

COLORADO INDEPENDENT ETHICS COMMISSION

Complaint No. 08-01

MOTION TO DISMISS

In the Matter

Of

Michael Coffman

Respondent, Michael Coffman, by and through his attorneys, respectfully submits this Motion to Dismiss.

INTRODUCTORY STATEMENT

In November 2006, the voters of Colorado enacted Amendment 41 to the Colorado Constitution, now codified as Article XXIX. Section 5 created an ethics commission independent of any branch of government. Under its provisions, any person may file a complaint with the Independent Ethics Commission (the "Commission") alleging a violation of Amendment 41 or any other standard of conduct and reporting requirement specified in law.

Developmental Pathways v. Ritter, a case commenced in Denver District Court by individuals and non-profit associations, challenged the constitutionality of Amendment 41. On May 21, 2007, Denver District Court Judge Habas entered a preliminary injunction, enjoining certain provisions of Amendment 41. On February 25, 2008, the Colorado Supreme Court overturned Judge Habas's decision. The Colorado Supreme Court held that the matter was not ripe for review. *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2007). The Court held that, before there is any enforcement or threat of enforcement of the provisions of Amendment 41, the Commission must fully form and promulgate rules. *Id.* at 535. The Court recognized that neither had occurred at the time of the decision. *Id.*

On February 13, 2008, two weeks prior to the Supreme Court's decision and while the preliminary injunction was in place, Colorado Ethics Watch ("CEW") -- a self-proclaimed independent watchdog group -- prematurely filed with the Commission a Complaint ("Complaint") against Colorado Secretary of State Mike Coffman. The Complaint reads like an indictment filed by a criminal prosecutor, except this Complaint is filed by an outside group that primarily targets Republican officials and conservative organizations. The Complaint alleges that Mr. Coffman committed various crimes and other violations of the law.

COLO. REV. STAT. § 24-18.5-101(2)(a); *see generally Developmental Pathways*, 178 P.3d at 527. Amendment 41 commands that “[n]o more than two members shall be affiliated with the same political party.” COLO. CONST. art. XXIX(5)(2)(b). Colorado statute further requires that Democrats and Republicans “shall have equal numbers of members appointed to the commission.” COLO. REV. STAT. § 24-18.5-101(2)(b). The Commission’s mandate is 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.” COLO. CONST. art. XXIX(5)(1); *see also* COLO. REV. STAT. § 24-18.5-101(4); *Developmental Pathways*, 178 P.3d at 527; Indep. Ethics Comm’n R. P. 2(B), *available at* <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1223375602913> (last visited Dec. 17, 2008) [hereinafter “IEC Rules” or “IEC Rule”] (“The purpose of the IEC shall be to give advice and guidance on ethics issues arising under Article XXIX and any other standards of conduct or reporting requirements as provided by law, and to hear complaints, issue findings and assess penalties and sanctions where appropriate.”)³

Amendment 41 provides that “[a]ny person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.” COLO. CONST. art. XXIX(3)(a); *see also* IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527. The Commission must dismiss without a hearing any frivolous complaint. COLO. CONST. art. XXIX(3)(b); *see also* IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528.

A “frivolous” complaint is defined as:

any complaint filed under article XXIX that fails to allege that a [public officer, member of the general assembly, local government official, or government employee] has accepted or received any gift or other thing of value for *private gain or personal financial gain*.

Developmental Pathways, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)) (alterations added; emphasis in original). “Private gain” or “personal financial gain” means:

any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence an official act that is performed in the course and scope of the public duties of a public officer, member of the general assembly, local government official, or government employees.

³ Neither Amendment 41, Section 24.18.5-101 of the Colorado Revised Statutes, IEC Rules, nor the Colorado courts define “other standards of conduct and reporting requirements as provided by law.”

Id. (quoting COLO. REV. STAT. § 24-18.5-101(5)(b)(II)) (emphasis added). An “official act” is “any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.” IEC Rule 3(A)(11).

In addition to “frivolous” complaints, the Commission *must dismiss a complaint* if: (a) the Commission has no jurisdiction; (b) “the alleged violation, if true, would not constitute a violation of Article XXIX, or any other standards of conduct or reporting requirements under the jurisdiction of the IEC”; or (c) “the complaint fails to allege that the conduct complained of occurred within the preceding twelve months.” IEC Rule 7(D); *see also Developmental Pathways*, 178 P.3d at 534-35, n.8 (“This [12-month] provision essentially sets forth the statute of limitations period for violations under the Amendment.”).⁴

