

BEFORE THE COMMISSIONER OF POLITICAL PRACTICES
STATE OF MONTANA

<p>In Re: Ethics Complaint of Mr. Benjamin R. Engelking v. Scott E. Lemert, Montana Board of Plumbers COPP-2017-ETH-003</p>	<p style="text-align: center;">CAUSE NO. COPP-2017-ETH-003 NOTICE OF DISMISSAL SUMMARY DECISION OF COMPLAINT WITHOUT INFORMAL CONTESTED CASE HEARING</p>
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On March 17, 2017, Mr. Benjamin R. Engelking of Mountlake Terrace, Washington filed an ethics complaint with the Office of the Commissioner of Political Practices, posed as a complaint against Scott Lemert, a board member and officer of the Montana Board of Plumbers.

On April 10, 2017, Commissioner Motl issued an Amended Notice Ethics Complaint Accepted for Filing. On June 1, 2017, Commissioner Mangan requested a formal response be provided by Mr. Lemert. On June 15, 2017 the Department of Labor and Industry, on behalf of Mr. Lemert and the Montana Board of Plumbers provided a response to Mr. Engelking's complaint.

JURISDICTION AND AUTHORITY

The Commissioner of Political Practices has jurisdiction to hear and decide complaints filed under Montana's Code of Ethics against state officers, legislators, state employees and county attorneys, Mont. Code Ann. § 2-2-136. Unless a complaint is dismissed as frivolous, or for failing to state a claim of a potential violation of the code, the Commissioner "shall hold an informal contested case hearing", Mont. Code Ann. § 2-2-136(1)(c).

Having reviewed the Montana Board of Plumber's response, the Commissioner determines that no additional factual development is necessary pursuant to a prior decision of this office, *Turner v. Threet*, November 15, 2012, and the facts presented in the record. Therefore the Commissioner is issuing the following summary decision without holding an informal contested case hearing on the complaint, Mont. Code Ann. §2-2-136(1)(b).

CONTENTIONS

Mr. Engelking contends that Mr. Scott Lemert, of the Montana Board of Plumbers, and Matthew Lemert violated provisions of the Montana Code of Ethics. The specific statutes Mr. Engelking alleged that were violated are:

(1) The requirements in this section are intended as rules of conduct, and violations constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) Except as provided in subsection (4), a public officer or public employee may not acquire an interest in any business or undertaking that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by the officer's or employee's agency.

...

(4) When a public employee who is a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority is required to take official action on a matter as to which the public employee has a conflict created by a personal or private interest that would directly give rise to an appearance of impropriety as to the public employee's influence, benefit, or detriment in regard to the matter, the public employee shall disclose the interest creating the conflict prior to participating in the official action.

(5) A public officer or public employee may not perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when the officer or employee has a substantial personal interest in a competing firm or undertaking.

Mont. Code Ann. § 2-2-105.

And "[a] public officer or a public employee may not perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative or agent...", Mont. Code Ann. § 2-2-121(2)(e).

DISCUSSION

The Montana Legislature adopted the Code of Ethics for Montana state and local officers and employees and legislators "prohibiting conflict between public duty and private interest", Mont. Constitution, Article XIII, §4. "The holding of public office or employment is a public trust, created by the confidence that the electorate reposes in the integrity of public officers, legislators, and public employees....[who] shall carry out the individual's duties for the benefit of the people of the state", Mont. Code Ann. § 2-2-102(1). "A public officer ... or public employee whose conduct departs from the person's public duty is liable to the people of the state and is subject to the penalties provided ...for abuse of the public's trust", *id.* (2).

ANALYSIS

"It is the purpose of this part to set forth a code of ethics prohibiting conflict between public duty and private interest as required by the constitution of Montana", Mont. Code Ann. § 2-2-101. The purpose of the code of ethics states quite simply the purpose of the entire act. We as state employees and officers are charged with conducting our professional duties for the benefit of all Montanans, and to be mindful of the public trust invested in our duties as we carry them out, Mont. Code Ann. § 2-2-103(1).

