PEARSON & PARIS, P.C.
THE LAW FIRM OF THE ROCKY MOUNTAINS

May 31, 2013

The Honorable Thom LeDoux
District Attorney, 11th Judicial District
136 Justice Center Road, Room 203
Canon City, Colorado 81212

Re: Complaint filed by Monica Jones dated May 12, 2013

Dear Mr. LeDoux:

You informed me on May 21, 2013, that you received a complaint from Monica Jones regarding a number of alleged improprieties involving two Board members of the Hartsel Fire Protection District. I have reviewed Ms. Jones' complaint and I respond as follows:

General Background:

The Hartsel Fire Protection District (the "District") is a governmental entity created pursuant to the Special District Act. *See* Title 32, C.R.S. On June 1, 1979, the district court entered its decree of organization and further established the District's five (5) member board (the "Board"). The powers of the Board are contained specifically in sections 32-1-1001 and 1002, C.R.S. The Board exercises these powers by simple majority vote.

In 2012, the District had total revenues of approximately $770,000.00 with total expenditures in the same amount. The District's 2013 budget projected expenditures of $761,972.00. The District services an area of approximately 950 square miles, which is roughly the size of Rhode Island, with a population of approximately 1,500 scattered throughout the District. The District operates six fully functioning fire stations strategically located across the District. The mission of the District coupled with its vast size and scattered population is out of proportion with its annual revenues.

This inequity between the District's mission and available revenues has created a culture where Board members and volunteers donate vast amounts of time without any compensation and contribute essential equipment and materials at or below cost. For example, in 2011, Station 7 was constructed with countless hours of volunteered time. The District has produced and rebuilt two vehicles in-house in ongoing efforts to minimize costs. The Board members and volunteers have always demonstrated a cost-conscious mindset to stretch every penny of revenue to the limit. These cultural altruistic attitudes form the backdrop against which Ms. Jones' allegations must be viewed.

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Board Member Jeffrey Winter:

Jeffrey Winter was elected to serve a four year term on the Board in May of 2010. During the first Board meeting after the 2012 election, the Board elected Mr. Winter to serve as the Board president.

Ms. Jones takes issue with three payments characterized as "paycheck" payments made to Mr. Winter on: January 11, 2012 in the amount of $125.48; February 8, 2012 in the amount of $71.71; and April 11, 2012 in the amount of 107.55 for a total of: $304.74.

Prior to his election to the Board, Mr. Winter, from time to time, provided compensated weekend work for the District at a rate of $18.50/hr., known as: "The Chief's Weekend-Work Program." This rate was the same for any volunteer firefighter who participated in the Chief's weekend-work program. Mr. Winter continued to participate in the weekend-work program after his election to the Board. The total gross amount thus received by Mr. Winter was $997.50 over a two year period. When, on May 20, 2012, the District and Mr. Winter realized that it was inappropriate for him to have been compensated by the District while he was serving as a Board member, Mr. Winter repaid this entire sum to the District that same day. In other words, he paid back more than the net amount he received from the District. This repayment occurred well over a year ago.

Ms. Jones also takes issue with an invoice (Invoice No. 05412) presented by Mr. Winter to the District in the amount of $697.39. The Board approved this invoice at the April 12, 2012 Board meeting. The invoice is broken down into labor and materials. The total labor charge was: $200.00. However, Mr. Winter did not include this labor costs in the total invoice amount. The materials charge totaled: $697.39. Mr. Winter billed only the cost of the materials to the District. Mr. Winter's costs for those materials equaled the amount he billed the District for those materials. In other words, Mr. Winter did not make any profit on the transaction and he did not sell the materials to the District at a higher price than what he paid for them. Furthermore, Mr. Winter was able to acquire those materials at a substantial discount from what the District could otherwise have purchased those materials for without the intervention of Mr. Winter.

Board Member William Schwartzkopf:

William Schwarzkopf was appointed to the Board in 2009 to fill a then existing vacancy and he was elected to a four year term in May of 2012. During the first Board meeting after the 2012 election, the Board elected Mr. Schwartzkopf as the Board Vice-President.