The Commission *may dismiss a complaint*, if: (a) “[t]he complaint is groundless or brought for the purposes of harassment as determined by the IEC”; (b) “[a]nother body has already taken action on the subject of the complaint and the IEC believes the action of the other body was appropriate”; or (c) “the complaint fails to comply with IEC rules of procedure regarding complaints.” IEC Rule 7(E). The Commission may stay a complaint if (a) “[a]n action on the same subject of the complaint is pending before another body with concurrent jurisdiction”; or (b) “[t]he alleged violation is a criminal matter or a criminal investigation is pending.” IEC Rule 7(F).⁵

The Commission shall, however, “conduct an investigation, hold a public hearing, and render findings on each non-frivolous complaint pursuant to written rules” it adopts. COLO. CONST. art. XXIX(3)(c); *see also* IEC Rule 8(A) (“The IEC shall hold a public hearing on all complaints within the jurisdiction of the IEC that have not been dismissed as frivolous or dismissed on other grounds.”); *Developmental Pathways*, 178 P.3d at 527. The Commission may delegate to an administrative law judge or hearing officer a particular hearing. IEC Rule 8(B). Amendment 41 grants the Commission the power to issue subpoenas for both documents and witnesses. COLO. CONST. art. XXIX(4). To issue a subpoena, Colorado statute requires a motion by a commissioner and the approval of “no fewer than four” commissioners. COLO. REV. STAT. § 24-18.5-101(8).

⁴ In addition to this pending complaint, as of December 15, 2008, the Commission has considered three other complaints. Indep. Ethics Comm’n, Complaints, *available at* <http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1225190784719> (last visited Dec. 17, 2008). The Commission dismissed all three of these complaints, because (1) they were “frivolous”; (2) “the alleged misconduct occurred more than 12 months prior to the filing of the complaint, pursuant to Colorado Constitution Article XXIX, Section 5(2)(3)(a) and (b), and IEC Rule 7.D.2 and 4”; (3) of the “lack of jurisdiction pursuant to IEC Rule 7.D.1, because it alleges misconduct by a member of the judicial branch”; and/or (4) “pursuant to IEC Rule 7.D.3, the alleged violation, if true, would not constitute a violation of Colorado Constitution Article XXIX, or any other standard of conduct or reporting requirement under the jurisdiction of the IEC.” *Id.*

⁵ The Commission denied Mr. Coffman’s request to file a motion to stay, even though the Complaint is criminal in nature.

State; (8) the audit also stated that Mr. Coffman “shares responsibility for these violations,” pursuant to the state personnel rules; (9) the audit further stated that four other employees of the Office of the Secretary of State held outside employment without prior authorization, and Mr. Coffman knew of two of these circumstances; (10) “[d]ocuments obtained by Ethics Watch through its [Colorado Open Records Act] request strongly suggest that Mr. Kopelman was one of the two employees”; (11) Mr. Coffman and his assistant received directly from Mr. Kopelman the outside company’s emails between January and March 2007; (12) Mr. Kopelman utilized his outside company’s email address, with Mr. Kopelman’s official title included in the signature block, to correspond with Mr. Coffman and his staff; (13) if Mr. Coffman knew of Mr. Kopelman’s company, Mr. Coffman “deliberately misled the public and should be held accountable for allowing his employees to engage in partisan conflicts of interest, failing to perform the duties of his office and violating the public trust.”; and, (14) “Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman’s failure to perform the duties required of his office.” *Id.*, at 1-4, 5.

Allegation 2: Mr. Coffman Allegedly Certified One Company’s Voting Machine, Against His Expert Panel’s Recommendation, After The Company Hired Mr. Coffman’s Campaign Consultant As Its Lobbyist

CEW next alleges that (1) in April 2007, the Office of the Secretary of State accepted applications to retest the security standards on four electronic voting systems, one system of which was Premier; (2) Mr. Coffman appointed an expert advisory panel to advise him on the retesting; (3) in August 2007, Mr. Coffman “consulted with Phase Line Strategies LLC (“Phase Line”) about hiring the company to run his” congressional campaign; (4) Mr. Coffman had a “working relationship” with Phase Line’s president for more than ten years; (5) on September 17, 2007, Premier hired Phase Line as its lobbyist; (6) on October 30, 2007, Mr. Coffman’s spokesman stated that Mr. Coffman “had every intention to run” for Congress; (7) Mr. Coffman knew of Phase Line’s representation of Premier when Mr. Coffman hired Phase Line to run his congressional campaign; (8) Mr. Coffman’s panel recommended that he recertify none of the four systems; (9) because Mr. Coffman stated that Premier’s system substantially complied with legal requirements, he recertified Premier’s system; (10) Mr. Coffman decertified some or all of the other three manufacturer’s voting machines; (11) following a news report, Premier terminated its relationship with Phase Line; (12) Mr. Coffman continued his relationship with Phase Line; and, (13) “Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman’s failure to perform the duties required of his office.”

Id., at 4-5.

