



# Agenda

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## ETHICS & CAMPAIGN REVIEW BOARD

Thursday, May 19, 2011

4:00 p.m.

City Council Chambers

City Hall, 200 Lincoln Avenue

1. PROCEDURES
  - a) Roll Call
  - b) Approval of Agenda
  - c) Approval of Minutes – April 21, 2011
2. DISCUSSION MATTERS
  - a) City Attorney Advisory Letter – May 9, 2011.
3. ACTION ITEMS
  - a) Consideration of Complaint 2011-1.
4. BOARD MATTERS
5. DATE OF NEXT MEETING
6. PUBLIC COMMENT
7. ADJOURNMENT

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**CITY OF SANTA FE**  
**ETHICS AND CAMPAIGN REVIEW BOARD**

**May 19, 2011**

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**MINUTES OF THE  
CITY OF SANTA FE**

**ETHICS AND CAMPAIGN REVIEW BOARD**

**MAY 19, 2011**

**a) ROLL CALL**

A regular meeting of the City of Santa Fe Ethics and Campaign Review Board was called to order on this date at approximately 4:00 pm, by Chairman Fred Rowe in the City Councilor's Chambers, City Hall, 200 Lincoln Avenue, Santa Fe, New Mexico.

Roll call indicated the presence of a quorum:

**Members Present:**

Fred Rowe, Chair  
Ruth Kovnat  
Patricio Larragoite  
Rebecca Frenkel

**Members Absent:**

Fred Friedman (excused)  
Nancy Long (excused)

**Staff Present:**

Yolanda Vigil, City Clerk  
Melissa Byers, Legal Department

**Others Present:**

Karen Heldemeyer  
Julie Ann Grimm, the Santa Fe New Mexican  
Fred Flatt  
Charmaine Clair, Stenographer

Chair Rowe read an e-mail (Exhibit 1) he received from Nancy Long into the record:

"In the event a work commitment I have this afternoon prevents me from attending the ECRB meeting today, I wanted to convey to you that I will recuse myself from consideration of Complaint Case #2022-1 in order to uphold all confidence in the Board's integrity and impartiality as our Rules provide.

Thank you and please excuse me from the meeting if I am unable to attend today.

Sincerely, Nancy Long"

**b) APPROVAL OF AGENDA**

**Ms. Kovnat moved to approve the Agenda as presented. Mr. Larragoite seconded the motion and it passed by unanimous voice vote.**

**c) APPROVAL OF MINUTES-**  
**Minutes of April 21, 2011**

**Ms. Frenkel moved to approve the Minutes of April 21, 2011 as presented. Ms. Kovnat seconded the motion and it passed by unanimous voice vote.**

**DISCUSSION MATTERS**

**a) City Attorney Advisory Letter – May 9, 2011**

Chair Rowe said the City Attorney Gino Zamora was invited. He asked Mr. Zamora to read or summarize his advisory opinion to the Board. He said Board members could pose questions or add comments afterwards.

Mr. Zamora said he was present at the request of the Chair and the Board as a result of questions that were raised at the April 21, 2011 Board meeting. He said he received a letter from Chair Rowe dated April 26, that sought opinion on four questions that relate to current duties and to Complaint Case #2011-1 specifically.

He said he has provided his May 9, 2011 response to the Board's questions and for clarity has restated Chair Rowe's questions and the answers from the City Attorney's office.

Mr. Zamora explained the terms "new ethics code" (post April 16, 2011) versus the "old" and the current and future (effective July 1, 2011) ECRB membership.

A summary of his response follows:

*Question 1:* What is the status of the Ethics and Review Campaign Board between now and the successor board?

*Answer:* The current membership of the Board was properly appointed and remains in place to enforce the pre-April 16, 2011 ethics code. The members could not be replaced until July 1, 2011. The existing membership is clearly empowered to consider the complaints filed on or before April 16, 2011 under the old ordinance.

Mr. Zamora said the new ethics code does not address the role of the current ECRB membership but he believes it could be read and implied the current membership has the authority to consider complaints filed under the new ethics ordinance. He said however there could be equal argument against that. He said it was an oversight that the new ordinance does not address the ECRB membership from April 16, 2011 through July 1, 2011.

Mr. Zamora recommended where possible, when considering complaints under the new ordinance the Board should defer the complaints until the first of July. He said the new Board would have authority over that case.

