



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

Ethan Watson, City Clerk

Sent via Electronic Mail

October 18, 2021

Eddy Aragon
c/o Rosario Vega Lynn
P.O. Box 65513
Albuquerque, NM 87193
rosariovegallynnlawfirm@outlook.com

Karen Montoya
c/o Kenneth H. Stalter
Stalter Law LLC
4801 All Saints Rd NW
Albuquerque, NM 87120
ken@stalterlaw.com
(505) 315-8730

Re: *Montoya v. Aragon, BOE 08-2021*

Dear Ms. Vega Lynn and Mr. Stalter:

On October 13, 2021, Ms. Karen Montoya Co-Chair of a Measure Finance Committee filed a complaint with our office against Mr. Eddy Aragon. Pursuant to Part K(1)(c) of the Board of Ethics Rules, the complaint was immediately sent to Mr. Aragon. On October 15, 2021, counsel for respondent sent a letter to the City Clerk's Office regarding the allegations in the Complaint. Exhibit 1, Response 10-15-21.

This letter discusses the complaint diversion process provided for in Part K of the City Clerk's 2021 Election Code Regulations ("EC Regulations") and Part 4(A) of the Board of Ethics Rules and Regulations ("BoE Rules") with regard to the third version of this complaint. The Rules and Regulations require that the complaint provide a reasonably detailed description of the alleged violations including the Sections of the Election Code, Code of Ethics, and Open and Ethical Elections Code or Rules and Regulations of the City Clerk allegedly violated and an explanation of how the complainant believes those rules, regulations, and ordinances were violated. See BoE Rules 4(A)(2)(a)(v) and EC Regs at Part K(1)(b)(i)(E).

The complaint alleges a variety of allegations regarding the City Election Code and Federal Communication Commission Regulations. The Board of Ethics and Campaign Practices does not enforce the Federal Communications Act or Federal Communications Commissions Rules. The remaining allegations in the complaint generally relate to whether and the extent to which Mr.

Aragon was required to report use of his radio pursuant to the rules in the Election Code.¹ In response, Mr. Aragon – through counsel – essentially argues that he was not required to report any such contribution and that any air time or use of the radio station may not have been a “contribution” at all. See Exhibit 1, at 2.

While either of the parties may have a meritorious legal argument in regards to the use of the radio station, their arguments go far beyond the inquiry before the Clerk’s Office in the Complaint diversion process. In addition to various filing requirements (e.g. a complaint may only name a single respondent), the central inquiry is whether the complaint provides

“[a] reasonably detailed description of the alleged violation(s), including the Section(s) or Parts (s) of the Election Code, Code of Ethics, Open and Ethical Code or the Rules and Regulations of the Board of the City Clerk were violated and any other pertinent violation”

2021 Regulations of the Albuquerque City Clerk for the Election Code at K1(b)(i)(E). Here other than the allegations about the FCC, the allegations in the complaint do provide a sufficiently detailed description.

The Clerk’s Rules and the Board’s Rules do not provide for a partial rejection of a complaint. As a result, even though the Board has no jurisdiction over purported violations of FCC rules, in light of that fact that other allegations in the complaint do contain a reasonable description of alleged violations and otherwise comply with the relevant rules, the Clerk refers this matter to the Board of Ethics.

The Clerk notes that this office expressly reserves any determination regarding revocation and makes no determination regarding revocation at this time.

Sincerely,

A handwritten signature in black ink, appearing to read 'Ethan Watson', written in a cursive style.

Ethan Watson
Albuquerque City Clerk

Encl.

Cc: Miriam Diemer, Deputy City Clerk
Andrew Schultz, Board of Ethics and Campaign Practices

¹ There are several related allegations with different stated violations which all generally stem from Mr. Aragon’s use of the Radio Station 1600Kiva.

Rosario D. Vega Lynn
Attorney at Law

Vega Lynn Law Offices, L.L.C.
P.O. Box 65513
Albuquerque, NM 87193
Direct: (505) 903-9411
Email: rosariovegallynnlawfirm@outlook.com

October 15, 2021

Via email: ewatson@cabq.gov

Ethan Watson
Albuquerque City Clerk
P.O. Box 1293
Albuquerque, NM 87103

Re: Ethics Complaint by Karen L. Montoya

Dear Mr. Watson:

Please accept this correspondence as a formal opposition to Ms. Montoya's complaint filed with your office on October 13, 2021.

The burden is on Ms. Montoya to provide facts and evidence in support of her complaint. Ms. Montoya swore under penalty of perjury that "to the best of my knowledge, information, and belief, formed after a reasonable inquiry under the circumstances, each factual contention of this Complaint is supported by evidence." However, all of Ms. Montoya's allegations are based on speculation, conjecture, hearsay and a flawed interpretation of the law. She cannot cure these defects because she also fails to identify any witnesses, authenticate documents and identify the source of any information to which she lacks firsthand knowledge.