2. *Based upon these two sets of allegations, CEW states three claims against Mr. Coffman.*

Claim 1: Violation of C.R.S. § 24-50-101(3)(d) and 4 CCR § 801, Rule 1-11
(Department of Personnel – Legislative Declaration – Terminology;
Personnel Board Rules and Personnel Director’s Administrative
Procedures)

CEW first claims, *inter alia*, that

[o]n information and belief, Secretary Coffman knew or should have known that Mr. Kopelman was operating a partisan political business while employed as the state’s elections technology manager in violation of state personnel rules and state law.

Id., at 6 (emphasis added). Moreover,

[o]n information and belief, Secretary Coffman personally benefited from his transgressions. Allowing Mr. Kopelman to continue operating Political Live Wires while employed in the secretary of state’s office, and therefore, using state time and resources, presumably helped Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress.

Id. (emphasis added).

Claim 2: Violation of C.R.S. §§ 18-8-404 and/or 405
(Colorado Criminal Code – First Degree Official Misconduct and Second
Degree Official Misconduct)

CEW next claims, *inter alia*, that Mr. Coffman violated the criminal code, punishable as a misdemeanor, as follows:

[T]here is reason to believe that Secretary Coffman committed first degree official misconduct. The attached documents and the audit suggest that: (1) Secretary Coffman was aware that Mr. Kopelman was engaged in a partisan side business and did nothing to stop it; and (2) Secretary Coffman and/or Dan Kopelman benefitted from Mr. Kopelman’s continued operation of Political Live Wires.

Id. (emphasis added). Moreover,

Additionally, Secretary Coffman violated state personnel rules and state law by failing to disclose his conflict with Premier by way of

their mutual engagement of Phase Line. See C.R.S. § 24-50-117. On information and belief, Secretary Coffman’s nondisclosure advantaged all parties involved -- Premier had its voting machine certified, Phase Line delivered on its contract with Premier and Secretary Coffman assisted his long-time political allies and current campaign consultants.

Id. at 7.

Claim 3: Violation of C.R.S. § 1-13-107
(Criminal Violation: Violation of Duty/Corrupt Discharge)

CEW finally claims that Mr. Coffman violated the criminal corrupt discharge statute, punishable as a misdemeanor, *inter alia*, that

[b]y authorizing the certification of Premier’s voting system against the recommendations of the expert panel when a known conflict existed between Secretary Coffman and Premier’s lobbying firm, Secretary Coffman appears to have engaged in “corrupt conduct in the discharge” of his duties under the Election Code.

Id., at 7 (emphasis added).

C.

Procedural History Within The Independent Ethics Commission

On October 8, 2008, the Commission notified the parties of the hearing and hearing procedures. Notice of Hearing and Hearing Procedures, Oct. 13, 2008, Ex. 2. The Commission’s staff and parties’ counsel held a general status conference on October 20, 2008. Transcript of Status Conf., Oct. 20, 2008, Ex. 3. On November 3, 2008, the Commission issued its procedural determination for the case. Procedural Determination, Nov. 3, 2008, Ex. 4. The Commission ruled, *inter alia*, that parties must obtain permission to file motions. *Id.* Additionally, the Commission stated that, *inter alia*,

[t]he IEC wishes to emphasize that it contemplates that complaints and hearings before it will not be treated as formal litigation and it encourages the parties to work together to present the material each side feels is relevant for the IEC to consider in its deliberations.

Id., at 2. CEW objected to the Commission’s procedural determinations, arguing, *inter alia*, that the Commission failed its constitutional duty to investigate. Objections, Nov. 13, 2008, Ex. 5.

Mr. Coffman responded to CEW’s Complaint on November 13, 2008, (1) denying the allegations; (2) arguing that the Complaint is “frivolous and brought for the purposes of

harassment”; (3) the Commission lacks jurisdiction; (4) the Complaint fails to state a claim for relief; (5) even if the allegations in the Complaint were true, it does not allege a violation under Article XXIX or other standards of conduct or reporting requirements under the Commission’s jurisdiction; (6) the claims are barred in whole or in part by the statute of limitations; (7) the Denver District Attorney’s Office already reviewed the allegations and found they lacked merit; and, (8) CEW failed to comply with the Rules of Procedure. Response, Nov. 13, 2008, Ex. 6.

On November 13, 2008, Mr. Coffman requested leave from the Commission to file several motions. Request for Submission of Motions, Nov. 13, 2008, Ex. 7. Specifically, Mr. Coffman requested to file a (1) motion to dismiss; (2) motion to stay; (3) motion for jury trial; (4) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse; (5) motion for determination of standard of review; (6) motion to continue and extend deadlines; and, (7) motion to conduct discovery. *Id.*

On November 17, 2008, the Commission met in executive session. Transcript of Gen. Bus. of the Indep. Ethics Comm’n, Nov. 17, 2008, Ex. 8. Thereafter, the Commission publicly denied Mr. Coffman’s requests to file a (a) motion to stay; (b) motion for jury trial; and, (c) motion to conduct discovery. *Id.* The Commission, however, approved Mr. Coffman’s request to file a (i) motion to dismiss; (ii) motion to transfer matter to an administrative law judge, or in the alternative, motion to recuse; (iii) motion for determination of standard of review; and, (iv) motion to continue and extend deadlines. *Id.*

LEGAL ARGUMENTS

I.