As you know, William Schwartzkopf is a master plumber. In January of 2012, it became apparent that Station 5 was not in compliance with the state plumbing code. Mr. Schwartzkopf started a search for a plumber who could perform all work on Station 5 in the most cost effective manner. He found William Gotwald, a non-master plumber. Mr. Schwartzkopf proposed to Mr. Gotwald that he work under Mr. Schwartzkopf's license and at a substantially reduced hourly rate to further minimize costs. Mr. Gotwald agreed.

Indeed, Mr. Gotwald performed all of the plumbing work for Station 5. Mr. Schwartzkopf oversaw his work but he was not compensated by anyone for providing that service. Mr. Schwartzkopf did not receive any kickback from Mr. Gotwald for the work done at Station 5.

A. The February 29, 2012 invoice to the District

On January 19, 2012, Mr. Gotwald presented a bill to Mr. Schwartzkopf for 19 hours of labor at $30.00 per hour for a total of $570.00 (Most plumbers charge between $75 to $150 per hour). Mr. Schwartzkopf personally paid this invoice to Mr. Gotwald on January 20, 2012. On February 20, 2012, Mr. Gotwald presented a bill to Mr. Schwartzkopf for 15 hours of labor at $30.00 per hour for a total of $450.00. Mr. Schwartzkopf personally paid this invoice to Mr. Gotwald on February 22, 2012. Mr. Schwartzkopf, as of February 22, 2012 paid a total of $1,020.00 to Mr. Gotwald for 34 hours of labor pertaining to plumbing work done at Station 5.

Furthermore, Mr. Schwartzkopf did make five (5) field visits to Station 5 to supervise Mr. Gotwald's work. Mr. Schwartzkopf resides in the Badger Creek subdivision which is 45 miles from Station 5 – the round trip is 90 miles. Therefore, Mr. Schwartzkopf could have submitted an invoice to the District for reimbursement of mileage at the regular 2012 IRS rate of 55.5 cents/mile for a total of: $249.75. Instead, Mr. Schwartzkopf billed $50.00. Mr. Schwartzkopf also presented gas receipts for two trips he made for Station 5 related business. He was reimbursed his actual fuel costs in the amount of $62.50.

On February 29, 2012, Mr. Schwartzkopf presented an invoice to the District related to "Station #5 – Rework Plumbing under concrete to meet state plumbing code." On this invoice, Mr. Schwartzkopf listed the 34 hours of labor performed by Mr. Gotwald, which Mr. Schwartzkopf had already paid, the 5 trip charges, and the fuel reimbursement.

It is clear that the February 29, 2012 invoice submitted by Mr. Schwartzkopf to the District constitutes nothing more than a request for reimbursement in the amount of $1,132.50. Mr. Schwartzkopf did not personally gain anything from this transaction. On March 7, 2012, the District issued check# 36874 for $1,132.50 made payable to Mr. Schwartzkopf for expenses he had incurred on behalf of the district.

B. The April 10 invoice to the District

On March 13, 2012, Mr. Gotwald presented a bill to Mr. Schwartzkopf for 28 hours of labor at $30.00 per hour for a total of $840.00. Mr. Schwartzkopf personally paid this invoice to Mr. Gotwald on March 15, 2012. On March 30, 2012, Mr. Gotwald presented a bill to Mr. Schwartzkopf for 25 hours of labor at $30.00 per hour for a total of $750.00. Mr. Schwartzkopf personally paid this invoice to Mr. Gotwald on April 2, 2012. Mr. Schwartzkopf, as of April 2, 2012 paid a total of $1,590.00 to Mr. Gotwald for 53 hours of labor pertaining to plumbing work done at Station 5.

Furthermore, Mr. Schwartzkopf purchased supplies for Station 5. He paid for those supplies with his own money. The total of the amount of those items was: $478.43. Mr. Schwartzkopf provided satisfactory receipts to the District to substantiate the amounts of the expenses charged to the District.