The provisions of the Montana Code of Ethics which apply to disclosure of private financial interests prohibit a public officer from performing an official act that directly and substantially affects their own economic benefit, ie their business interests, Mont. Code Ann. §§ 2-2-105 and 2-2-121(2)(e). By disclosing the interest prior taking or abstaining from official action, a state employee or officer may still participate in a quorum vote of a Board, commission, or committee.

Allegation 1: Prior to June 16, 2015, Scott Lemert and Matthew Lemert did not meet the requirements to be course instructors pursuant to ARM 24.180.2102.

The Montana Board of Plumbers has jurisdiction to approve continuing education courses and instructors, not the Commissioner. However, based on the evidence provided to the COPP, on May 11, 2015, CE Made Simple applied to the Montana Board of Plumbers for approval of a continuing education course the law required that:

Course sponsors are responsible for ensuring that instructions are credentialed as one or more of the following: (i) a Montana licensed journeyman or master plumber, with additional training in related subject areas; (ii) a certified teacher

with board approved plumbing credentials; (iii) a certified journeyman and apprentice plumbing instructor; (iv) a plumbing inspector possessing a state journeyman or master plumber's license; or (v) continuing education instructor from another state or jurisdiction who is approved by the board.

Mont. Admin. R. 24.180.2102(1)(b)(2005).

Based on a plain reading of the law, the Commissioner observes that it was CE Made Simple as the course sponsor that was responsible for making sure that its course instructors met the qualifications, not the Montana Board of Plumbers. The copy of CE Made Simple's application attached as Exhibit 2 to Mr. Engelking's Ethics Complaint shows that Mr. Scott Lemert was a Montana licensed master plumber, and that Mr. Matthew Lemert was a Montana licensed journeyman plumber, and both proposed instructors had additional training in related subject areas as IAPMO Certified Plumbing Inspectors.

Mr. Engelking asserts that the Montana Board of Plumber's was applying a "new" rule to CE Made Simple's application, and that the Lemer's instructor approval was based solely on their additional certification of IAPMO Certified Plumbing Inspectors on August 6, 2013 (Complaint Exhibit 4). However both of CE Made Simple's proposed instructors met the qualifications as course instructors based on a plain reading of Mont. Admin. R. 24.180.2102(1)(b)(i)(2005). Further, Mr. Lemert did not participate in the Board's consideration or approval of CE Made Simple's application.

There is no further need for the Commissioner to conduct any factual inquiry into the Montana Board of Plumber's June 17, 2015 approval of CE Made Simple's continued education course or instructor application approval. By not participating in the consideration or vote of the Board on approving CE Made Simple's application to be a continuing education course sponsor, Mr. Lemert properly complied with Mont. Code Ann. § 2-2-105(4). This allegation is dismissed as frivolous and without basis in law or in fact, Mont. Code Ann. §2-2-136(b).

Allegations 2 and 3: That the Board of Plumbers, in proposing a new rule for regulating the approval of continuing education courses for Montana plumbers, unlawfully restricted in-state and out of state competition.

On October 14, 2016 The Board of Plumbers, Department of Labor and Industry published a "Notice of Public Hearing on Proposed Amendment and Repeal" of several of its rules in the Montana Administrative Register Notice 24-180-49, and pursuant to the provisions of the Montana Administrative Procedure Act. The statement of

reasonable necessity for ARM 24.180.2102 provided "[w]hile the current rule provides board flexibility to consider all proposed instructor qualifications, the number of proposals that fail to include properly qualified instructors, of late, coupled with a recent complaint that the board may not be reviewing instructor qualifications objectively, lead the board to conclude it is reasonably necessary to amend this rule to provide more concrete, objective criteria for qualifications", *id.* Following a period of public comment and response by the Board, the proposed amended rule was subsequently adopted, and became effective February 4, 2017.