THE COMMISSION MUST DISMISS THIS COMPLAINT, BECAUSE THE COMMISSION IS DEVOID OF JURISDICTION TO HEAR COMPLAINTS BASED UPON CONDUCT THAT OCCURRED PRIOR TO SEPTEMBER 1, 2008.

The Commission Rules require the Commission to dismiss complaints where, as here, they have no jurisdiction. The decision in *Developmental Pathways v. Ritter* makes it clear that the Commission cannot consider complaints based upon conduct that took place prior to September 1, 2008. Hence, this Complaint must be dismissed as a matter of law.

In *Developmental Pathways v. Ritter*, the Court overturned the district court decision, because the matter was not ripe. Ripeness did not exist until all of the commission members were appointed and rules were finally promulgated. The Court made it abundantly clear that the provision allowing complaints to be filed based upon conduct that occurred in the preceding twelve months does not apply here:

[The twelve-month] provision essentially sets forth the statute of limitations period for violations under the Amendment. It does not imply that any conduct following the Governor’s proclamation of the Amendment on December 31, 2006 could automatically serve as the basis for an ethics complaint. The Commission must first

act by, for example, adopting rules governing the complaint process, before there is any enforcement or threat of enforcement.

178 P.3d at 535, n.8. This was the very basis of the Supreme Court's decision to overturn Judge Habas's district court decision, because the matter was not yet ripe.

As a matter of law, therefore, the Commission must dismiss this complaint.

II.

EVEN ASSUMING *ARGUENDO* THAT THE COMMISSION HAS AUTHORITY TO HEAR THIS COMPLAINT, WHICH IT CLEARLY DOES NOT, THE COMMISSION MUST DISMISS CLAIMS BASED UPON CONDUCT PRIOR TO SEPTEMBER 1, 2007.

Amendment 41 and the Commission Rules also mandate the dismissal of a complaint when the complaint "fails to allege that the conduct complained of occurred within the preceding twelve months." COLO. CONST. art. XXIX(2)(6); IEC Rule 7(D); *Developmental Pathways*, 178 P.3d at 534-35, n.8 ("This [12-month] provision essentially sets forth the statute of limitations period for violations under the Amendment.").

For the reasons set forth above, the Commission must dismiss CEW's Complaint for lack of jurisdiction. In the event that the Commission does not do so, at best, the Commission cannot consider allegations prior to its promulgation of rules. Hence, at best, the Commission can only consider conduct that took place on or after September 1, 2007. Moreover, because it is CEW's burden to properly plead facts within the 12-month constitutional period, the Commission should also not consider any facts that, from the face of CEW's Complaint, are ambiguous as to whether they occurred within the 12-month constitutional period.

The Commission, therefore, must dismiss the first two claims against Mr. Coffman, because all of the alleged wrongful conduct occurred prior to September 1, 2007. This precludes the Commission's consideration of the following allegations (strikethrough):

Allegation 1: Mr. Coffman Allegedly Knew Of And Deliberately Mised The Public About His Employee's Unlawful Outside Political Business

~~CEW first alleges that (1) in January 2007, Mr. Coffman hired Dan Kopelman, a political ally since 1996 who is a political consultant and an owner and operator of a political website called "Political Live Wires," to serve as the elections technology manager within the Office of the Secretary of State; (2) in his previous position as the Colorado state treasurer, Mr. Coffman also hired Mr. Kopelman to serve as his systems analyst; (3) Mr. Kopelman took two weeks of paid leave from his position in the Office of the State Treasurer to help Mr. Coffman's campaign for secretary of state; (4) Mr. Coffman's campaign paid Mr. Kopelman's company \$1,500 for consulting services during this paid leave; (5) Mr. Coffman's campaign also paid Mr. Kopelman and Mr. Kopelman's company for other expenditures; (6) Mr. Coffman claimed that he did not know of Mr. Kopelman's company until May 2007, after a newspaper reported the story;~~

The remaining allegations are not based upon conduct that took place prior to September 1, 2007.

With regard to the second allegation, most of the relevant factual allegations are outside the 12-month constitutional period; therefore, CEW's Complaint does not state factual allegations to support the remaining claims. The Commission, therefore, should dismiss these claims, along with all the factual allegations related to the same.