On April 10, 2012, Mr. Schwartzkopf presented an invoice to the District related to "Station #5 – Plumbing." On this invoice, Mr. Schwartzkopf listed the 53 hours of labor performed by Mr. Gotwald, which Mr. Schwartzkopf had already paid, and the expenses he had incurred for materials earmarked for Station 5. It is clear that the April 10, 2012 invoice submitted by Mr. Schwartzkopf to the District constitutes nothing more than a request for reimbursement in the amount of $2,008.43. Mr. Schwartzkopf did not personally gain anything from this transaction. On April 11, 2012, the District issued check# 36874 for $2,008.43 made payable to Mr. Schwartzkopf for expenses he had incurred on behalf of the District.

Analysis:

A. Neither Board member had a conflicting interest that required the disclosure of the transactions.

Ms. Jones urges that you file charges against Messrs. Winter and Schwartzkopf for violation of section 18-3-308, C.R.S. Ms. Jones' submittal does not give rise to any conclusion, beyond a reasonable doubt, that either board member violated section 18-3-308, C.R.S. She fails to properly state salient facts, she fails to provide a complete presentation of legal standards, and she draws conclusions that reasonable persons would not reach.

Section 18-3-308, C.R.S. provides:

> (1) A public servant commits failing to disclose a conflict of interest if he exercises any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction without having given seventy-two hours' actual advance written notice to the secretary of state and to the governing body of the government which employs the public servant of the

> existence of a known potential conflicting interest of the public servant in the transaction with reference to which he is about to act in his official capacity.
>
> (2) A "potential conflicting interest" exists when the public servant is a director, president, general manager, or similar executive officer or owns or controls directly or indirectly a substantial interest in any nongovernmental entity participating in the transaction.

[Emphasis added]. This statute may not be read in isolation where the public servant is a director of a special district. Indeed, section 32-1-902(b), C.R.S. provides:

> (b) No director shall receive compensation as an employee of the special district, other than that provided in this section, and any director shall disqualify himself or herself from voting on any issue in which the director has a conflict of interest unless the director has disclosed such conflict of interest in compliance with section 18-8-308, C.R.S. Reimbursement of actual expenses for directors shall not be considered compensation.

[Emphasis added].

1. The Jeffrey Winter Invoice:

It is clear that Mr. Winter did not profit from his transaction with the District. He submitted a bill for reimbursement of expenses incurred on behalf of the District. Therefore, he did not have a potential conflicting interest. Furthermore, section 32-1-902(b), C.R.S. specifically exempts reimbursements from the disclosure requirements of section 18-8-308, C.R.S.

The invoice that Mr. Winter submitted also did not constitute a "government contract, government purchase, government payment, or other government pecuniary transaction." He, as an individual, purchased materials for the District without any direction from the Board. He then sought reimbursement from the District. This act of seeking reimbursement does not turn the invoice into a government contract or purchase. It remained a private purchase. The Board could have denied the reimbursement request and by doing so Mr. Winter would not have had a remedy at law to obtain the reimbursement. This alone establishes that Mr. Winter did not participate in or vote on a government contract.

Furthermore, Jeff Winter, at no time, owned or controlled "a substantial interest" in any nongovernmental entity participating in the transaction. The Hartsel Fire Protection District functions through its five member board. The Jeff Winter Invoice was presented to the Board at

the April 12, 2012 general meeting. Five board members were present at that meeting. A motion was made to pay the bills. The Minutes of the meeting indicate: "There was no opposition, the motion carried unanimously." Since the meeting was attended by all five board members and the motion to pay the bills, to include Mr. Winter's invoice, carried unanimously, Mr. Winter did not own or control a substantial interest in the transaction.

Therefore, Mr. Winter did not violate section 18-8-308, C.R.S. because the invoice was not a government contract or transaction and he did not have a substantial interest in the District's participation in the reimbursement transaction. Furthermore, mere reimbursements do not fall within the purview of the conflict of interest statute.

2. The William Schwartzkopf Invoice:

It is equally clear that Mr. Schwartzkopf did not profit from his transaction with the District. He submitted a bill for reimbursement of expenses incurred on behalf of the District. Therefore, he did not have a potential conflicting interest. Furthermore, section 32-1-902(b), C.R.S. specifically exempts reimbursements from the disclosure requirements of section 18-8-308, C.R.S.

