



ROBLESIRAELIANAYA

Memorandum

To: Sandoval County Ethics Board
From: Luis Robles
Date: April 4, 2024
Re: **Kenneth and Kathleen DeHoff Ethics Complaint and Recommended Disposition**

The purpose of this memorandum is to provide you with an analysis and recommended disposition for the unnumbered Code of Conduct Complaint, received March 11, 2024 and dated March 8, 2024, submitted by Sandoval County residents, Kenneth and Kathleen DeHoff (the "DeHoffs").

The DeHoffs allege on the Complaint form that the specific sections of the Sandoval County Ethics Ordinance ("Ordinance" or "Ethics Ordinance") they believe were violated are the entirety of Sections 2, 3, and 5(a)(2). I believe the DeHoffs were attempting to allege that Sections 2-172, Declaration of Policy; 2-173, Responsibility of Public Office; and 2-175(a)(2), Standards of Conduct were violated, and this analysis will proceed as such. However, in the attached affidavit, the DeHoffs fail to mention Sections 2-172 and 2-175(a)(2), and instead only briefly cite the Section 2-173 requirement that public servants "observe the highest standards of law in the exercise of the powers and duties of their office." The DeHoffs' affidavit almost entirely relies on the alleged violation of other New Mexico statues and rules as the basis for its allegations of ethical misconduct. Section 2-172 of the Ordinance reads,

The proper operation of democratic government requires that elected and appointed officials, employees and volunteers of local governments be independent, impartial and responsible to the people; that governmental decisions and policy be made in proper channels of the governmental structure; that public office or the pursuit of public office not be used for personal gains; that the public have confidence in the integrity of its government; and, that, persons and businesses seeking to contract and contracting with the county abide by the requirements set out herein to prevent conflicts of interest and unfair contracting practices. To assist in attaining these goals, there is an established ethics ordinance for all elected and appointed officials, employees and volunteers of county government, including members of boards, committees and commissions (hereinafter "public servants"). The purpose of this ordinance is to establish standards of conduct for all public servants, by setting forth those acts or actions which are incompatible with the best interests of the county and by requiring such public servants to disclose personal interests, financial or

otherwise, in matters affecting the county. It is the further purpose of this ordinance to protect county employees and volunteers from undue influence, threats or fear of threat or reprisal with respect to the exercise of their constitutional right to support candidates of their choice. This article is in addition to the personnel rules and regulations of Sandoval County.

This article is promulgated under the county's authority to regulate the conduct of public servants under its control and contractors doing business with the county and prospective contractors. The penalties and remedies are not exclusive, and are complementary to other standards of conduct, including criminal prohibitions, and New Mexico's Governmental Conduct Act, NMSA 1978, § 10-16-1 et seq., which apply to individuals covered by this ordinance. The penalties under the Governmental Conduct Act may be more stringent than this article. Nothing herein shall preempt or prevent law enforcement or other governmental jurisdictions to investigate or pursue penalties for the same course of behavior prohibited under this article.

Section 2-173 of the Ordinance reads,

Public servants hold office, employment, or volunteer for the benefit of the public. They are bound to uphold the Constitution of the United States and the New Mexico Constitution; to observe the highest standards of law in the exercise of the powers and duties of their office; to impartially carry out the laws of the nation, state and county; to discharge faithfully the duties of their office regardless of personal considerations; and to recognize that the public interest must be their prime concern.

Public servants have the common obligation of serving the public. In performing their duties, public servants shall treat the public and each other with respect, concern, and responsiveness, recognizing that their common goal of exceptional public service can only be achieved by working together. Disputes that arise among public servants shall be resolved at the lowest possible level; keeping in mind that public money spent on resolving these disputes is money not spent on important public needs.

Subsection 2-175(a)(2) of the Ordinance reads,

(a) General ethical standards of public service.

[...]