Allegation 2: Mr. Coffman Allegedly Certified One Company's Voting Machine, Against His Expert Panel's Recommendation, After The Company Hired Mr. Coffman's Campaign Consultant As Its Lobbyist

CEW next alleges that (1) in April 2007, the Office of the Secretary of State accepted applications to retest the security standards on four electronic voting systems, one system of which was Premier; (2) Mr. Coffman appointed an expert advisory panel to advise him on the retesting; (3) in August 2007, Mr. Coffman "consulted with Phase Line Strategies LLC ("Phase Line") about hiring the company to run his" congressional campaign; (4) Mr. Coffman had a "working relationship" with Phase Line's president for more than ten years; (5) on September 17, 2007, Premier hired Phase Line as its lobbyist; (6) on October 30, 2007, Mr. Coffman's spokesman stated that Mr. Coffman "had every intention to run" for Congress; (7) Mr. Coffman knew of Phase Line's representation of Premier when Mr. Coffman hired Phase Line to run his congressional campaign; (8) Mr. Coffman's panel recommended that he recertify none of the four systems; (9) because Mr. Coffman stated that Premier's system substantially complied with legal requirements, he recertified Premier's system; (10) Mr. Coffman decertified some or all of the other three manufacturer's voting machines; (11) following a news report, Premier terminated its relationship with Phase Line; (12) Mr. Coffman continued his relationship with Phase Line; and, (13) "Secretary Coffman and/or his allies . . . personally benefitted from Secretary Coffman's failure to perform the duties required of his office." *Id.* at 5-7.

III.

THE COMMISSION MUST DISMISS THE COMPLAINT, BECAUSE IT IS FRIVOLOUS AS A MATTER OF LAW.

The Commission must dismiss without a hearing any frivolous complaint. COLO. CONST. art. XXIX(3)(b); *see also* IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528. CEW's Complaint is frivolous, as it fails to allege that Mr. Coffman "has accepted or received"

any money, forbearance, forgiveness of indebtedness, gift, or other thing of value given or offered by a person seeking to influence [any vote, decision, recommendation, approval, disapproval, or other action, including action, which involves the use of discretionary authority] that is performed in the course and scope of the public duties of [Mr. Coffman].

These allegations -- individually or even combined -- are wholly insufficient, as a matter of law, from the allegation of “private gain” or “personal financial gain” required to withstand dismissal for frivolousness. *See Developmental Pathways*, 178 P.3d at 528 (emphasis added) (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)). Even if, for argumentative sake, Mr. Coffman somehow enhanced his chances of winning his election to another public office by either (1) employing Mr. Kopelman in his current public office or (2) “assist[ing] his long-time political allies and current campaign consultants,” this is not “private gain” or “personal financial gain” that is required under Amendment 41. The first allegation concerns an election to a public office; the second allegation addresses supposed benefits to people other than Mr. Coffman. It is telling that even the rigorous Amendment 41 specifically excepted from the fifty-dollar ban “campaign contributions.” COLO. CONST. art. XXIX(3)(3)(a); *see also Developmental Pathways*, 178 P.3d at 527. If Amendment 41 specifically excludes from its reach direct political gain, such as a campaign contribution, it no doubt would exclude indirect political gain, such as (1) “presumably help[ing] Secretary Coffman maintain and enhance his political network and position himself to pursue his bid for Congress” or (2) “assist[ing] his long-time political allies and current campaign consultants.” Complaint, at 6, 7 (emphasis added).

Presumably understanding that the private-gain or personal-financial-gain requirement subjects its complaint to mandatory dismissal, CEW nonetheless alleges that “personal gain is not a necessary element in order for the Commission to initiate an investigation, impose penalties or issue a public censure.” Complaint, Feb. 13, 2008, Ex. 1, at 5. Indeed, CEW continues:

Pursuant to Colo. Const. art. XXIX, § 9, the Commission is authorized to hear complaints, issue findings and assess penalties on ethics issues arising under *any standards of conduct* as provided by law. The Commission’s constitutionally mandated authority may not be restricted by statute and, therefore, C.R.S. § 24-18.5-101, which purports to restrict the Commission’s authority to hear complaints that do not allege personal gain, cannot prevent the Commission from investigating and making findings regarding the allegations contained herein.

Id. (emphasis in original).

First, while the Colorado Supreme Court has not squarely addressed this issue, the Court did not pause to question it. *See Developmental Pathways*, 178 P.3d at 528 (quoting COLO. REV. STAT. § 24-18.5-101(5)(a)). Second, if the Commission takes this position, it raises other serious constitutional concerns; namely, it raises concerns about fair notice and the retroactive application of criminal statutes, implicating the Due Process and the *Ex Post Facto* Clauses of both the United States and Colorado Constitutions.