The invoice that Mr. Schwartzkopf submitted also did not constitute a "government contract, government purchase, government payment, or other government pecuniary transaction." He, as an individual, purchased certain materials for the District without any direction from the Board. He then sought reimbursement from the District. This act of seeking reimbursement does not turn the invoice into a government contract or purchase. It remained a private purchase. The Board could have denied the reimbursement request and by doing so Mr. Winter would not have had a remedy at law to obtain the reimbursement. This alone establishes that the Mr. Schwartzkopf did not participate in or vote on a government contract.

In addition, the agreement that Mr. Schwartzkopf entered into with Mr. Gotwald is also not a government contract. Indeed, it was a contract only between Mr. Schwartzkopf, as an individual, and Mr. Gotwald. This is borne out by the fact that Mr. Gotwald invoiced Mr. Schwartzkopf directly and Mr. Schwartzkopf paid Mr. Gotwald's invoice with his own personal funds – not District funds.

Furthermore, Mr. Schwartzkopf did not exercise any substantial discretionary function in connection with a government contract, purchase, payment, or other pecuniary transaction pertaining to Mr. Gotwald's work on Station 5. Mr. Gotwald performed the labor. Mr. Schwartzkopf paid Mr. Gotwald in full. When the work was completed, Mr. Schwartzkopf sought reimbursement from the District for his expenses in paying Mr. Gotwald. There was no

discretion involved by Mr. Schwartzkopf in how Mr. Gotwald performed the labor, other than ensuring compliance with the state plumbing code. Mr. Schwartzkopf merely permitted Mr. Gotwald to work under his license. That arrangement does not give rise to a conflict of interest requiring disclosure. Furthermore, Mr. Schwartzkopf did not derive a pecuniary gain or benefit from the transaction.

B. Neither Board member obtained a benefit for themselves nor another and they did not knowingly violated any laws.

Ms. Jones urges that you file charges against Messrs. Winter and Schwartzkopf for violation of section 18-8-404(1)(c), C.R.S. Ms. Jones' submittal does not give rise to any conclusion, beyond a reasonable doubt, that either board member violated section 18-4-404(1)(c), C.R.S. She fails to properly state salient facts, she fails to provide a complete presentation of legal standards, and she draws conclusions that reasonable persons would not reach.

Section 18-8-404(1)(c), C.R.S. provides:

> (1) A public servant commits first degree official misconduct if, with intent to obtain a benefit for the public servant or another or maliciously to cause harm to another, he or she knowingly:
>
> ...
>
> (c) Violates any statute or lawfully adopted rule or regulation relating to his office.

The statute contains a dual *mens rea* requirement: (1) acting with "intent" to obtain a benefit for the public servant or another and (2) "knowingly" violating any statute related to his office.

With respect to the invoices that Messrs. Winter and Schwartzkopf presented to the District for payment, it is clear that they did so without any intent to obtain a benefit for the public servant or another. The submittal of the invoices was to reimburse them for out-of-pocket expenses incurred for the benefit of the District. Neither Mr. Winter nor Mr. Schwartzkopf, obtained any pecuniary gain related to the submittal of those invoices.

Furthermore, neither Messrs. Winter and Schwartzkopf knowingly violated any statute when they submitted those invoices and voted to approve payment of those invoices since (1) the transactions were for reimbursements, specifically exempted as a conflicting transaction under section 32-1-902(1)(b), C.R.S. and (2) neither of them personally derived a pecuniary gain from the transactions.

Therefore, with respect to the invoices that Messrs. Winter and Schwartzkopf submitted to the District, their actions do not constitute a violation of section 18-8-404(1)(c), C.R.S.

With respect to the paychecks that Mr. Winter received from the District, I submit that (1) Mr. Winter did not "knowingly" violate section 32-1-902(1)(b), C.R.S. when he received paychecks for compensated weekend work done for the District and (2) once he realized that he should not have been compensated by the District, he repaid to the District the entire "gross" amount of the sum total of all compensation received from the District to the date of repayment – May 20, 2012. Mr. Winter reimbursed the District for those wages well over a year ago.

