or falsification is discovered, without the need to first quantify it.

7-18-2021 Hearing Officer's Ruling, attached as Exhibit 3. This view is consistent with the Candidate guide published by the City Clerk, which states that "It is the candidate or candidate's representative's responsibility to ensure that the receipt books are filled out accurately, including a signature from the contributor." *Ex. 2, at 19.*

**IV. Respondent's own arguments and exhibits show that the complaint is not frivolous, groundless, or brought for the purposes of harassment.**

Finally, Respondent argues that the complaint is frivolous, groundless, or brought for the purposes of harassment, and should be dismissed on that basis. Respondent's own motion, however, shows that the complaint is based in fact. Respondent attached a notice of investigation, showing that Cheney is under administrative investigation for his conduct. Respondent's own City government therefore does not deem the issues presented here as frivolous or groundless. With respect to the other categories of allegations, Respondent generally admits the truth of the facts alleged: that the original campaign filings contained false statements and that this campaign submitted qualifying contribution receipts that were signed by people other than the listed contributors. Thus, the complaint is not frivolous, groundless, or brought for the purposes of harassment.

**V. Conclusion**

For the foregoing reasons, Complainant respectfully requests that this Board deny Respondent's motion to dismiss.

Respectfully submitted,

STALTER LAW LLC

/s/ Kenneth H. Stalter

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### **Certificate of Service**

I hereby certify that on October 5, 2021, this filing was sent via email to  
ewatson@cabq.gov, aschultz@rodey.com, keefelawoffice@gmail.com, and  
patrogers@patrogerslaw.com.

/s/ *Kenneth H. Stalter*  
Kenneth H. Stalter





Office of the City Clerk  
P.O. Box 1293  
Albuquerque, NM 87103  
Phone (505) 924-3650 Fax (505) 924-3660  
www.cabq.gov/clerk

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## Application for Certification as a Participating Candidate for the Office of Mayor

Applicant Candidates shall file this form with the City Clerk no later than 12:00 p.m. (noon) on **June 19, 2021**.

I, Timothy M. Keller, hereby apply for certification as a Participating Candidate for Mayor under the Open and Ethical Elections Code, and in support thereof swear or affirm as follows:

1. I have complied with all requirements of the Open and Ethical Elections Code and have met all requirements in raising Seed Money, In-Kind Contributions and Qualifying Contributions and in making campaign expenditures.
2. I have submitted to the City Clerk receipts for each Qualifying Contribution I have received and affirm that to the best of my knowledge that all Qualifying Contributors were registered to vote in the City of Albuquerque to which I seek election at the time I or my representative received the Qualifying Contribution.
3. I have submitted to the City Clerk all Qualifying Contributions received by me or my representatives and that me or my representatives received all such Qualifying Contributions during the Qualifying Period.
4. I have submitted all Qualifying Contributions, Seed Money and In-Kind Contributions and any corresponding documentation thereof collected by me and my representatives.
5. I have submitted an Affidavit in Support of Disclosure Report for Seed Money Contributions and In-Kind Contributions.
6. I agree to comply with all requirements of the Open and Ethical Elections Code and these Regulations.

I, Timothy M. Keller, hereby swear or affirm, under penalty of perjury under the laws of the State of New Mexico, that all the information on the uploaded form and on any attachments is true, correct, and complete, to the best of my knowledge.

6/19/21

Date

**EXHIBIT**

**1**

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I, Ethan Watson, Albuquerque City Clerk hereby  do  do not certify the above Applicant Candidate, Timothy M. Keller as a Participating Candidate under the Open and Ethical Elections Code for the position of Mayor on this 9th day of July, 2021.





## 2021 Candidate Guide

Office of the City Clerk  
Ethan Watson



District 1:	411
District 3:	315
District 5:	505
District 7:	442
District 9:	418

**2. Timeframe:**

Mayoral candidates may collect qualifying contributions from April 17, 2021, through June 19, 2021.

City Council candidates may collect qualifying contributions from May 31, 2021, through July 5, 2021.

**3. Qualifying Contribution Books:**

The City Clerk will provide candidates with qualifying contribution books that contain receipts for contributions. The books are pre-printed, and the candidate must fill in their name and what district they are campaigning to represent. The books contain three pages for each receipt: the pink page is the contributor’s receipt, the white original is for the City Clerk, and the yellow is the candidates copy. Candidates must obtain books from the City Clerk and they, or their representative, must sign an Acknowledgement of Receipt for the number of books received. Candidates shall submit books back to the Clerk with original white pages intact. All books must be returned by the end of the Qualifying Period, though candidates should return completed books at the end of each week so that the Clerk’s office can verify contributions on a rolling basis.