*Question 2-* relating to Complaint #2011-1, could the Board consider the charges if the pre-existing or changed provisions of the 2011 Ordinance regarding improper use of city services, etc. apply to this proceeding, which alleges code violations.

*Answer:* the short answer is no- the complaint was filed under the old ethics ordinance that was changed in substantive and subtle ways in the new ethics ordinance. Therefore complaint direction under the old ordinance may or may not apply and any continuing violation under the old ordinance would have to have a new complaint filed under the new ordinance.

*Question 3-* in light of the recusal of three of the six sitting board members from this proceeding, can the board take further actions as to the merits of Complaint Case #2011-1.

*Answer-* Yes, although the process is complicated. He said the Board could continue to consider and act upon complaint #2011-1. The Board has sufficient members for a quorum and there were sufficient members remaining after recusal, for a decision. He quoted from the City of Santa Fe Rules and Procedures for City Committees as amended in 2009.

Mr. Zamora provided an example: the Board has a quorum of four; all four members participate in an agenda item. To pass that item 3 of the 4 members would need to vote in the affirmative.

Mr. Zamora said the additional context that is to be considered is recusal. The Committee Rules do not address recusal and other rules were looked at for guidance. The guidance found was within the City of Santa Fe Governing Body Procedural Rules: section IX (G) (3) states that "a recusal for conflict of interest purposes shall not be counted as a yes or no vote."

Mr. Zamora said the rule of reduction shall be applied in such case. He advised if the Governing Body Rules were followed, the decision may be made by a majority vote of those who have not recused themselves (4 members present, 2 recused then the 2 votes remaining must be a majority of the affirmative.)

*Question 4-* May the existing ECRB Board refer the case for action to the successor board for legal and prudential reasons.

*Answer:* It was not recommended that Complaint Case #2011-1 be further delayed.

Mr. Zamora said there were sufficient procedural avenues for reaching a conclusion to the matter with the current ECRB membership and the current membership has expertise in the old ethics ordinance. He recommended the current membership decide the matter and not defer the complaint.

## **ACTION ITEMS**

- a. Board Consideration of Complaint Case #2011-1

Chair Rowe said the Board was appreciative of the thoroughness and promptness with which the City Attorney responded to the Board's inquiries. He said it was clear this was not a black-and-white situation and was complicated and the answers were not clear.

Chair Rowe said he would make additional comments that bear on the recusals in a significant way. He said the answer from the City Attorney had said "under the circumstances he stated." He said the Board had to consider who was present; one absentee was Fred Friedman whose indication as to recusal is unknown. Another absentee, Vice Chair Nancy Long stated she recused herself.

Chair Rowe said in addition he has given consideration to the recusals and to the Board proceeding with a truncated membership. The current sitting membership was six and three of those have recused themselves leaving three possible votes.

Chair Rowe said with reluctance he would point to the rules (F4) which state due to the sensitivity of the Board's mission to enforce ethical standards and the importance of public trust and confidence and the Board's integrity and impartiality, Board members should lean toward recusal in close or doubtful cases.

Chair Rowe said he viewed this as a close and doubtful case and he also would recuse himself. He said that means only one member was present who had not recused.

He asked for the record, that any member who wishes to recuse make a short statement.

Ms. Kovnat said she previously indicated she would recuse herself. She said she has given political support to the parties in the complaint and for that reason her participation would be improper.

Ms. Frenkel thanked Mr. Zamora for his clear information. She said she announced at the last meeting that she would recuse herself; she has given political support to both parties. She said, however the main reason she recused herself was because she and Ms. Heldemeyer were good friends and had discussed the issue prior to Ms. Heldemeyer issuing her complaint. She thought it proper that she recuse herself.

She said she couldn't understand the issue with Mr. Friedman; if he does not recuse himself the Board would have two members. She understood if a subcommittee was appointed they could function as a two member committee.

Mr. Zamora said that was correct if the Board chooses to do so.

Ms. Kovnat said in the hypothetical situation, the subcommittee would consist of the only two members of the Board capable of taking action.

Ms. Frenkel said if the issue was important enough that someone brought it up and in her opinion the complaint should be considered.

Ms. Frenkel asked the City Attorney about his comment "because the complaint was submitted before the new ordinance was passed;" would that validate the consideration of the complaint by the Board. She asked if that would limit replies to what was submitted by either party before April 16 or could the Board consider addendums and responses received after that also.

