NEW MEXICO STATE ETHICS COMMISSION

SANDRA PRICE,

Complainant,

vs. No. C-2021-004

BRIAN F. EGOLF, JR.,

Respondent.

RESPONDENT BRIAN F. EGOLF'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Respondent Brian F. Egolf respectfully moves the Commission to dismiss the complaint filed against him by Sandra Price (Complainant). The complaint is frivolous, lacks a good faith basis, and fails to state a claim upon which relief can be granted. The Commission should dismiss the complaint with prejudice.

I. INTRODUCTION

Respondent currently serves in New Mexico's "citizen legislature" as the Representative for District 47 and Speaker of the House of Representatives. House Bill 4 (HB 4), sponsored by Representatives Georgene Louis, Patricia Roybal Caballero, Senator Joseph Cervantes, as well as Respondent, proposes a "New Mexico Civil Rights Act" that would permit "an individual to bring a claim against a public body or person acting on behalf of or under the authority of a public body

for a violation of the individual's rights, privileges, or immunities arising pursuant to the Bill of Rights of the Constitution of New Mexico."[1]

Complainant originally contended that Respondent's "sponsorship of [HB 4] is an ethical conflict under NMSA 1978, § 10-16-3 and NMSA 1978, § l0-16-4" of the Governmental Conduct Act. Complainant bases her allegations on her "review of the legislation and the committee hearings." *See* Sandra Price Letter to Legislative Ethics Comm. (Feb. 10, 2021)[2] attached to Complaint Form at 1. After submitting her original complaint, however, Complainant asked to "correct" her claim because she "ha[s] come to learn that this section specifically excludes legislators in the definition of 'public officer or employee.'" Sandra Price Letter to New Mexico Ethics Comm'n (Feb. 24, 2021) at 1.

The Commission's procedural rules authorize a motion to dismiss for failure to state a claim upon which relief may be granted. *See* 1.8.3.10(A)(1)(c) NMAC. Although the Commission's rules do not expressly incorporate the rules of procedure governing proceedings in state courts, this type of motion – a motion to dismiss for failure to state a claim upon which relief can be granted – is identical to the dispositive motion authorized by Rule 1-012(B)(6) of the New Mexico Rules

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[1] *See* https://www.nmlegis.gov/Sessions/21%20Regular/bills/house/HB0004.pdf.

[2] It appears that Complainant has brought the same allegations before two different bodies but is using her letter to the Interim Legislative Ethics Committee as her complaint in the present action filed before the Commission.

of Civil Procedure. The Commission thus should look to the interpretation of Rule 1-012(B)(6) used by New Mexico courts in construing its identical procedural provision. Under this analysis, the Commission should dismiss the complaint with prejudice. In addition to these standards, there are other reasons that compel dismissal of the complaint. These additional reasons are discussed first because they also provide relevant and important context.

II. THE COMPLAINT SHOULD BE DISMISSED BECAUSE IT IS FRIVOLOUS AND UNSUBSTANTIATED

The Commission's rules expressly authorize a motion to dismiss for failure to state a claim upon which relief can be granted. *See* 1.8.3.10(A)(1)(c) NMAC. The rules also include additional grounds for dismissal of a complaint. Under 1.8.3.11(A) NMAC, the Commission's general counsel "shall determine whether the complaint is frivolous or unsubstantiated." Here, at least three reasons support dismissal of the complaint in addition to the complaint's failure to state a claim upon which relief can be granted,.

First, although Complainant represents that her "intent with this letter is not to argue the pro or cons of HB 4" (02/10/2021 Letter at 1), that is precisely what she does. A large number of Respondent's claimed violations of the Governmental Conduct Act cited in the complaint rest almost exclusively on Complainant's assertions that statements allegedly made by Respondent during a House Judiciary Committee meeting concerning the need for HB 4 and its potential impact on

future litigation and taxpayers are inaccurate or misleading. (*Id.* at 2-3). The Commission has no authority to adjudicate matters concerning the merits of proposed legislation, or the potential financial impact of proposed legislation on taxpayers. The Commission should not entertain complaints purporting to assert an ethics violation based on the Complainant's disagreement about the need for, or merits of, proposed legislation.