(2) Public servants shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

In the attached affidavit describing the alleged misconduct, the DeHoffs identify six (6) separate issues, namely:

1. An allegation that, in claiming a statutory right of appeal in a New Mexico District Court case with the same parties (*see* D-1329-CV-2023-01382) (“*Cross Appeal*”), the County intentionally and fraudulently misquoted and thus misrepresented New Mexico law, namely N.M.S.A. 1978, Section 39-3-1.1(C);
2. That, in claiming a statutory right of appeal in the above matter, the County disregarded and thus violated N.M.S.A. 1978, Section 7-38-28(A), a limitation on the statutory right to appeal decisions of the County Valuation Protests Board that allegedly should have barred the County from appealing in the above matter;
3. That, in claiming a statutory right of appeal in the above matter, the County disregarded and thus violated Rule 1-074(A) N.M.R.A. providing that there must exist a statutory right to appeal administrative decisions to the district courts;
4. An allegation that the County failed to produce the record in violation of Rule 1-074(H) N.M.R.A. requiring agencies to file the record on appeal within thirty (30) days of filing the notice of appeal with the agency;
5. That the County’s *Cross Appeal* constitutes a false claim in violation of Rule 16-301 N.M.R.A., which provides that counsel shall not bring a proceeding unless there is a non-frivolous basis in law and fact; and
6. That making and failing to correct this allegedly false claim constitutes two separate violations of Rule 16-303 N.M.R.A., mandating that a lawyer shall not knowingly make or fail to correct a false statement of fact or law to a tribunal.

The DeHoffs have misunderstood the Ethics Ordinance, including the meaning of “standards” and the purposes of the policy declaration, responsibilities of public office, and general ethical standards of public service stated in Sections 2-172, 2-173, and 2-175(a)(2), respectively. The DeHoffs have erroneously concluded that violations of different New Mexico statutes and rules constitute violations of Sections 2-172, 2-173, and 2-175(a)(2), but that is not the construction nor purpose of these Sections. I explain the misapplications of the Ethics Ordinance to the issues in order below, grouping issues 1 and 2 on New Mexico statutes, grouping issues 3 and 4 on the New Mexico Rules of Civil Procedure, and grouping issues 5 and 6 on the New Mexico Code of Professional Conduct.

1. Violating *other* New Mexico statutes, unless directly stated, is not prohibited conduct within the scope of the Sandoval County Ethics Ordinance.

The DeHoffs maintain that any violation of *other* New Mexico statutes and rules constitute a violation of the Ethics Ordinance. In support of this conclusion, the DeHoffs list two (2) New Mexico statutes and four (4) New Mexico rules which they believe the County violated as the basis for their Complaint, namely N.M.S.A. 1978, §§ 39-3-1.1(C), 7-38-28(A); and Rules 1-074(A), 1-074(H), 16-301, and 16-303 N.M.R.A. The DeHoffs fundamentally misunderstand the purpose and application of the Ethics Ordinance.

Specifically, the DeHoffs allege that the County intentionally and fraudulently misquoted Section 39-3-1.1(C) to leave out, "Unless standing is further limited by a specific statute," and subsequently disregarded and violated Section 7-38-28(A) which states that a "property owner may appeal" pursuant to Section 39-3-1.1. The DeHoffs allege that, because the County is not a property owner under the meaning of Section 7-38-28(A), they had no statutory right to file their *Cross Appeal*. In violating these two statutes, the DeHoffs argue that the County also violated two (2) New Mexico rules of professional conduct and two (2) New Mexico rules of civil procedure, which I will discuss below in Sections 2 and 3, respectively.

The DeHoffs' claim that the County did not have a statutory right to appeal the judgment in the parties' corresponding New Mexico District Court case is outside the scope of the Ethics Ordinance. The Ethics Ordinance is chiefly concerned with financial interests, conflicts of interest, and fiduciary duties, and the alleged violations of N.M.S.A. 1978, §§ 39-3-1.1(C), 7-38-28(A) are not subject to discipline under the Ethics Ordinance.

