

CITY OF ALBUQUERQUE
BOARD OF ETHICS AND CAMPAIGN PRACTICES

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WAYNE JOHNSON,

Complainant,

vs.

BOE Case No. 08-2017

TIM KELLER,

Respondent.

DECISION BY THE BOARD OF ETHICS AND CAMPAIGN PRACTICES

THIS MATTER came before the City of Albuquerque Board of Ethics and Campaign Practices (“the Board”) when a Complaint was filed on September 8, 2017 by Wayne Johnson (“Complainant”) against Tim Keller, a candidate for Mayor of Albuquerque (“Respondent”). Complainant and Respondent collectively are referred to as “the Parties”.

Complainant alleges various violations of the Open and Ethical Elections Code of Article XVI of the City Charter and the Regulations of the Albuquerque City Clerk for Open and Ethical Elections by Respondent.

The Board held a preliminary hearing on September 25, 2017, at which time it voted to accept the complaint and to conduct an evidentiary hearing on the allegations in the Complaint.

The Board subsequently issued an order and amended order governing the conduct of the evidentiary hearing. As set forth in the amended order (dated Oct. 5, 2017):

The Evidentiary Hearing shall be held for a total of three hours from 9:00 AM until Noon on November 9, 2017. The time shall be divided equally between Complainant and Respondent. During their allotted time, each party will be afforded an opportunity to make opening and closing statements and to present evidence in support of their respective positions in the form of witness testimony, documents and recordings.

The Board held an evidentiary hearing on November 9, 2017.¹ At this hearing, Complainant and Respondent were represented by counsel. Consistent with parameters set by the Board in its earlier amended order, counsel for the Parties were afforded an opportunity to make opening and closing statements, to present evidence in support of their respective positions in the form of witness testimony, documents and recordings. In addition to these presentations and materials, before the hearing the Parties submitted written statements, various motions, witness lists, as well as numerous exhibits. The parties also submitted briefs containing authorities related to the legal issues to be considered by the Board at the evidentiary hearing. At the request of both Parties, the Board issued subpoenas for the attendance of witnesses at the hearing and production of written materials by those witnesses at the hearing.

At the close of the evidentiary portion of the hearing on November 9, 2017, the Board voted to go into closed session to deliberate on the arguments, testimony and evidence presented at the hearing. The Board then returned from closed session and announced that it was recessing the hearing.

On November 13, 2017, the Board reconvened the evidentiary hearing. The Board voted to return to closed session to continue to deliberate on the arguments and evidence presented at the hearing. After considering the written and oral presentations of counsel, and the testimony and evidence submitted at the November 9, 2017 hearing, the Board made the following unanimous decisions:

¹ Board member Gerges Scott recused himself from, did not attend, the November 9, 2017 hearing. Given his absence from the hearing, he did not participate in the deliberations or decision of the Board in this case.

Merits

Complainant provided sufficient evidence of violations of Articles XIII and XVI of the City Charter.

Background

1) The City of Albuquerque Charter allows candidates for City Council or Mayor to obtain public financing in the manner set forth in the Open and Ethical Elections Code. Such candidates are described in the Open and Ethical Elections Code as “Participating Candidates.” In addition to these provisions, as both Parties agreed at the evidentiary hearing, the general Election Code, set forth in Article XIII of the City Charter, also applies to candidates for City office.

2) For candidates who accept public financing, the Open and Ethical Elections Code makes a distinction between money and in-kind contributions.

(A) The only money that a candidate who accepts public financing can receive is “seed money” (as defined in Art. XVI sec. 3(R)) and money received from the “Open and Ethical Elections Fund” (as described in Art. XVI sec. 10). “A Participating Candidate shall limit total campaign Expenditures and debts to the amount of money distributed to that Participating Candidate from the Fund plus any collected Seed Money. A Participating Candidate shall not accept contributions or loans from any other source.” Art. XVI sec. 8(B).

(B) An “in-kind contribution” is “[a] good or service, other than money, having monetary value not to exceed more than 5% of the annual salary for such office at the time of filing the Declaration of Candidacy, but not including an individual who volunteers his own personal service.” Art. XVI sec. 3(K). A publicly financed candidate “may accept In-Kind Contributions from the beginning of the Exploratory Period up to the regular municipal election.