Second, the complaint contains materials that are both legally and factually frivolous. The complaint should be deemed frivolous to the extent it relies on indisputably meritless legal theories. In particular, as Complainant belatedly seems to recognize, any theory that relies on Section 10-16-4 which applies only to "a public officer or employee" – a term that expressly "excludes legislators" NMSA 1978 § 10-16-2(I) – should be rejected. The Commission should dismiss any claim that Respondent violated Section 10-16-4, and should disregard all allegations purporting to support that claim in resolving the complaint.

The complaint also should be deemed frivolous to the extent it alleges demonstrably false factual assertions. According to Complainant, her review of Respondent's "own website" shows that "20% of his practice is Civil Rights violations and 40% is Civil Litigation on behalf of Plaintiffs." (02/10/2021 Letter at 1.) The document Complainant attached as Exhibit 1 to her complaint, however, consists of four pages taken from two separate websites. Only the last two pages

appear on the website for Respondent's law firm, and those pages contain no statistical breakdown of Respondent's law practice. The first two pages of the Exhibit on which Complainant repeatedly relies for the supposed statistical breakdown of Respondent's law practice – come from https://www.superlawyers.com/, which is an attorney rating service published byThomson Reuters.

The complaint's inclusion of plainly meritless legal theories and demonstrably false factual allegations highlight the need for the Commission to review the complaint's allegations with a skeptical eye, notwithstanding Complainant's representation that she does "not take the filing of this complaint lightly." (02/10/2021 Letter at 4.)

Third, the complaint's various allegations that Respondent's conduct in connection with HB 4 constitutes "an ethical violation," "an ethical conflict," a "fail[ure] to live up to the high level of trust that the public has placed upon him," a "fail[ure] to exercise candor," and/or "fail[ure] to meet his requirement of ethically discharging his high responsibility of public service" should be understood for what they are: allegations derived from speculative and otherwise unwarranted assumptions that Respondent violated a law that does not exist. The complaint assumes, for example, that the terms of Sections 10-16-3 and 10-16-4 required Respondent to disclose during the February 8, 2021 meeting of the House

Judiciary Committee information including the specific nature of his law practice; that "[t]his legislation will result in Speaker Egolf's caseload increasing"; that Respondent "would personally benefit from the legislation's passage"; and that "[t]he attorney's fees authorized by HB 4 clearly and unequivocally benefit[s] the private practice of Speaker Egolf." (02/10/2021 Letter at 2-4.) *See also* 02/24/2021 Letter at 1 ("The personal benefits that Mr. Egolf stands to gain if HB 4 is passed is a financial one.").

There is no basis to conclude that enactment of HB 4 constitutes a current or potential conflict of interest requiring disclosure under Section 10-16-3. Nor is there anything in the statutes cited in the complaint that requires (as the complaint appears to assume) that legislators must disclose at every hearing and at every point in the legislative process the information set out in the complaint. *See Perea v. Baca*, 1980-NMSC-079, ¶ 22, 94 N.M. 624 ("A statute must be read and given effect as it is written by the Legislature, not as the court may think it should be or would have been written if the Legislature had envisaged all the problems and complications which might arise in the course of its administration.").

The complaint disregards the fact that New Mexico has a part-time "citizen legislature," in which many (if not most) legislators have jobs in a variety of professions. Legislators are medical professionals who, in the course of representing the citizens who elected them, are called upon to act on legislation

concerning medical issues and practice. They are farmers who act in a legislative capacity on legislation affecting agriculture. They are educators who advocate for legislation benefitting school districts. And they are attorneys who act in a legislative capacity on legislation that might become a law that one day might be the subject of future litigation. Virtually any proposed bill has the potential to impact many members' lives and livelihood. And any proposed bill that creates a new cause of action carries with it the potential that it could benefit any citizen – including any legislator – because it provides a cause of action that did not previously exist in the law.