Although the DeHoffs fail to allege what specific parts of Sections 2-172 and 2-173 were violated by the County's misconduct, it is of no consequence as these sections provide no relevant violable provisions. Sections 2-172 and 2-173 immediately precede Section 2-174, Definitions. Section 2-174 was intended to immediately precede the first of two (2) Sections in the Ordinance with violable provisions, namely Section 2-175, Standards of Conduct. It follows that Sections 2-172 and 2-173 were intended only to promote public policy and interest as a foundation for the Ethics Ordinance without proscribing a mandatory course of conduct for Sandoval County employees. Sections 2-172 and 2-173 further lack the specificity needed to provide notice of what is prohibited by clearly identifying the conduct in question.

First, Section 2-172 is titled the "Declaration of Policy" which provides employees with a framework of public policy meant to inform the decisions of public servants acting within the scope of their employment. Section 2-172 itself states that the enumerated requirements therein are merely goals. The only language in Section 2-172 that might be construed as mandatory and thus violable is preceded in the same sentence with the general purpose of the Ethics Ordinance and pertains only to the disclosure of financial and other personal interests:

The purpose of this ordinance is to establish standards of conduct for all public servants, by setting forth those acts or actions which are incompatible with the best interests of the county and by *requiring* such public servants to disclose personal interests, financial or otherwise, in matters affecting the county."

(emphasis added). Section 2-172 thus lacks the language necessary to form a relevant, specific, and mandatory course of conduct for Sandoval County employees, and it therefore contains no applicable violable provision. Additionally, there exists no provision in the Ethics Ordinance which states that failing to adhere to the Declaration of Policy is, itself, prohibited conduct subject to discipline.

Second, Section 2-173 is titled the “Responsibility of Public Office” which promotes a generalized and common obligation of all employees to serve the public by working together and acting in accordance with the public interest. The DeHoffs’ affidavit briefly claims the following:

This retaliatory filing of an illegal action by Sandoval County against my wife and I is a violation of New Mexico State Law, a violation of New Mexico Legal Ethics rules and as such sanctionable under Sandoval County Ethics Guidelines that requires all Sandoval County Employees ‘observe the highest standards of law in the exercise of the powers and duties of their office.’

While this language cited from Section 2-173 appears to be specific and mandatory on its face, the underlying conduct is enforceable by other means since Section 2-173 was not intended as a “catch-all” for any acts not enumerated or otherwise covered by Sections 2-175 or 2-176. Section 2-173 was merely intended to inform the interpretation and application of the sections of the Ethics Ordinance which contain specific and violable mandates, namely Sections 2-175 and 2-176, by providing these such examples of what it means to serve at the benefit of the public. Further, there is no provision in the Ethics Ordinance which states that failing to adhere to the Responsibility of Public Office is itself prohibited conduct subject to discipline.

Subsection 2-175(a)(2) is similar to Sections 2-172 and 2-173, as it directs employees to generally maintain the integrity and ethically discharge the high responsibilities of public service. Subsection 2-175(a) is titled “General ethical standards of public service” and prefaces the rest of Section 2-175, Standards of Conduct. Unlike the other provisions of Section 2-175, the “General ethical standards of public service” are not prohibitions on conduct. These provisions lack the specificity needed to provide notice of what is prohibited by clearly identifying the conduct in question. Nor was this section intended as a “catch-all” for any acts not covered in the rest of 2-175. Instead, it is a set of guiding principles which informs the interpretation and application of Section 2-175. Once again, there is no provision in the Ethics Ordinance which states that failing to adhere to the General Ethical Standards is itself prohibited conduct subject to discipline.

Even if such violations of other New Mexico statutes were within the scope of the Ethics Ordinance, the Board lacks the capacity to make a legal determination which is reserved for the New Mexico courts. It is the duty of the judiciary, and not the Sandoval County Ethics Board, to “say what the law is.”¹ The Ethics Ordinance contains no provisions that speak to these statutory matters. Instead, the Ethics Ordinance is fairly limited in scope to financial fiduciary matters and mirrors the New Mexico Governmental Conduct Act. While there is general language within the Ethics Ordinance that might seem to encompass a wider range of ethical issues, this is a misapplication.