Ms. Montoya claims that Mr. Aragon is in violation of the City Albuquerque (CAO) Election Code and the Federal Communications Act (FCA) because he "has openly used the radio station platform on a daily basis to obtain nominating petition signatures and raise money for his political campaign." Despite not being an attorney, Ms. Montoya includes legal analysis of both the Election Code and FCA. Ms. Montoya references Mr. Aragon's radio activity arguing that his actions are a "blatant" disregard for the rules. Ms. Montoya's legal analysis is flawed as is her application of her alleged facts to the law. In addition, she fails to present any argument that the City Clerk's Office can enforce federal law.

Mr. Aragon campaign has complied with the City Election Code

In support of her ethics complaint, Ms. Montoya relies on speculation and conjecture. It appears she claims these alleged violations began on April 21, 2021 when Mr. Aragon submitted his Candidate Registration. In fact, Mr. Aragon was not considered a qualified, certified candidate until the city and county clerks accepted the signatures of his petition. The Bernalillo County

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Clerk certified Mr. Aragon's candidacy on September 3, 2021. Ms. Montoya's allegations as to activity preceding Mr. Aragon's candidacy as a privately funded candidate are irrelevant to her ethics complaint.

Ms. Montoya's complaint alleges violations of Part E and G of the Election Code because he did not list "airtime" nor disclose "any in-kind contributions from Rock of Talk, LLC despite the fact that he is using the KIVA radio station on a daily basis to raise funds and support for his candidacy." Mr. Aragon owns the radio station, makes his living as a radio personality and resides in his radio station. None of these are "contributions" as defined by the Election Code at Article XII Section 2(g)(2), (3). The Election Code specifically states:

[C]ontributions of commercial or professional services shall be attributed a cash value equal to their **fair market value**...[N]one of the following shall be considered a contribution: **a candidate's own services and property**, other than cash; **the use of a dwelling unit and residential premises incidental thereto for any campaign purpose** and the provision of refreshments and entertainment in connection with such use; the services of the person who is performing the duties of the candidate's treasurer; and the use of vehicles for any campaign purpose other than in connection with the performance of a commercial or professional service.

Assuming *arguendo* that Ms. Montoya's claims are true, no "in-kind" contributions occurred because *The Rock of Talk* has **never** sold any ads to any political candidate. In an advisory opinion, the New Mexico Attorney General suggested that determining what an "in-kind" contribution is can be accomplished "by calculating the cost it would bear in providing identical services to those provided by the nonprofit in question." See N.M. Att'y Gen. Adv. Letter to Mary Kay Papen, New Mexico State Senator (April 29, 2016) ("Valuation of In-Kind Services"). If the airtime cannot be purchased, the cost is zero and the fair market value is likewise zero. Thus, any "contribution" to Mr. Aragon's mayoral campaign by *The Rock of Talk* is zero and was properly excluded from campaign finance reports.

Federal Communications Act does not apply to municipal elections.

Ms. Montoya claims Mr. Aragon violated the Federal Communications Act (FCA) at Section 315 oftentimes referred to as "the fairness doctrine." The FCA applies to candidates for federal office not municipal elections. 47 CFR § 73.1941. The City Clerk does not have authority to investigate or enforce alleged FCA violations.

Even if the City Clerk had such authority, the Fairness Doctrine violates Mr. Aragon's freedom of speech protected by the First Amendment and the New Mexico Constitution. The *Rock of Talk* program content is set by the listeners who call-in to the program and speak about issues affecting them as well as their concerns which range from traffic to health to crime to education.

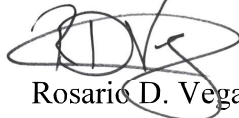
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The Rock of Talk does not feature discussions with newsmakers unless a newsmaker calls into the program at which point they are treated the same as other callers. To date, neither Manny Gonzales nor Tim Keller has called the show.

In *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969), the Court cautioned that if the Fairness doctrine ever began to restrain speech, then the rule's constitutionality should be reconsidered. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257 (1974), the court said the fairness doctrine and "[g]overnment-enforced right of access inescapably "dampens the vigor and limits the variety of public debate." That case involved a newspaper that had published a couple of editorials criticizing Pat Tornillo, a candidate for the Florida legislature. Tornillo wanted the Herald to publish his responses; the paper refused. A Florida statute then required newspapers to publish responses to criticisms. The court said the law was unconstitutional. In 1985 the FCC said the Fairness Doctrine was having "a chilling effect" on freedom of speech leading to the FCC abolishing the Fairness Doctrine in 1987.

For the foregoing reasons, Karen L. Montoya's ethics complaint is fundamentally flawed and incurable. Mr. Aragon respectfully submits that these defects require the City Clerk to summarily reject the complaint.

Respectfully,

A handwritten signature in black ink, appearing to read 'RDV', with a large, loopy flourish underneath.

Rosario D. Vega Lynn