INDEPENDENT ETHICS COMMISSION - Formal Complaint Form

BEFORE THE INDEPENDENT ETHICS COMMISSION OF THE STATE OF COLORADO

CASE NO. ________
(IEC use only)

COMPLAINT

The Complainant(s) is (are): Colorado Ethics Watch

Address (Include City and Zip Code) 1630 Welton Street, Suite 415, Denver, CO 80202
Daytime Phone No. 303-626-2100

The Respondent(s) is (are): J. Kevin McCasky

Address (Include City and Zip Code) 1667 Cole Boulevard, Suite 400, Golden, CO 80401 E-mail: ceo@jeffco.org

The specific act or things complained of, with the facts to give a full understanding of the situation, is (are):

Facts

Respondent J. Kevin McCasky was elected to the Jefferson County Board of County Commissioners ("Commissioners") in 2004 and was re-elected in 2008 to a second four-year term.

On January 18, 2011, the Jefferson Economic Council ("JEC") announced that Commissioner McCasky had been hired as its new Chief Executive Officer. See Press Release attached as **Exhibit 1**. The JEC describes itself as "a public/private partnership with over 70 investors" that is "dedicated to the retention and expansion of primary jobs throughout Jefferson County." *See id.*

Upon information and belief, Mr. McCasky began work as CEO of the JEC on February 22, 2011.

The vacancy for the position of CEO of JEC was created by the resignation of Preston Gibson, announced in September, 2010. *The Denver Post* reported that the JEC planned to complete its search for a new CEO by the end of 2010. Ann Schrader, "Preston Gibson resigns as president of Jefferson Economic Council," *The Denver Post*, September 10, 2010.

The JEC is supported in part by contributions from Jefferson County. Upon information and belief, the original draft Jefferson County budget for 2011 included a proposed $380,000 contribution to the JEC. On December 7, 2010, the Commissioners passed Resolution No. CC10-382, which approved a $400,000 "yearly contribution" to the JEC as part of Jefferson County's budget for 2011. A copy of Resolution No. CC10-382, as it appears in the appendices to the official 2011 Jefferson County budget, is attached as **Exhibit 2.** The minutes of the Commissioners' December 7, 2010 meeting, attached as **Exhibit 3** reflect that the resolution was moved by Commissioner Griffin, seconded by Commissioner McCasky and adopted unanimously.

According to a report by the *Columbine Courier*, Commissioner McCasky was actively seeking employment with the JEC at the time he voted on Jefferson County's grant to the JEC. The *Courier* reported that "McCasky's application for the high-paying JEC position was under consideration in November when the county's 2011 budget was revised to increase JEC funding from $380,000 to $400,000 — as McCasky urged his fellow commissioners to boost Jeffco's contribution while the county itself was facing significant budget cuts." Emile Hallez Williams, "Commissioner feathered nest of future employer," *Columbine Courier*, February 16, 2011. This conclusion is reasonable because the vacancy was announced in early September and it was reported that the JEC intended to conclude its search by the end of the year. Thus, it appears that not only did Commissioner McCasky take official action with respect to Jefferson County's 2011 contribution to the JEC, he actually urged that it be increased by $20,000.

While Commissioner McCasky's salary as CEO of JEC is not publicly known, JEC's Form 990 filed with the Internal Revenue Service for 2009 reported Mr. Gibson's salary as $121,000. Salary for a Jefferson County Commissioner is set at $87,300 pursuant to C.R.S. § 30-2-102(2.1). It appears likely that Commissioner McCasky received a substantial salary increase as a result of leaving his position as a Commissioner to become CEO of the JEC.

Pertinent ethical standards of conduct

Colorado's Ethics Code prohibits elected local government officials from taking official action affecting a business with which they are negotiating employment. Specifically, C.R.S. § 24-18-109(2)(b) provides that a local government official or employee "shall not . . . [p]erform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which he either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent." The Ethics Code defines "financial interest" as including "[a]n employment or a prospective employment for which negotiations have begun." C.R.S. § 24-18-102(4).

By voting on JEC's budget request, including an increase in the amount of the request, after having begun negotiations with JEC for employment, Commissioner McCasky may have breached his fiduciary duty to the people of Jefferson County. *See* C.R.S. § 24-18-109.

The reported conduct may also violate the provision of Article XXVIII's gift ban. The definition of "gift" in Colo. Const. art. XXVIII, § 3(2) includes "promises or negotiations of future employment."

The IEC expressed its views on the meaning of this provision in Position Statement 09-03. After noting that Article XXIX only prohibits negotiations or promises of future employment that are not supported by adequate consideration, the IEC observed that "it is axiomatic that most negotiations and offers of employment are supported by mutual consideration in the form of the employer's promise to provide compensation to the prospective employee and the prospective employee's promise to provide services to the prospective employer. Indeed, it would be the rare case where an employee's offer of employment is not supported by sufficient consideration from the employee. It is this rare case to which the plain language of Section 3(2) is directed."

The IEC went on in Position Statement 09-03 to identify some factors that would make a promise of future employment an improper gift under Section 3(2). One of the factors is when the promise is "made or solicited in a factual context suggestive of a conflict of interest or an attempt to influence an official act." In such a case, "the possibility or appearance of impropriety becomes more likely, and Section 3(2) may preclude such solicitation or acceptance." Elaborating on this point, the IEC said that a presumption that Section 3(2) has not been violated will arise when the public official or employee "is not currently, was not in the recent past, and will not in the reasonably foreseeable future, be in a position to take direct official action with respect to the prospective employee. However, those individuals who are in a position to take direct official action, either currently or in the reasonably foreseeable future should not be placed in situations where their judgment might be perceived to be influenced one way or another."

It should be noted that the exemption to the gift ban contained in Section 3(f) does not apply to this complaint because the possible gift was not "[r]easonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting." Even if the exemption could apply, the IEC would need to investigate and determine whether the JEC receives more than 5% of its funding from for-profit sources.

The remedy to the matter I (we) would like is:

The IEC should investigate and determine whether Mr. McCasky was engaged in negotiations or accepted an offer of future employment from the JEC at the same time that the Commissioners were considering JEC's 2011 budget request and indeed raised the amount of the appropriation at the alleged behest of Mr. McCasky. If he did, the IEC should issue a resolution of censure or a monetary penalty if the facts would support imposition of such a penalty.

C.R.S. § 24-18-103(2) provides that a local government official who breaches his fiduciary duty "whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the state or local government." Ethics Watch respectfully submits that the IEC itself also has jurisdiction to enforce this ethical standard of conduct pursuant to Colo. Const. art. XXIX, § 5, which confers jurisdiction on the IEC "to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law."

The Colorado Constitution specifies that "Any public officer, member of the general assembly, local government official or government employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions." Colo. Const. art. XXIX, § 6. The amount of any penalty to be imposed by the IEC and paid to Jefferson County should be determined by the IEC after an investigation and hearing.

Complainant Colorado Ethics Watch is a project of Citizens for Responsibility and Ethics in Washington, a non-profit corporation authorized to conduct business in Colorado. To the best of the Complainant's knowledge, information and belief, the facts and any allegations set out in the complaint are true.

DATED: March 2, 2011.

Luis Toro
Director , Colorado Ethics Watch