The words in Subsection 2-175(a)(2) are in fact taken directly from New Mexico’s Governmental Conduct Act, Section 10-16-3(B). These same sentences were found to be

¹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

unconstitutionally vague by the New Mexico Court of Appeals in 2020. The court found that although § 10-16-3(B) describes behavior to which government officials should aspire, it does not include a definition or clarification of the conduct with which the officials are required to comply. To the extent the phrases “conduct themselves in a manner that justifies the confidence placed in them by the people,” “maintaining the integrity,” and “discharging ethically” were intended to require or prohibit certain conduct, the New Mexico Court of Appeals was unable to ascertain with any reasonable degree of certainty the conduct the legislature intended to prohibit. The language not only fails to provide “persons of ordinary intelligence” a fair opportunity to determine whether their conduct is prohibited, but it also fails to provide minimum guidance that would preclude subjective and ad hoc application of the law.² Therefore, this language does not impose a certain standard of conduct, but rather illustrates an ideal to which public employees should aspire.

Likewise, the identical language in the Ethics Ordinance does not impose a broader duty on Sandoval County employees beyond the fiduciary duties clearly articulated in the remainder of the Ordinance. Nor would it be desirable for the Ethics Ordinance to do so, because the language of Subsection 2-175(a)(2), like the language of Section 10-16-3(B), is too vague to create a consistent and identifiable boundary between acceptable versus unacceptable conduct. The reasoning that underlies *State v. Gutierrez* applies equally to the Ethics Ordinance.

Although the alleged noncompliance with two (2) New Mexico statutes, if true, is not acceptable for Sandoval County employees, the legal issues implicated by such behavior are not encompassed by the Ordinance. Such complaints are properly brought to the New Mexico courts, which are the intended and appropriate avenue for the DeHoffs’ statutory right of appeal claim.

2. Violating the New Mexico Rules of Civil Procedure, unless directly stated, is not prohibited conduct within the scope of the Sandoval County Ethics Ordinance.

Following on the heels of the above claim, the DeHoffs allege that “NMRA 1-074, the District Court Appeals Process, is applicable only to those individuals with an established statutory right of appeal the right to use the district court appeals process within (sic).” The DeHoffs further allege that the County was “required by law NMRA 1-074(H) to produce the record to my wife and I within thirty days of our filing of our Appeal in District Court, ... [and] both parties have still failed to do so in spite of our filings to them to make them aware of the violation of the law.” In summary, the DeHoffs claim that the *Cross Appeal* violated Rule 1-074(A) requiring a statutory right to appeal administrative decisions to the district courts, and that the County failed to produce the record in violation of Rule 1-074(H) which requires agencies to file the record on appeal within thirty (30) days of filing the notice of appeal with the agency.

Without weighing the merits of the DeHoffs’ wrongful pleading and failure to produce claims, the Ethics Ordinance was not intended to police the improper adherence to the New Mexico Rules of Civil Procedure. Subsection 2-175(a)(2) reads, “Public servants shall conduct themselves

² See *State v. Gutierrez*, 2020-NMCA-045, cert. granted.

in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.” Similarly, Section 2-173 reads, “Public servants ... are bound ... to observe the highest standards of law in the exercise of the powers and duties of their office[.]” The DeHoffs may have concluded from the phrases “a manner that justifies the confidence placed in them” and “maintaining the integrity and discharging ethically the high responsibilities,” in addition to “observe the highest standards of law,” that some duty broader than a fiduciary duty was being imposed and that the alleged behavior of the County Assessor and County Attorney was therefore in violation of this broader duty. However, that is not the function of this language.

The Ethics Ordinance contains no provisions that speak to procedural matters, nor does the Ethics Ordinance encompass wrongful pleading or other fraudulent misrepresentation issues. Again, the legal issues implicated by such behavior are not encompassed by the Ordinance. Such complaints are properly brought to the New Mexico courts, which are the intended and appropriate avenue for the DeHoffs’ wrongful pleading and failure to produce claims.