Mr. Zamora said the complaint itself was initiated under the old ordinance prior to April 16 and was valid. He said any replies and documentation that relate to that complaint could be considered and all would be considered under the old ordinance, not the new ordinance.

Chair Rowe said his decision to recuse was taken after considerable thought as to the chair's appropriate role in the matter. In retrospect he said he was twice appointed by the respondent Rebecca Wurzbarger and in addition had spent several years in close work with the complainant Karen Heldemeyer in the operation of the Neighborhood Network.

He said under those circumstances, he believed in light of the rule adopted by the ECRB that members should lean toward recusal, he would recuse himself. He said he wasn't convinced he could muster the requisite impersonal, detached objectivity which a case of this complexity warrants.

Chair Rowe added an observation with respect to Ms. Frenkel; theoretically two members, who were not recused, could conduct proceedings. He said he would state as fact rather than a predisposition, that one member (Fred Friedman) who was not present, has previously indicated he was appointed by the complainant Karen Heldemeyer.

Chair Rowe said in addition, if the two Board members not recused were to consider the matter, the Chair would observe that the Board has three lawyer members who stated they would recuse. He thought it would be impossible for the two remaining Board members to make a determination without the participation at any stage of the three lawyer members.

Mr. Larragoite said he appeared to be the only member who has not recused himself that day. He said he and Chair Rowe have debated on many occasions and discussed Board members being present and that attorneys should chair subcommittees, etc. He said that the Board has existed as a citizen panel and not necessarily a legal review panel has been the basis of his debates.

He thought possibly Chair Rowe was leading to the fact that the two members not recused on the subcommittee, would not be attorneys. He said it is what it is; he wanted to state that because he thought the discussion was heading down that road.

Ms. Kovnat said she was troubled that a matter as important and significant as this could be heard with only two members and thought that was not wise for such an important complaint. She said the City Council had been wise in reconstituting the ethics ordinance and the problem of recusal would be mitigated by the new method of appointment.

Ms. Kovnat recommended the complaint be tabled and her recommendation had nothing to do with the absence of a lawyer on the committee. She said the issue was too fraught with potential problems to proceed.

Mr. Larragoite agreed with Ms. Kovnat's assessment that the complaint was too important. He said if an even numbered subcommittee ran into a debatable issue, where could they go from there.

**Ms. Kovnat moved, in light of the recusals and the shortness of time between now and July 1, to table Complaint Case #2011-1 to be considered by the successor board. Mr. Larragoite seconded the motion for purposes of discussion.**

Ms. Frenkel said by tabling the complaint the Board was saying the complaint would have to be filed again after July. She said to ask the new board to study the old ordinance in order to make a decision seemed to go against the City Attorney's advice.

Chair Rowe said the City Attorney indicated his recommendation was for the current Board not to delay, in light of the circumstances at the time of the advisory letter. He said the circumstances have changed and were modified by what transpired in the meeting.

Chair Rowe said in addition, the advisory letter by the City Attorney, for whom he has immense respect for as well as the hard work and analysis by the advisory letter, stated that the Board has expertise that the successor Board would lack. He said though this Board has expertise in general, the Board has no expertise with regard to the sections of the code involved (1-7.7I) which was changed to section E, which made a significant change by the deletion of one of the exceptions to the improper use of City services.

Chair Rowe said he could state fairly that this Board has no expertise with respect to the old and new section. He said the Board would need to determine what the City Council intended when they made the change to the code.

Chair Rowe called for further discussion; seeing none a vote was called.

**The motion failed with one affirmative vote and two votes against the motion.**

**Ms. Frenkel moved that the complaint be referred to the Complaint Subcommittee to be made up of two of the ECRB members, Mr. Larragoite and Mr. Friedman, unless Mr. Friedman recused himself.**

Ms. Frenkel said she agreed with Mr. Larragoite regarding the ECRB being a citizen's board. She said the purpose was for citizens to determine if a complaint was in the interest of the citizens of Santa Fe.

Chair Rowe pointed out the new ordinance specifically requires a four lawyer composition of the Board along with recommendations for Board membership by the local Bar Association. He said that was some indication that the participation of legal professionals particularly in an adjudication that involves ethics violations and adjudications directly appealable to the County District Court include legal considerations.