Respondent recognizes his obligation to comply with rules and laws applicable to the conduct of New Mexico legislators, as well as the important policies they serve. Respondent respectfully contends, however, that no portion of the Governmental Conduct Act requires an attorney who is also a citizen legislator to treat every piece of proposed legislation as a potential conflict of interest because it might, hypothetically, allow the attorney to represent a potential client at some point in the future. Any disposition of the complaint other than dismissal with prejudice would create perverse incentives for individuals to file complaints alleging ethical violations as a means of attacking proposed legislation and legislators who sponsor or vote for such legislation, undermining the ability of

New Mexico legislators to carry out their obligation to represent the people who elected them.

III. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Complainant asserts that Respondent violated the Governmental Conduct Act, specifically citing Sections 10-16-3 and 10-16-4 of the Act. Complainant does not assert any other claim against Respondent under any other law over which the Commission has jurisdiction.[3] None of Complainant's contentions are valid. Her assertions under Section 10-16-4 are without merit because this Section does not apply to legislators. Her claims under Section 10-16-3 are vague, are not grounded in the statute, and cannot withstand scrutiny. The complaint fails to state a claim for relief under this statute.

A. Applicable Standard

Under Rule 1-012(B)(6), the question is "whether the facts as stated in a complaint state a claim for relief." *Blea v. City of Espanola*, 1994-NMCA-008, ¶ 2, 870 P.2d. The complaint must affirmatively show with sufficient detail a legal

[3] Complainant also concedes that none of the conduct she alleged constitutes a violation of criminal law. (*See* Complaint Form.) Under Section 10-16-4(D) – the only section even remotely applicable to Respondent as a legislator – the prohibited criminal act requires both that the legislator "request or receive" and that a person "offer . . . any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act." NMSA 1978, § 10-16-3(D) (2011). Complainant does not contend, and offers no evidence whatsoever, that such a prohibited exchange ever took place or even was attempted.

basis for recovery. *Kisella v. Dunn*, 1954-NMSC-099, ¶ 18, 275 P.2d 181; *Derringer v. State*, 2003-NMCA-073, ¶ 5, 68 P.3d 961 (complaint "must tell a story from which the essential elements prerequisite to the granting of the relief sought can be found or reasonably inferred") (internal quotation marks & citation omitted). Well-pleaded material allegations are considered; legal conclusions and unwarranted inferences are not. *C&H Constr. & Paving, Inc. v. Foundation Reserve Ins. Co.*, 1973-NMSC-076, ¶ 9, 512 P.2d 947. *See Milliron v. County of San Juan*, 2016-NMCA-096, ¶ 5, 384 P.3d 1089 (in considering a motion to dismiss for failure to state a claim, court is "not permitted to consider facts not pleaded in order to make a plaintiff's claim provable").

B. The Complaint Fails to State a Claim upon Which Relief Can Be Granted Against Respondent Based on Section 10-16-4

Complainant based her entire complaint on Respondent's role as a legislator in sponsoring and advocating for HB 4. (02/10/2021 Letter at 1-4; 02/24/2021 Letter at 1.) Complainant also asserts that Respondent's alleged conduct is a violation of Section 10-16-4 of the Governmental Conduct Act. (*Id.* at 1 & 3.) Although Complainant recently asked the Commission to "correct" her claim because she "ha[s] come to learn that this section specifically excludes legislators in the definition of 'public officer or employee,'" (02/24/2021 Letter at 1),

Complainant did not withdraw or dismiss that portion of her complaint.[4] Thus, to the extent that Complainant continues to rely on Section 10-16-4, the Commission should find that this claim is entirely without merit because this Section does not apply legislators.

Section 10-16-4 of the Governmental Conduct Act applies only to a "public officer or employee."[5] The phrase "public officer or employee" is a defined term in the Governmental Conduct Act. As used in that statute:

> 'public officer or employee' means any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage ***but excludes legislators***

NMSA 1978 § 10-16-2(I) (2011) (emphasis added). The unambiguous language of the Act thus makes clear that Section 10-16-4 does not apply to legislators such as Respondent.

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[4] Complainant's recent letter also was not "notarized and sworn to by the complainant, under penalty of false statement" as required by the Commission's rules. 18.3.9(A)(2)(e) NMAC. To-date, the Commission has not allowed Complainant to "correct and supplement" her complaint.