3. Violating the New Mexico Code of Professional Conduct, unless directly stated, is not prohibited conduct within the scope of the Sandoval County Ethics Ordinance.

Under the New Mexico Code of Professional Conduct, The DeHoffs allege that the County’s *Cross Appeal* “represents the flagrant violation of ... the legal ethics rules ... which should have prevented Linda Gallegos and Michael Eshleman from filing a false claim which had no basis in the law and ... that should have prevented the deception deployed ... in the filing of this claim[.]” Further, the DeHoffs allege that they “corrected them in our response they failed to correct their errors before the court, an additional violation of NMRA 16-303.” I believe the DeHoffs were attempting to allege that the County violated Rule 16-301 by failing to bring a proceeding with a non-frivolous basis in law and fact, and that the County violated Rule 16-303(A)(1) by knowingly making and failing to correct a false statement of fact or law to a tribunal.

Again, violation of *other* New Mexico statutes, rules, or regulations, unless otherwise noted, are not within the purview of the Ethics Ordinance. Sections 2-172, 2-173, and 2-175(a)(2) are not implicated by violation of other state statutes, rules, or regulations. Enforcement of New Mexico statutes, rules, and regulations is properly contained within those state statutes, rules, or regulations.

The Code of Professional Conduct was “not intended to create a private cause of action since its intended remedy is the imposition of disbarment, suspension or reprimand of the offending attorneys.”³ Exposing “attorneys to actions for breach of ethical duties imposed by the codes would be contrary to the public interest in affording every citizen the utmost freedom of access to the courts.”⁴ The DeHoffs are not without recourse, as the “public can avail itself of other

³ *Garcia v. Rodey, Dickason, Sloan, Akin & Robb, P.A.*, 1988-NMSC-014, ¶ 18, 106 N.M. 757.

⁴ *Id.*

remedies against unprofessional lawyers.”⁵ Although the “Rules of Professional Conduct cannot be used to launch a malpractice claim, they still provide guidance in ascertaining the extent of lawyers’ professional obligations to their clients.”⁶ Thus, complaints and allegations under the Code of Professional Conduct are properly brought to the Disciplinary Board of the New Mexico Supreme Court.

Once more, the legal issues implicated by alleged violations of the New Mexico Code of Professional Conduct are simply not encompassed by the Ethics Ordinance.

4. Conclusion and Recommended Disposition

Fundamentally, all of the DeHoffs’ claims are properly brought before other government entities and the relief they seek is available under other laws. The DeHoffs’ Complaint fails to allege which specific parts of Sections 2-172 and 2-173 were violated by the alleged misconduct aside from the single guideline that County employees “observe the highest standards of law in the exercise of the powers and duties of their office,” and instead solely relies on the allegations that *other* New Mexico statutes and rules were violated as a basis for violation of the Ethics Ordinance. The DeHoffs’ Complaint thus mistakes the purpose and application of the Ethics Ordinance. Sections 2-172, 2-173, and 2-175(a)(2) are not prohibitions on conduct which can be violated, do not encompass violations of other statutes or rules, and were not intended as “catch-all” provisions for any conduct not enumerated therein. The DeHoffs are in no position to be drawing legal conclusions, and their claims that the County is in violation of two New Mexico statutes and three different New Mexico rules are best reserved for the New Mexico courts or the Disciplinary Board, not the Sandoval County Ethics Board.

The DeHoffs’ Complaint does not invoke the jurisdiction of the Ethics Ordinance, and as such the Complaint should not be heard by the Sandoval County Ethics Board pursuant to Section 2-177(a)(3). Instead, I recommend that the Board dismiss this Complaint and direct the Compliance Officer to send the DeHoffs an explanatory letter, pursuant to Section 2-180(3), which explains to the DeHoffs the deficiencies of their Complaint and its dismissal.

⁵ *Id.*

⁶ *Spencer v. Barber*, 2013-NMSC-010, ¶ 15.