**4. Qualifying Contribution Website:**

All candidates who have filed a Declaration of Intent to Seek Public Financing, and who do not have any outstanding campaign finance compliance issues or fines with the Board of Ethics, may use the City Clerk’s qualifying contribution Website. This website will allow candidates to accept electronic qualifying contributions. All candidates using the website must abide by the City Clerk’s Guidance for the qualifying contribution website, and any amendments thereto. The qualifying contribution website is the only permitted method for a candidate to accept electronic qualifying contributions.

The qualifying contribution website allows for automatic voter verification. Potential contributors will be asked to verify their voter registration and then will be directed to electronically contribute to a campaign. This will allow for additional means for donation, and will provide an accurate and almost instant tally of a candidate’s verified qualifying contributions. Because the site verifies a voter’s registration prior to allowing for donation, it requires additional personal information that the receipt books do not. We encourage candidates to use both options.

**5. Soliciting Qualifying Contributions:**

Candidates may solicit qualifying contributions from all registered voters in the district the candidate seeks to represent. It is the candidate or candidate’s representative’s responsibility to ensure that the receipt books are filled out accurately, including a signature from the contributor. All the information on the receipt book can be filled out by someone other than the contributor,

but the contributor must sign the receipt on their own. All \$5 contributions must be paid by the contributor. If any of the funds are provided by someone other than the contributor listed on the receipt, those contributions will be deemed fraudulent.

**6. Contribution Reporting:**

Candidates shall bring fully or partially completed receipt books to the City Clerk's office each Friday of the qualifying period. For each book submitted, a corresponding amount of \$5 contributions shall be attached to the book and submitted at the same time. The final submission of books and contributions shall be made on the last day of the qualifying period.

**7. Verification of Contributions:**

The Office of the City Clerk will verify each qualifying contribution to make sure the contribution counts toward the candidate's minimum number of contributions necessary to participate in the public financing program. The City Clerk staff will notify the candidate of the number of contributions accepted and rejected. In the event that candidates have contributions to report each week, the City Clerk staff will update candidates on the number of contributions accepted and rejected in a timely manner.

**8. Certification for Public Financing:**

The City Clerk will certify candidates who meet the requirements under the Open and Ethical Elections Code, and who submit an Application for Certification along with their final qualifying contribution by the final day of the qualifying period. To be certified to participate in the public financing program, candidates must meet the criteria listed in the City Charter Article XVI, Section 7(A) and 2021 Regulations for the Open and Ethical Elections Code, as well as have collected the minimum number of required qualifying contributions, and have complied with seed-money and in-kind contribution restrictions. Other restrictions that could disqualify a candidate are outlined in the 2021 OEEC Rules and Regulations. The City Clerk will notify a candidate of certification by email, and by posting a list of qualified candidates on the City Website.

## Financial Reporting Site:

The current financial reporting software is available through the City Clerk's website, or can be reached at: [campaignfinance.cabq.gov](http://campaignfinance.cabq.gov).

A candidate or their treasurer will need to create an account on the site, enter contact information for the campaign, and declare if the campaign will be publically financed or privately financed.

Contributions, expenditures, debts, etc., can be entered as unique entries, or can be maintained in an Excel document and uploaded on the day each financial report for a period is due. The financial reporting site has created an excel document that can be uploaded to the system. In order to use the excel document provided, rather than entering each item uniquely on the site, you will be required to use "codes" to distinguish different types of contributions and expenditures. These codes are outlined in the

RECEIVED  
July 18, 2021  
JE

BEFORE THE ALBUQUERQUE CITY HEARING OFFICER

IN THE MATTER OF THE APPEAL OF THE DENIAL OF CERTIFICATION  
AS PARTICIPATING CANDIDATE FOR PUBLIC FUNDING OF SHERIFF  
MANUEL GONZALES III

**HEARING OFFICER'S RULING**

Hearing Officer Rip Harwood (Ripley B. Harwood, P.C.), after review of the facts and evidence presented at a hearing on the merits on July 15, 2021, and after review of the closing arguments and legal authority cited by the parties, finds and rules as follows:

The sole issue presented in this appeal is whether the City Clerk's decision to not certify Mr. Gonzales' application for certification as a participating candidate was proper or improper. Authority is either scant or non-existent as to the standard of review applicable to this appeal. I therefore apply the standard applicable to review of most administrative decisions, i.e., whether the decision is supported by substantial evidence and is not arbitrary or capricious or otherwise improper. I also note that the Appellant, Sheriff Gonzales, bore the burden of proving that the Clerk's decision was improper. I applied a preponderance of evidence standard in reviewing whether that burden was met.