Because CEW’s Complaint fails to allege Mr. Coffman’s “private gain” or “personal financial” gain, it is “frivolous.” The Commission is required under Colorado statute, therefore, to grant Mr. Coffman’s motion to dismiss CEW’s Complaint.

IV.

CEW FAILS TO STATE A CLAIM FOR WHICH RELIEF MAY BE GRANTED OR PENALTIES COULD BE IMPOSED BY THE COMMISSION.

Amendment 41 provides that “[a]ny person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.” COLO. CONST. art. XXIX(3)(a) (emphasis added); *see also* IEC Rule 7(A); *Developmental Pathways*, 178 P.3d at 527. The Commission Rules mandate the dismissal of a complaint when the alleged violation, if true, would not constitute a violation of Article XXIX, or any other standards of conduct or reporting requirements under the jurisdiction of the IEC. IEC Rule 7(D).

The Commission must dismiss CEW’s Complaint because, even if CEW’s allegations were true, there is no violation. This is so -- as this motion already discussed in detail -- because CEW fails to properly allege Mr. Coffman’s “private gain” or “personal financial gain.” This, therefore, makes CEW’s Complaint “frivolous,” and the Commission does not have the jurisdiction to hear frivolous complaints. *See supra* Part III (outlining in detail Mr. Coffman’s frivolous legal argument); COLO. CONST. art. XXIX(3)(b); COLO. REV. STAT. § 24-18.5-101(5)(b)(II); IEC Rule 7(D)(2); *Developmental Pathways*, 178 P.3d at 528.

Further, there is no “standard of conduct . . . as provided by law” at issue here. The Commission does not have jurisdiction over every law in Colorado, but arguably only over “standards of conduct,” which they have not shown fall within the Commission’s province. Further, there is no “standard of conduct . . . as provided by law” at issue here. The Commission does not have jurisdiction over every law in Colorado, but arguably only over “standards of conduct,” which they have not shown fall within the Commission’s province. Curiously, CEW’s first claim for relief is predicated upon COLO. REV. STAT. § 24-50-101(3)(d) and 4 CCR § 801, Rule 1-11. COLO. REV. STAT. § 24-50-101 provides for the legislative declaration and terminology for the State Personnel System Act which follows. Subsection (3)(d) merely explains the purpose and policy of the state personnel system. It does not provide a claim for relief or other statutory act, let alone a standard of conduct that would be actionable here. Similarly, 4 CCR § 801 merely establishes the Personnel Board Rules and Personnel Director’s Administrative Procedures. Rule 1-11 simply provides the appointing authority that all appointing authorities, managers, and supervisors are accountable for compliance with these rules and for reasonable business decisions, including implementation of other policy directives and executive orders. Again, it creates no substantive rights for relief here or other standards of conduct that fall within the province of this Commission. CEW’s attempt to combine these two provisions and create a claim for relief, let alone one that would qualify as a standard of conduct provided by law and actionable here, is inane.

Additionally, the Commission cannot provide a remedy for CEW’s Complaint. Indeed, Colorado statute mandates the trial of criminal misdemeanor charges in county court. COLO. REV. STAT. § 16-5-101(3). No other entity has jurisdiction. In other words, the Commission’s

assessment of penalties for a criminal matter is not “provided by law,” as required under Amendment 41. COLO. CONST. arts. XXIX(3)(d) (emphasis added) (“The Commission may also ‘assess penalties for violations as prescribed by this article and provided by law.’”); *see also* IEC Rule 8(D)(5) (“The IEC may impose penalties and sanctions as provided by law” (emphasis added).); *see generally* *Developmental Pathways*, 178 P.3d at 527-28 (quoting COLO. CONST. art. XXIX(6)) (“The manner of recovery and additional penalties may be provided by law.”). The other violation is arguably over personnel rules.

Even if CEW were to prevail, they have not cited, nor can they cite, any legal authority for any remedy the Commission could provide. Indeed, there is no constitutional or statutory authority for the Commission to do anything as a result of a subsequent hearing. This includes, among other things, the ability to censure Mr. Coffman. Further, there is a question whether the Commission has any jurisdiction over Mr. Coffman if he is no longer a statewide elected official.

V.

CEW HAS NO PRIVATE RIGHT OF ACTION TO BRING CRIMINAL COMPLAINT AGAINST MR. COFFMAN, AND THE COMMISSION IS DEVOID OF JURISDICTION TO HEAR SUCH MATTERS.

CEW’s second claim for relief alleges a violation of Sections 18-8-404 and/or 405 of the Colorado Revised Statutes; its third claim for relief alleges a violation of Section 1-13-107. Both are criminal violations punishable by fines and imprisonment. COLO. REV. STAT. §§ 1-13-107, 18-8-404, and 18-8-404. These two claims must be dismissed.