Ms. Frenkel said the subcommittee of two might come to that conclusion and that might be what they recommend. She thought the two members who have not recused themselves should at least review the complaint and make a recommendation.

**Mr. Larragoite seconded the motion.**



Mr. Larragoite said he also looked at the new ordinance and the membership of four attorneys. He said that brought back the same argument of whether this was a citizen's board or a legal review panel. He said if anything progressed to the District Court level that would be a legal issue; however as an ethics commission he was not in favor of that majority when the new ordinance was written.

Ms. Frenkel added that the Board wasn't working under the *new* ordinance; but under the old.

Ms. Kovnat said she tried to think through the scenario with the two member subcommittee. That subcommittee would report back to the full Board that consists of four members who have recused themselves and could not act on the subcommittee's recommendation. She thought that was an exercise in futility, given the fact that the entire Board would be gone in six weeks.

Mr. Larragoite said he was prepared to move forward with the complaint as advised by the City Attorney; although he recognized the potential dilemma.

Mr. Zamora clarified the decision was the Board's to make and not the City Attorney's. He recommended should the board *choose* to go forward with the complaint there was a process. He said the original theme of the question was if the ECRB was in a place where they could *not* proceed. He said he answered the Board could proceed if they chose.

Mr. Zamora said his recommendations were based on the original letter (six current members, three of which could participate) and there were changes in the facts. He said options exist with either direction; to consider and act on the complaint today or to act on and consider the complaint in the future.

Chair Rowe said this is a difficult situation and an important matter. He suggested, if appropriate, to poll the two absent members (Mr. Friedman and Ms. Long) on their views about how to proceed.

Mr. Larragoite reminded the Board that a motion was on the table that should be dealt with first. He restated the motion was to forward the complaint to the subcommittee with the possibility one Board member might recuse himself, in which case it would become a moot decision.

Ms. Frenkel called the question.

**The motion to refer to the Complaint Subcommittee was passed by majority vote. Ms. Kovnat voted against the motion.**

## **BOARD MATTERS**

The Board discussed and coordinated dates for the next meeting with the consideration the Complaint Subcommittee would need to meet first.

**Ms. Frenkel moved for the next meeting to be Thursday, June 2, 2011 at 4 p.m. to hear the report and the Complaint Subcommittee's decision. Mr. Larragoite seconded the motion and it passed by unanimous voice vote.**

**DATE OF NEXT MEETING- Thursday, June 2, 2011**

**PUBLIC COMMENTS**

Ms. Heldemeyer said she agreed with Mr. Larragoite regarding four lawyers on the Board. She said it is important to do things legally but making it too legalistic was already the case. She said she had many people tell her they wanted to file this type of complaint but was intimidated and unsure of the procedure.

She said she wouldn't think the Ethics Board should be a place where a \$200 an hour lawyer had to be hired to bring a complaint.

Ms. Heldemeyer thought the new board wouldn't be appointed by July 1 but hoped they were together before the election season in October. Her hope was that people would feel able to bring more complex issues. She said the Board has to have an open and welcoming attitude to the public and be able to move quickly.

Chair Rowe said he appreciated Ms. Heldemeyer's observations.

Jim Harrington commended the Board on working hard on a thorny problem. He said the new code would make the problem easier.

Chair Rowe said he thought everyone agreed the new code would diminish some of the problems the Board faced, in particular 1) appointments made by the Mayor rather than individual City Councilors and 2) by requiring that Board members do not participate in campaigns of City Councilors nor make campaign contributions. He said if those rules had been in place, the Board wouldn't face the predicament today.

Chair Rowe said everyone would agree the best was wished for the successors, whoever they might be.

**ADJOURNMENT**

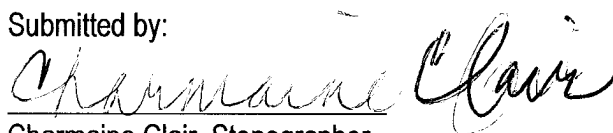
**Mr. Larragoite moved to adjourn the meeting. Ms. Kovnat seconded the motion and it passed by unanimous voice vote.**

*There being no further matters to discuss and the agenda having been completed, the meeting was adjourned at 4:59 p.m.*

Approved by:

\_\_\_\_\_  
Fred Rowe, Chairman

Submitted by:

  
Charmaine Clair, Stenographer