[5] *See* NMSA 1978 § 10-16-4(A) (2011) ("It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position."); NMSA 1978 § 10-16-4(B) (2011) ("A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest. . . ."); NMSA § 10-16-4(C) 2011 ("No public officer during the term for which elected and no public employ during the period of employment shall acquire a financial interest. . . .").

Despite the Act's express exclusion of legislators from the application of Section 10-16-4, Complainant inexplicably relies on this provision as the basis for her claims of alleged unethical conduct. As stated by Complainant, "Mr. Egolf's sponsorship of this legislation is an ethical conflict under NMSA 1978, § 10-16-3 and NMSA 1978, § 10-16-4." (02/10/2021 Letter at 1.) Complainant later categorically asserts "New Mexico's Governmental Conduct Act commands that legislators disqualify themselves from action from which they would financially benefit." (02/10/2021 Letter at 3.) She then quotes Section 10-16-4(B) verbatim as the exclusive support for that assertion. (*Id.*)

Complainant specifically and repeatedly relied on Section 10-16-4 of the Governmental Conduct Act to support her allegation of improper conduct. As Complainant now seems to understand, this assertion is wrong as a matter of law. She also set forth nearly one full page of entirely speculative facts that seemingly support only her misguided argument related to this inapplicable provision. Because these contentions relate solely to a statutory provision that does not apply to Respondent, none of these facts are germane, and they all should be disregarded. Section 10-16-4 does not apply to Respondent because, as a legislator, he does not fall within the definition of "public officer or employee" as set forth in the Act. The Commission should dismiss with prejudice any all portions of the complaint

asserting a claim based on an alleged violation of Section 10-16-4 of the Governmental Conduct Act.

C. The Complaint Fails to State a Claim upon Which Relief Can Be Granted Against Respondent Based on Section 10-16-3

Complainant's only other allegations against Respondent are based on Section 10-16-3 of the Governmental Conduct Act. First, Complainant contends that Respondent "failed to disclose conflicts of interest." (02/10/2021 Letter at 1 & 2.) She also asserts that Respondent "failed to exercise candor" in his statements regarding HB 4 during the debates in the House of Representatives. (*Id.* at 2 & 3.) These claims are without substance and should be dismissed.

1. Respondent's Alleged Lack of Disclosure of a Potential Conflict of Interest Does Not Violate Section 10-6-3.

The complaint asserts that because "HB 4 would directly benefit [Respondent's] practice," Respondent violated Section 10-6-3 of the Governmental Conduct Act by failing to disclose "this conflict." 02/10/2021 Letter at 1.) This claimed "conflict" is purely conjectural and has no basis in fact. Moreover, Complainant presented no facts and identified no witnesses who can substantiate this alleged violation. Complainant failed to present a viable cause of action for violation of Section 10-6-3, and the Commission should dismiss this portion of the complaint for failure to state a claim upon which relief can be granted.

The hypothetical conflict that Complainant asserts is based on a simple syllogism: (1) Respondent is a lawyer who represents plaintiffs in civil rights cases; (2) Respondent is a legislator who co-sponsored a bill creating a new civil rights cause of action that eliminates qualified immunity and provides for attorneys' fees; (3) therefore, Respondent has an impermissible conflict because the bill will directly affect Respondent's financial interests and benefit his private law practice. This reasoning cannot withstand scrutiny and should be rejected by the Commission.

HB 4 proposes a new cause of action that does not presently exist. The provisions of the New Mexico Constitution's Bill of Rights are not self-executing, and there is no statutory authorization for a civil action to recover damages for the deprivation of state constitutional rights. Thus, the only civil rights claims that New Mexico residents can assert are for violations of the federal constitution under the federal Civil Rights Act. That Respondent's law practice consists, in part, of representing plaintiffs in "civil rights actions" means that these are cases brought for violations of different rights not secured by the New Mexico Constitution. Respondent has no current practice arising under the New Mexico Constitution, and Complainant failed to identify any clients or cases of Respondent who have claims that can be asserted under the proposed New Mexico Civil Rights Act.