I recognize that, in general, ignorance of the law is no defense. *See* § 18-1-504(2), C.R.S. However, for purposes of section 18-8-404(1)(c), C.R.S., liability attaches only where a person "knowingly" violates a statute relating to his office. Thus, where a person is unaware that his conduct violates a statute relating to his office, there can be no liability under section 18-4-404(1)(c), C.R.S. *See also* § 18-1-504(2)(a), C.R.S. (mistake of law permissible where permitted by a statute). Since section 18-4-404(1)(c), C.R.S. addresses only a knowing violation of law, it contemplates that a mistake of law, or stated differently, the unknowing violation of law does not result in criminal liability. Furthermore, the payment of the paychecks was sanctioned by the Board as a whole providing further relief from the general mistake of law rules. *See* § 18-1-504(2)(b), C.R.S.

As stated before, the District had employed Mr. Winter, from time to time, prior to his installment on the Board for weekend work. He continued that work once he became a director for the District. Neither the Chief, nor the Board, nor Mr. Winter gave his continued sporadic compensated employment for the District any thought. When this issue was brought to the District's attention, Mr. Winter, immediately and without protest, wrote a personal check to the District repaying his gross wages. He did so well over a year ago on May 20, 2012.

Conclusion:

In spite of Ms. Jones' acerbic complaint, I submit that the facts do not support charging either, or both, Messrs. Winter and Schwartzkopf with any crimes related to their tireless support of the District. More to the point, there exists no evidence to warrant filing charges against them for failing to disclose a conflict of interest and first degree official misconduct.

To the contrary, Messrs. Winter and Schwartzkopf acted, and continue to act, at all times in the best interest of the District. They have each volunteered countless hours to maintain the District in a state of operational readiness. Ms. Jones' myopia prevents her from recognizing those truths.

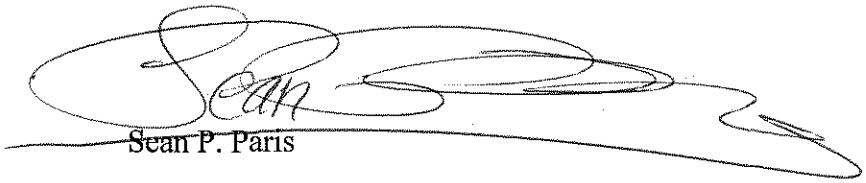
Please keep in mind that over the last seven years, the Board of Directors of the Hartsel Fire Protection District, including its Chief, has been under relentless attack by Ms. Jones and her cronies – she has instigated a criminal investigation about the conduct of the 2010 special district election; she has unsuccessfully run for Board vacancies; she has filed a complaint with the Secretary of State for alleged campaign finance violations without any determination of any wrongdoing (she voluntarily dismissed the complaint when she was served with written discovery requests); she has instigated a criminal investigation regarding an alleged assault involving Andy Grey, the husband of the Board's secretary; she has run for a vacancy on the Board of County Commissioners with a stated purpose of asserting control over the District; she has filed a civil rights suit in federal court against the District and its Chief – a suit she completely withdrew from under threat of federal Rule 11 sanctions for lack of standing, and she has instigated a criminal investigation into the tape malfunction at the January 2011 executive session of the Board.

None of these odious tactics have resulted in any findings by anyone of misconduct by the Board, its members, or Chief Hutcheson. Indeed, no criminal charges have yet been filed, let alone a verdict of guilty obtained, as a result of any of those criminal investigations. Likewise, Ms. Jones' adventures in the civil justice system have all resulted in a dismissal. Her political ambitions have borne no fruit. In her tape recorded interview with Jefferson County investigators relating to the executive session tape investigation, she allegedly stated that it would be "fun to see the board members in jail and have Hutcheson lose his job." Her vendetta knows no bounds.

She has now filed the instant complaint, full of conclusory allegations, written as though she were still employed at the District Attorney's Office, apparently borrowing the style of her charging language from the CDAC charging manual. Obviously, Ms. Jones' credibility is of great concern in evaluating any of her complaints.

I am confident that you will conclude that no charges are warranted in this matter. Please feel free to contact me should you have any questions or concerns regarding this, or any other matter.

Very truly yours,



Sean P. Paris