The rule, as amended, specifically provides for reciprocity for out of state continuing education instructors, as well as qualifications for out of state licensed journeyman or master plumbers. Further, the rule provides clarity to all in-state providers as to the qualifications necessary to be a continuing education instructor for the Montana Board of Plumbers. The Commissioner finds that there is no further factual development necessary to make a determination in on the second and third allegation, and dismisses these allegations as frivolous and without basis in law or fact, Mont. Code Ann. §2-2-136(b).

Allegation 4: At the September 17, 2015 Scott Lemert participated in a quorum of the Board vote denying AnytimeCE's application for continuing education courses and Mr. Engelking as an approved instructor.

Allegation 5: At the December 15, 2016, Scott Lemert participated in a vote approving AnytimeCE's Alternative Instructor, and voted against two motions which approved two AnytimeCE's proposed courses. Both courses passed with a majority vote.

On June 22, 2016, the Montana Board of Plumbers sent a letter to AnytimeCE detailing the reasons that its application for approval as a continuing education provider was being denied, namely, that the proposed instructor does not meet the Board's statutory qualifications (Complaint Exhibit 14). Specifically, the Board pointed out that AnytimeCE's proposed instructors did not meet the qualifications required by the rule (either as a certified teacher with board approved plumbing credentials, or as a certified journeyman and apprentice plumbing instructor). The Board of Plumbers also had discretion to approve or disapprove a continuing education instructor from another state, Mont. Admin. R. 24.180.2102(1)(b)(2005).

Based on the evidence submitted with Mr. Engelking's ethics complaint, AnytimeCE continued to work with the Montana Board of Plumbers to provide an alternative qualified instructor, and course material length to meet the requirements set

by the Board. When the qualifications and course material met the Board's standards, they exercised their discretion to approve AnytimeCE's application as a Course Sponsor for Montana's plumbers under the rule in place at that time. Subsequently, the Board of Plumbers proposed amended rules, and adopted them in late 2016 and early 2017.

The Montana Board of Plumber's principal responsibility is to create, administer and enforce a licensing system for plumbers, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1107, (2015). The Montana Board of Plumbers has 5 plumbers, 3 public members, and a DEQ representative. Therefore actions of the Board as a quorum could always be perceived as plumbers against other plumbers.

Holding a public position does not prevent a member of the board from pursuing other fulltime employment, *see eg. Wadsworth v. DOR*, 275 Mont. 287, 28-31, 911 P.2d 1165. Mr. Lemert has long served as a professional member of the Montana Board of Plumbers, applied for and disclosed the fact that he also runs a continuing education course business, and currently serves as the Licensed Master Plumber Member.

The Montana Board of Plumbers specifically sought out Mr. Lemert's expertise for improving the process by which the Board approves or denies continuing education providers. The Board and the Department of Labor then crafted and published new rules which went through public notice, comment and adoption. None of these actions were actions taken by Mr. Lemert alone.

The Commissioner finds that Mr. Lemert has adequately disclosed his business interest to the Board and to members of the public, through applying for and receiving approval for his own continuing education business. The Commissioner further finds that Mr. Lemert has not taken direct adverse official action against a competing business without adequate prior disclosure to the Montana Board of Plumbers. The allegations 4 and 5 are therefore also dismissed.

CONCLUSION AND NOTICE

The Commissioner provides notice to the parties that this dismissal is a final agency order, and either party may seek judicial review of the Commissioner's determination pursuant to Montana Code Annotated Title 2, Chapter 4, part 7, Mont. Code Ann. § 2-2-136(3). The parties are further informed that the complaint, record established, and decision are available for public inspection upon issuance this final determination, Mont. Code Ann. § 2-2-136(4).

DATED this 22nd day of June, 2017.

A handwritten signature in black ink, appearing to read 'J. Mangan', is written over a horizontal line.

Jeffrey A. Mangan
Commissioner of Political Practices
of the State of Montana
P.O. Box 202401
1209 8th Avenue
Helena, MT 59620