The New Mexico Legislature created the New Mexico Civil Rights Commission in the First Special Session of the Fifty-Fourth Legislature.[6] The Legislature charged the nine member bipartisan commission with evaluating and making recommendations about the creation of a civil right of action for violations of state constitutional rights, and also reviewing the use of qualified immunity as a defense to civil rights claims asserted against an employee of a public body. The Governor signed the bill in June 2020 and the commission was fully appointed two months later. Under the law, the commission was required to submit a report of its findings, including specific recommendations and proposed legislation, to the Governor, the New Mexico legislative council, and the appropriate legislative interim committee dealing with courts, corrections and justice by November 15, 2020. Respondent was not a member of the commission.

The commission performed its mandated functions and recommended that the Legislature enact a New Mexico Civil Rights Act. The Commission's final report contained a draft bill which, *inter alia*, allows for a prevailing party in a case brought under the Act to recover reasonable attorney fees and eliminates qualified immunity as a defense to claims brought under the Act.[7] Thus, by co-sponsoring

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[6] H.B. 5, 54th Leg., 1st Spec. Sess. (N.M. 2020).

[7] The Commission's Report, dated November 20, 2020, is available at https://cmsadmin.generalservices.state.nm.us/uploads/files/RMD/CRC/New%20Mexico%20Civil%20Rights%20Commission%20Report.pdf.

the bill, Respondent did nothing more than help introduce the legislation for consideration. *See* https://www.nmlegis.gov/Glossary ("Sponsor" is "[t]he legislator who introduces a bill.") That introducing a bill is in no way equivalent to assuring its passage can be seen in the significant amendments to HB 4 from the House Judiciary Substitute Committee that were approved by the House.[8]

Finally, Complainant's assertion that passage of HB 4 automatically will translate into untold financial gain for Respondent simply ignores the realities of both the legislative process and civil litigation. At the very least, each of the following events must occur before Respondent possible could benefit from the passage of HB 4:

- The Legislature must pass HB 4 in substantially its present form.

  After passage in the House, the bill was sent to the Senate for consideration where it is now before the Senate Health & Public Affairs Committee.

- The Governor must sign the final version of HB 4 approved by the Legislature.

  This is by no means certain. The bill emerged as one of the most fiercely debated in the first half of the legislative session.

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[8] *See* https://www.santafenewmexican.com/news/legislature/new-mexico-house-committee-advances-revamped-civil-rights-bill/article_007e3b38-6a20-11eb-8ec1-bf5b28072839.html.

> It has drawn fierce opposition from city and county governments that argue they already face costly legal exposure for wrongdoing by law enforcement and correctional officers.

- Following enactment of the New Mexico Civil Rights Act, a person must suffer a deprivation of some right, privilege or immunity secured by the New Mexico constitution's bill of rights due to acts or omissions of a public body or person acting on behalf of, under color of or within the course and scope of the authority of a public body.
- That person must retain Respondent to serve as counsel for the claim to be asserted under the newly enacted New Mexico Civil Rights Act.

> There presently are over 8,600 lawyers licensed to practice law in the State of New Mexico. Hundreds of these attorneys handle constitutional and civil rights cases.

- Respondent must file suit and prevail in a court action to enforce the provisions of the New Mexico Civil Rights Act.

> Merely filing a lawsuit does not assure that the plaintiff will prevail. And even without the defense of qualified immunity, a defendant has numerous other dispositive defenses at its disposal which will defeat an alleged claim. Some of these defenses are procedural (*e.g.*, the failure adequately to plead a

claim for relief). Some of these defenses are evidentiary (*e.g.*, the failure to present sufficient admissible proof to support the factual allegations). Some these defenses go to the merits of a potential claim (*e.g.*, whether the alleged conduct amounts to a violation of the asserted portion of the bill of rights of the New Mexico constitution).