I find and rule that the City Clerk's decision to not certify Mr. Gonzales' application for certification as a participating candidate was proper. I find and rule that Appellant Gonzales failed to prove by a preponderance of evidence that the Clerk's decision was improper.

I reject the notion that the City Clerk has any duty to candidates to monitor for fraud or falsifications, or to notify candidates of the detection of

EXHIBIT

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same. Instead, I endorse the view that it is the duty of candidates to manage and oversee their campaigns in a way that assures that fraud and falsifications do not occur. I would view this as a non-delegable duty even if the Appellant had not signed a document acknowledging responsibility for the acts of his key subordinates. Failing to detect and eliminate a multitude of forged qualifying contribution forms bearing the signatures of his key subordinates constitutes failure to exercise ordinary care in the management of a campaign and meets the "knew or should have known" standard of Part C(15(a)(iii)). I conclude this analysis by noting that I regard the Clerk's duty under the applicable rules and regulations as starting and ending with the task of assuring the legitimacy of qualifying contributions so as to effectuate the overall objective of assuring that candidates qualify through broad-based public support.

I also reject as hyper-technical the argument that the Clerk made no findings in support of his decision. His letter to Sheriff Gonzales explained the reasons for denying certification, and those reasons stand as findings.

I also reject the argument that Sheriff Gonzales had any property interest in being certified as a participating candidate. I am persuaded by the arguments and authorities holding that no such property interest attaches or vests, if at all, unless and until a candidate lawfully achieves participating candidate status. I accordingly reject the argument that the Clerk's denial of certification deprived Mr. Gonzales of a property interest without due process, or otherwise had any constitutional ramifications.

A pivotal basis for my ruling is the fact that the candidate admitted that many of the qualifying contribution forms submitted to the City were forgeries. I

reject the argument that "this happens in every campaign". It should not happen in any campaign, and I reject the corollary notion that some level of fraud and falsification is tolerable or ok. In my view, the Clerk has the right and the duty to deny participating candidate certification whenever fraud or falsification is discovered, without the need to first quantify it. I would however, end by noting that the number of qualifying contribution forms discovered to be forged and therefore fraudulent was sufficient to be fairly regarded as widespread rather than isolated, and were traceable to Mr. Gonzales' key subordinates.

Another pivotal basis for my ruling is what I will refer to as the "Salvation Army incident". This incident directly involved the Sheriff himself. It is evidence of direct knowledge of fraud or falsification. No persuasive evidence was adduced to suggest that the contributor attesting to his conversation with the Sheriff had any motive to falsify what he claims was said. I accordingly regard the attestation as persuasive evidence of personal knowledge of fraud or falsification that meets the knowledge standard of Part C(15)(a)(iii).

I reject the argument that the Clerk had any ulterior motive for the denial. The suggestion was that the Clerk would lose his job if Mayor Keller lost the mayoral race. However, the evidence presented was that unlike other high level exempt city government positions, the Clerk's position is such that he can only be terminated for just cause. The evidence was that this is purposeful in order to isolate the Clerk from political pressures such as are exemplified by the very decision he had to make in this case. The Clerk's job does not terminate were Mayor Keller not to win reelection, so this argument is without merit.



Lastly, in anticipation of the virtual certainty that this decision will be portrayed as a partisan orchestration of a hearing officer chosen by the City Clerk to do the City's bidding, I offer the following: my thriving law practice does not rise or fall on City work or contracts. My hearing officer contract with the City terminates in August and my response to the City's request for proposals for the next contract term was unsuccessful. I have no vested interest in any continuing business relationship with the City of Albuquerque. I do not know and have never met the current mayor. I have little or no interest in local politics, and have never contributed time or money to any mayoral candidate in any mayoral campaign. My decision that the City Clerk did his job and properly carried out his duty is based solely upon review of the evidence and testimony presented at the hearing and upon the parties' respective post-hearing submissions of arguments and authorities, for which I thank them.

Respectfully submitted this  
19<sup>th</sup> day of July, 2021

**RIPLEY B. HARWOOD, P.C.**

By: /s/ Rip Harwood  
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505-299-6314

*Hearing Officer*