. . . The aggregate amount of In-Kind Contributions received . . . shall not exceed an amount equal to 10% of the applicable spending limit.” Art. XVI sec. 6(E).

3) To account for financial contributions and expenditures, the Election Code requires that “[e]ach candidate or the candidate’s treasurer . . . shall establish one and only one campaign bank checking account for each election.” Art. XIII sec. 4(a)(1). “All contributions of monies received for the benefit of the candidate’s campaign . . . shall be deposited in that account, and all disbursements shall be made from that account. Art. XIII sec. 4(a)(2).

The Present Case

4) Respondent chose to accept public financing for his campaign for Mayor.

5) Respondent created a campaign organization called “Tim Keller for Albuquerque.”

6) During the course of the regular municipal election, individuals who supported Respondent’s campaign were told that because Respondent had accepted public financing, he could not accept any other financial contribution.

7) Separate and apart from “Tim Keller for Albuquerque,” Respondent retained Rio Strategies, LLC to provide campaign-related services.

8) During the course of the regular municipal election, approximately 50 individuals who supported Respondent’s campaign wrote checks to Rio Strategies in amounts ranging from \$20 to \$5,000. These checks were deposited in a separate bank account maintained by Rio Strategies and not the campaign bank checking account.

9) Rio Strategies used these monies to purchase a variety of goods and services for the benefit of Respondent’s campaign. There is no evidence the individuals who provided these checks were told what specific expense would be paid from their monies.

10) Respondent reported these contributions on his campaign finance reports. Respondent listed these monies as “in-kind contributions” for such things as professional services, office supplies and rent.

11) Alan Packman, a partner of Rio Strategies, had access to, and was a signatory on, both the Rio Strategies checking account and the campaign checking account for Respondent. He thus was able to determine which campaign expenditures should be paid out of the campaign bank checking account and which should be paid out of the separate monies collected by Rio Strategies. These decisions were made with the knowledge and consent of Respondent and his campaign.

12) The relationship between Respondent, “Tim Keller for Albuquerque” and Rio Strategies was so highly intertwined and connected as to make it difficult to distinguish one from another. More specifically, there was no clear demarcation between which campaign contributions and expenditures were attributable to the Open and Ethical Elections Fund or any collected Seed Money, and which were assignable to the funds contributed by private individuals. All of the monies collected were used for the benefit of the candidate’s campaign.

13) This interrelated relationship between the candidate and Rio Strategies distinguishes the present case from an arms-length transaction between a donor and a third-party vendor who is unrelated to the campaign.

14) The contributions at issue in this case were monetary contributions and cannot properly be classified as in-kind contributions.

15) There is no evidence that the aggregate amount of In-Kind Contributions received by Respondent exceeded the amount permitted by the Open and Ethical Elections Code.

Conclusion

16) Respondent violated the Open and Ethical Elections Code of the City Charter by accepting monetary contributions in excess of the money distributed to him from the Open and Ethical Elections Fund or any collected Seed Money.

17) Respondent violated the Elections Code of the City Charter by failing to deposit all contributions of monies received for the benefit of his campaign in the single campaign bank checking account.

Penalty

18) Under the Board's Rules and Regulations for the Election Code of the City Charter, the Board is authorized to impose a fine not to exceed \$500 for each violation of the Election Code, or issue a public reprimand, or both. (Board Rules § 6(I)(1)).

19) In the present case, no fine or reprimand is warranted.

20) This finding is based on several things.

(A) The undisputed witness testimony showing that other candidates who had accepted public financing in earlier campaigns had engaged in similar practices in the past;

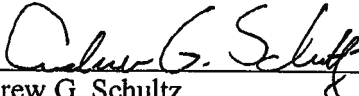
(B) The undisputed witness testimony that Rio Strategies had relied on similar practices in the past and recommended this plan to Respondent;

(C) The documentary evidence and witness testimony that these practices had been informally approved by the City Auditor in other campaigns; and

(D) Respondent acted in good faith and did not intend to violate either the Elections Code or the Open and Ethical Elections Code of the City Charter.

Any appeal from this decision of the Board must be taken to the Second Judicial District Court within the time limits set forth in Article XIII § 10(i) of the City Charter.

Dated this 13th day of November, 2017.



Andrew G. Schultz
Chair, Board of Ethics and Campaign Practices