Unless and until all these occurrences take place, Respondent will not have any opportunity even to represent a single client who seeks to assert a claim under the New Mexico Civil Rights Act.[9]

The entirely conjectural and tenuous nature of this hypothetical conflict of interest is a far cry from the complaint's categorical assertion that merely sponsoring HB 4 guarantees that Respondent will unfairly and improperly profit. Indeed, the complaint failed to demonstrate that in introducing a bill recommended by the New Mexico Civil Rights Commission, Respondent acted for the specific purpose "to obtain personal benefits or pursue private interests," as barred by Section 10-16-3(A). Complainant identified no witnesses who support her conjectural conclusion. Complainant failed to name any of Respondent's clients

[9] Respondent repeats her simplistic view in her most recent letter. "HB 4 allows Mr. Egolf, and the lawyers in his firm, to file more cases, be guaranteed attorney's fees, remove a defense for State Agencies and he, and his office, can file cases under multiple theories of law." (02/24/2021 Letter at 1.)

who can assert a potential claim under the proposed Act.[10] And Complainant failed to identify any existing cases being pursued by Respondent in which a claim under the Act can be asserted. Asserting an alleged ethical violation by a member of the Legislature requires more than the mere *ipse dixit* of the person filing a complaint.

Complainant's newly-minted "factual" allegations in her recent letter fail to cure these glaring deficiencies. Complainant now asserts that "over the last six years," Respondent "and his firm" settled an undisclosed number of cases with the State "for Civil Rights Violations." (02/24/2021 Letter at 1.) Complainant then hypothesizes that Respondent "and his firm" recovered attorney's fees, presumes the dollar amount of these conjectural fees, and throws in that he "likely collected costs." (*Id.*) Complainant again fails to comprehend that these cases – to the extent they exist – were cases brought for violations of different rights not secured by the New Mexico Constitution and were asserted under a different statute. She

[10] Complainant – a former state district court judge – feigns astonishment that Respondent may be able to seek redress under both the Tort Claims Act and the New Mexico Civil Rights Act in one lawsuit. (02/10/2021 Letter at 4.) The Rules of Civil Procedure, however, expressly permit a party to plead claims for relief in the alternative. *See* Rule 1-008(E)(2) NMRA ("A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses."). And the law is equally clear that a party is not entitled to multiple recoveries for the same harm. *See Hood v. Fulkerson*, 1985-NMSC-048, ¶ 12, 699 P.2d 608 (under New Mexico law, "[d]uplication of damages or double recovery for injuries received is not permissible.")

makes no claim that any of these cases could have been brought under the HB 4, nor does she contend that Respondent presently has additional cases that can be asserted under the proposed New Mexico Civil Rights Act.

Complainant did not identify what supposed "conflict" Respondent was required to "disclose." Moreover, it is equally unclear what remedy the complaint is seeking for this alleged violation. On one hand, Complainant wants Respondent to be required to make some sort of disclosure that "HB 4 would directly benefit his practice." (Letter at 1.) Yet Complainant also contends that "[e]ven if there had been disclosure by [Respondent] his continued involvement in the *[sic]* HB 4 creates a continued conflict of interest." (*Id.* at 2.) The contention that no disclosure would be sufficient and that the only appropriate remedy would be for Respondent to recuse himself from all further legislative deliberations related to this bill fails as a matter of law. *See* NMSA 1978 § 10-16-3 (2011).

That Complainant has no viable claim for relief is vividly demonstrated by her recent letter to the Commission. After recognizing that she cannot assert a valid claim under Section 10-6-4, Complainant simply states that she "would like to continue to make the same allegation previously asserted but instead would rely on NMSA 1978 Sec 10-16-3 A which pertains to misconduct of legislators." (02/24/2021 Letter at 1.) In short, Complainant has nothing more than a set of accusations in search of an alleged statutory violation. Without any analysis,

Complainant just assumes that her grievances will fit under any legal rubric. This kind of random assertion does not state an ethical violation by a member of the Legislature.

The complaint's unspecified and unsupported claim of an amorphous "conflict of interest' fails to state a claim upon which relief can be granted. The Commission should dismiss with prejudice any all portions of the complaint asserting such a claim based on an alleged violation of Section 10-16-3 of the Governmental Conduct Act.