The Colorado Constitution mandates the prosecution of all criminal actions by indictment or information. COLO. CONST. art. II(8). Moreover, Colorado statute provides the only methods of the commencement of a criminal action for the violation of any statute, which neither includes a private right of action nor action through the Commission. COLO. REV. STAT. § 16-5-101. Colorado statute further provides that only the district attorney or attorney general shall have the power to file and prosecute an information or a complaint for alleged violations of any provisions of the election offenses (including Section 1-13-107 of the Colorado Revised Statutes). COLO. REV. STAT. § 1-13-101. Hence, the criminal Complaint must be dismissed. CEW understood this which is why they asked the Denver District Attorney to investigate their allegations. *See* Ex. 10.

Furthermore, the structure of the Commission, along with the present proceedings as they relate to Mr. Coffman, raise fatal state and federal constitutional concerns, including under, *inter alia*, the Due Process Clause of the Fourteenth Amendment and the Confrontation Clause of the Sixth Amendment to the United States Constitution. There are obvious structural deficiencies that constitutionally and statutorily preclude the Commission from asserting jurisdiction in criminal matters.

By way of example only, Mr. Coffman faces the possibility of incarceration for a conviction under the misdemeanors alleged in CEW’s Complaint. COLO. REV. STAT. §§ 1-13-107, 18-8-404, and 18-8-404. Even if the Commission were to decide that it would not attempt

to impose incarceration, there is still a major stigma associated with a finding of criminal conduct. Second, the Commission has already denied Mr. Coffman his day in court. Commission Rules require prior written approval (a) to file a motion; and, (b) to conduct discovery. IEC Rules 8(D)(1) and (2). The Commission denied Mr. Coffman's motion to conduct discovery. Transcript of Gen. Bus. of the Indep. Ethics Comm'n, Nov. 17, 2008, Ex. 8. This raises concerns under the Due Process and Confrontation Clauses, under both the United States and Colorado Constitutions. Third, the Amendment and the Commission Rules permit the assessment of "penalties for violations as prescribed by this article and provided by law," based upon findings by the mere "preponderance of the evidence unless the commission determines that the circumstances warrant a heightened standard." COLO. CONST. arts. XXIX(3)(d) and (e). Mr. Coffman incorporates herein his motion for determination of evidentiary standard, filed simultaneously with this motion to dismiss. Fourth, the Commission Rules are not required to follow the Colorado Rules of Evidence, they permit hearsay evidence without specified guidelines, and they allow the exclusion of evidence "for such reasons as determined by the IEC." IEC Rules 8(D)(5) and 8(F). This again raises Due Process and Confrontation Clause concerns, under both the United States and Colorado Constitutions. *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005); *Cunningham v. California*, 549 U.S. 270 (2007)). Fifth, the Commission Rules provide no right to a jury trial. Defendants -- even for petty offenses -- are entitled to a trial by jury. *See id.*; COLO. REV. STAT. § 16-10-109(2) ("A defendant charged with a petty offense shall be entitled to a jury trial if, within twenty days after entry of a plea, the defendant makes a request to the court for a jury trial, in writing, and tenders to the court a jury fee of twenty-five dollars unless the fee is waived by the judge because of the indigence of the defendant."). Indeed, Colorado statute declares that the right to a jury trial is "inviolable and a matter of substantive due process of law." *Id.* § 16-10-101. So too does the United States Constitution. *See, e.g., Hill*, 539 F.3d at 1215 (citing *Apprendi*, 530 U.S. at 490, *Ring*, 536 U.S. at 602, 609; *Blakely*, 542 U.S. at 304-05; *Booker*, 543 U.S. at 243-44; *Cunningham*, 549 U.S. 270). Nonetheless, despite CEW's criminal allegations, the Commission denied Mr. Coffman's right to a jury trial. Transcript of Gen. Bus. of the Indep. Ethics Comm'n, Nov. 17, 2008, Ex. 8.

All of these constitutional and statutory concerns deprive the Commission of jurisdiction over the second and third claims for relief.

VI.

COUNTS 1 AND 2 SHOULD BE DISMISSED, AS THE COLORADO STATE AUDITOR HAS ALREADY INVESTIGATED AND TAKEN ACTION ON THE UNDERLYING ALLEGATIONS.

The Commission Rules provide that "[a] complaint may be dismissed by the IEC [if] [a]nother body has already taken action on the subject of the complaint and the IEC believes the action of the other body was appropriate." IEC Rule 7(E)(2).

Allegations 10 through 15 of CEW's Complaint even concede the fact that the Colorado State Auditor has already investigated and this allegation related to Counts 1 and 2 in CEW's

Complaint.⁶ Complaint, at 2-3. Indeed, the Colorado State Auditor found that, “as the appointing authority,” Mr. Coffman “shares responsibility for these apparent violations” related to Mr. Kopelman’s and four other employees’ outside employment. Voter Registration, Help America Vote Act, Dep’t of State, Performance Audit, Nov. 2007, Ex. 9, at 3; *see also id.* at 51. Moreover, CEW’s Complaint does not allege that the Colorado State Auditor’s investigation was inappropriate; indeed, CEW relies on this investigation in lodging its present Complaint.