2. Respondent's Alleged Lack of Candor Does Not Violate Section 10-6-3.

In addition to his supposed failure to disclose unspecified and non-existent conflicts, the complaint contends that Respondent "failed to exercise candor regarding HB 4 in his argument before the 200 virtual attendees in his answers to questions asked by other legislators." (Letter at 2.) The complaint then lists five statements Respondent allegedly made during the House Judiciary Committee's debates on HB 4 to show this lack of honesty. These include:

- A supposed discrepancy between the views of Respondent and a Cabinet Secretary testifying at a separate hearing before a different committee regarding the potential costs of future litigation brought under the proposed New Mexico Civil Rights Act. (*Id.*)

- Respondent's comments about the correct venue for lawsuits filed under the proposed Act with which Complainant personally disagrees. (*Id.*)

- The "ridiculously misleading" question posed by another legislator and Respondent's answer, based on Complainant's subjective perspective of the kinds of cases pending in New Mexico state courts. (*Id.*)

- Respondent's "extremely misleading and deceptive" arguments in favor of the attorneys' fee provision in HB 4 because, according to Complainant, contingency fee arrangements are equally as effective to secure compensation for attorneys who file suit on behalf of their clients. (*Id.*)

- Respondent's view that HB 4 helps to address civil rights violations by law enforcement personnel when, according to Complainant, such claims can be asserted under existing legislation. (*Id.* at 2-3.)

Without further explanation or support, Complainant sweepingly concludes that Respondent's "responses lacks *[sic]* candor and fails *[sic]* to meet his requirements of ethically discharging his high responsibility of public service." (*Id.* at 3.) Complainant is wrong, as none of these statements in any way constitute a violation of the Governmental Conduct Act.

The complaint presumably seeks to rely on the portion of Section 10-16-3 that reads "Legislators and public officers and employees 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." NMSA 1978, § 10-16-3(B) (2011). But contrary to Complainant's assumption that this provision establishes an unwavering standard of behavior (with which, by implication, Respondent did not comply), this subsection merely "describes behavior to which the listed officials should aspire." "[I]t does not follow . . . with a definition or clarification of the conduct that is required to comply." *State v. Gutierrez*, 2020-NMCA-045, ¶ 37 (May 29, 2020), *cert. granted*, S-1-SC-38367 (Sept. 8, 2020) (footnote omitted).

After construing this same subsection, the New Mexico Court of Appeals recently concluded that it was "unable to ascertain with any reasonable degree of certainty the conduct the Legislature intended to prohibit." To the contrary,

> Subsection (B) not only fails to provide persons of ordinary intelligence a fair opportunity to determine whether their conduct is prohibited, but also fails to provide minimum guidance that would preclude subjective and ad hoc application of the law.

Id. ¶ 38 (citations omitted). Complainant once again failed to cite this pertinent and persuasive legal authority or discuss why the Commission should ignore it.

More importantly, Complainant makes no effort to explain how or why an individual legislator who speaks in favor of a pending piece of legislation in an open committee hearing failed to "maintain[] the integrity and discharg[e] ethically the high responsibilities of public service." Legislators are expected to debate the merits of proposed bills, and the legislative process depends on the exchange of

competing views. Moreover, controversial and complex legislation (like HB 4) often invokes strong feelings and antagonistic viewpoints. But as set out in the complaint, Respondent's alleged "lack of candor" amounts to nothing more than either Complainant's disagreement with Respondent's statements about the substance of the bill or her quarrel with specific provisions included in the legislation. Neither demonstrates a violation of Section 10-16-3(B). The complaint's allegations regarding Respondent's supposed "lack of candor" related to HB 4 fail to state a claim upon which relief can be granted and should be dismissed with prejudice.

III. CONCLUSION

The complaint fails to state a claim upon which relief can be granted. Complainant's broadside attacks on the justifications for HB 4 do not constitute violations of the Government Conduct Act, and her ad hominem criticisms of Respondent's role as a legislator are inconsistent with the functions performed by these public servants. The charges leveled under Section 10-16-4 are totally misguided given that this section does not apply to legislators. And the scattershot claims brought under Section 10-16-3 have no merit. Complainant is not legally entitled to relief under any set of provable facts. As a result, the Commission should dismiss the complaint with prejudice.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

/s/ *Andrew G. Schultz*

By:_______________________________________

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CERTIFICATE OF SERVICE

We hereby certify that a true copy of the foregoing was emailed to the the following:

Sandra Price
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and filed to the New Mexico State Ethics Commission portal

this **26th** day of February, 2021.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

/s/ *Andrew G. Schultz*

By:_______________________________________

Andrew G. Schultz