Mr. Coffman, therefore, respectfully moves the Commission to exercise its discretion and dismiss Counts 1 and 2 in CEW’s Complaint, along with all the factual allegations related to the same.

VII.

THE COMMISSION SHOULD DISMISS COUNTS 1 AND 2, BECAUSE THE DENVER DISTRICT ATTORNEY’S OFFICE HAS ALREADY INVESTIGATED MR. COFFMAN AND DECLINED TO PROSECUTE.

Again, the Commission Rules provide that “[a] complaint may be dismissed by the IEC [if] [a]nother body has already taken action on the subject of the complaint and the IEC believes the action of the other body was appropriate.” IEC Rule 7(E)(2).

Exhibit 3 to CEW’s Complaint discusses how the Denver District Attorney’s Office has already investigated Mr. Coffman’s knowledge of Mr. Kopelman’s activities. Complaint, at Ex. 3, at 2. In fact, on June 15, 2007, CEW issued a press release calling on Denver District Attorney Mitch Morrissey to initiate a criminal investigation of Colorado Secretary of State Mike Coffman and Dan Kopelman. Colo. Ethics, Watch, Ethics Watch Calls On Dist. Atty. Morrissey To Initiate Crim. Invest. of Sec. Coffman, *available at* <http://www.coloradoforethics.org/node/23992> (last visited Dec. 17, 2008). CEW’s website also contains a copy of the letter, which it sent to Denver District Attorney Mitch Morrissey. A copy of the letter is attached hereto as Exhibit 10 and incorporated herein by this reference.⁷ The Denver District Attorney’s Office investigated this matter and found no violations of the law.

Mr. Coffman, therefore, respectfully moves the Commission to exercise its discretion and dismiss Counts 1 and 2 in CEW’s Complaint, along with all the factual allegations related to the same.

⁶ It is virtually impossible to discern upon what the first claim for relief is predicated. CEW cites a violation of Section 24-50-101(3)(d) of the Colorado Revised Statutes. This section is simply the legislative declaration-terminology for the Department of Personnel. There is no violation or standard of conduct based upon this statutory authority; rather, this section simply explains the purpose of the state personnel system and defines certain terms.

⁷ Colo. Citizens for Ethics in Gov’t, Letter, June 15, 2007, *available at* http://www.coloradoforethics.org/files/documents/DA_Letter_6.15.07.pdf (last visited Dec. 17, 2008).

VIII.

CEW BROUGHT THE COMPLAINT FOR PURPOSES OF HARASSMENT.

The Commission Rules provide that “[a] complaint may be dismissed by the IEC [if] [t]he complaint is . . . brought for purposes of harassment as determined by the IEC.” IEC Rule 7(E)(1).

CEW brought its Complaint against Mr. Coffman, a Republican, in an election year in which he ran for the United States House of Representatives. CEW’s Complaint also makes certain factual allegations from many years ago, well beyond Amendment 41’s purview. It also wholly fails to allege that Mr. Coffman received any required “private gain” or “personal financial gain.” Moreover, CEW apparently knew this, but simply argued that it does not need to follow this statutory requirement. Additionally, as discussed in CEW’s Complaint package, both the Colorado State Auditor and Denver District Attorney’s Office have investigated certain of these allegations. Even after this, CEW’s Complaint makes criminal allegations against Mr. Coffman, despite the fact that the Commission has no jurisdiction over, and can provide no remedy for, a criminal complaint. Finally, certain language in CEW’s Complaint demonstrates that its allegations and claims are flimsy at best. Complaint, at 5, 6, 7 (“Secretary Coffman knew ‘or should have known’”; “presumably helped Secretary Coffman . . .”; “The attached documents and audit suggest that”; “Secretary Coffman appears to have engaged.”).

Given that CEW’s Complaint is frivolous, certain allegations are stale, two government agencies have already investigated, CEW alleges criminal conduct for which the Commission has no jurisdiction and can provide no remedy, and the political timing is highly suspect, Mr. Coffman respectfully moves the Commission to determine that CEW’s Complaint is “brought for purposes of harassment” and dismiss CEW’s Complaint.

* * *

WHEREFORE, Respondent Michael Coffman, by and through his attorneys, respectfully moves this Commission to dismiss in its entirety CEW’s Complaint.

Respectfully submitted this 17th day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December 2008, a true and correct copy of the foregoing MOTION TO DISMISS was sent via E-mail Transmission and U.S. Mail to:

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