



**STATE ETHICS COMMISSION**

JERRY GRIZZLE and REBECCA HOLSTUN,

Complainants,

v.

CEDRIC PAGE,

Respondent.

Nos. 2023-14 & 2023-15 (consolidated)

**ORDER**

This matter is before me on the general counsel's findings. Having reviewed the general counsel's findings and as required by NMSA 1978, § 10-16G-10(E), I hereby ORDER that the complaint is dismissed.

**IT IS SO ORDERED.**

A handwritten signature in blue ink, appearing to read "Pamela G. Candelaria", written over a horizontal line.

PAMELA G. CANDELARIA, ESQ  
HEARING OFFICER  
ADMINSTRATIVE HEARINGS OFFICE



## **STATE ETHICS COMMISSION**

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Jeremy D. Farris, Executive Director

July 11, 2023

### **CONFIDENTIAL**

**To:** Jeremy Farris, Executive Director

**Re:** *Grizzle v. Page & Holston v. Page*, Case Nos. 2023-14 & 15 (consolidated): investigation findings and probable cause determination

Director Farris:

I am writing in regard to *Grizzle v. Page & Holston v. Page*. These consolidated complaints allege that Respondent Cedric Page violated the Governmental Conduct Act by (i) criticizing and seeking to discipline complainant Jerry Grizzle for submitting an Inspection of Public Records Act (“IPRA”) request to Page’s employer, the University of New Mexico; and (ii) questioning complainant Rebecca Holston’s fitness to serve as New Mexico Military Institute’s (“NMMI”) internal auditor.

As detailed below, I conclude that the complaint is not supported by probable cause. I request that you appoint a hearing officer and instruct the hearing officer to enter an order dismissing the complaint.<sup>1</sup>

### **Background**

Below I provide an overview of the parties to the complaint, a summary of the complaint, and a summary of my investigation of the complaint.

#### **I. Parties**

##### **A. The complainants**

The complainants in this consolidated matter are Jerry Grizzle, NMMI’s president, and Rebecca Holston, NMMI’s internal auditor.<sup>2</sup>

##### **B. Respondent**

Respondent Cedric Page was appointed to NMMI’s Board of Regents in 2019.<sup>3</sup>

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<sup>1</sup> See 1.8.3.13(B) NMAC; NMSA 1978, § 10-16G-12(A)(1) (2019).

<sup>2</sup> See Complaint (No. 2023-14) at 12; Complaint (No. 2023-15) at 3. Unless otherwise indicated, all citations to the complaint in these findings are to the complaint in State Ethics Commission No. 2023-14.

<sup>3</sup> Response and Motion to Dismiss (#8) at 3.

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## II. The complaints

The complainants allege Page violated the Governmental Conduct Act. Grizzle alleges that Page violated the Governmental Conduct Act when he “used his position [as NMMI regent] to air personal grievances in a public setting.”<sup>4</sup> Specifically, Grizzle alleges that he submitted a request to inspect employee evaluations of Page by Page’s employer, the University of New Mexico,<sup>5</sup> and that Page “berate[d]” Grizzle about the request at a meeting of the NMMI Board of Regents.<sup>6</sup> Grizzle alleges that Page’s comments were improper because they were unrelated to any item on the Board of Regents’ meeting agenda, and was motivated by “his private purpose of retaliating against [Grizzle] for filing the IPRA [request].”<sup>7</sup>

Complainant Holstun (joined by Grizzle) alleges that after the NMMI Board of Regents voted to hire her as an internal auditor (with Page voting against her hiring), Page “disapproved of my hiring in front of a live and recorded public forum meeting by badgering me with unrelated and irrelevant questions that not even my predecessors knew how to answer.”<sup>8</sup>

## III. Summary of my investigation

To investigate whether the complaint is supported by probable cause, I reviewed:

- The complaints and materials attached thereto;
- Page’s response to the complaints and motion to dismiss; and
- A recording of a meeting of the NMMI Board of Regents dated November 22, 2022 provided by Page.

### Legal standard

After the Executive Director determines the Commission has jurisdiction over a complaint, the General Counsel is required to investigate the complaint to determine whether it is supported by probable cause.<sup>9</sup> If the complaint is supported by probable cause, the complaint must be referred to a hearing officer, who will hold a public hearing and issue a decision on the merits.<sup>10</sup> If it is not, the complaint is dismissed.<sup>11</sup>

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<sup>4</sup> Complaint at 6.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 6-7.

<sup>7</sup> *Id.*

<sup>8</sup> Complaint (No. 2023-15) at 2.

<sup>9</sup> NMSA 1978, § 10-16G-10(D) (2021).

<sup>10</sup> *See* § 10-16G-10(G).

<sup>11</sup> *See* § 10-16G-10(E).

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In determining whether a complaint is supported by probable cause, the Act requires the general counsel to determine whether there is evidence that could form the basis for a finding of liability by a hearing officer or the Commission; however, to make that determination, the Act does not require the general counsel to exhaustively review all possible sources of evidence.<sup>12</sup>

A complaint may be supported by probable cause when there is evidence (not necessarily conclusive) of a violation.<sup>13</sup> A complaint also may be supported by probable cause when the undisputed facts establish a violation of the law. As the Court of Appeals put it in the context of claims for malicious abuse of process, “[t]he question of probable cause is a question of law and fact. Whether the circumstances alleged to show probable cause are true, and exist, is a matter of fact; but supposing them to be, whether they amount to probable cause, is a question of law.”<sup>14</sup>

### Discussion

The complaints allege that Page violated Section 10-16-3(A) & (B) of the Governmental Conduct Act.<sup>15</sup> For the reasons that follow, I conclude that the complaints are not supported by probable cause, and therefore subject to dismissal. However, before turning to that question, I address Page’s threshold argument that the Commission cannot investigate or adjudicate civil violations of Section 10-16-3(A) & (B) of the Governmental Conduct Act.

#### **I. The Commission has authority to investigate and adjudicate a civil violation of Section 10-16-3(A) & (B) of the Governmental Conduct Act.**

The complaints allege that Page violated Subsections (A) & (B) of Section 10-16-3 of the Governmental Conduct Act. In response, Page first makes a threshold argument that the Commission lacks authority to even investigate this matter, because the provisions of the Governmental Conduct Act that he is alleged to have violated are “merely aspirational expressions of ethical principles,” not laws that can be violated.<sup>16</sup> For this argument, Page relies on *State v. Gutierrez et al.*<sup>17</sup> In *Gutierrez*, the New Mexico Supreme Court affirmed a district

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<sup>12</sup> See § 10-16G-10(E).

<sup>13</sup> See *State v. Cordova*, 1989-NMSC-083, ¶ 15, 109 N.M. 211, 784 P.2d 30 (interpreting the term “probable cause” in the criminal procedure context to require that “(1) only a probability of [a violation] need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; [and] (3) common sense should control” (quoting *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 657 P.2d 613)); *State v. Vest*, 2011-NMCA-037, ¶ 7, 149 N.M. 548, 252 P.3d 772 (“The degree of proof necessary to establish probable cause for the issuance of a search warrant is more than a suspicion or possibility but less than a certainty of proof.”).

<sup>14</sup> *Yucca Ford, Inc. v. Scarsella*, 1973-NMCA-042, ¶ 4, 85 N.M. 89 (quoting *Leyser v. Field*, 1890-NMSC-001, ¶ 3, 5 N.M. 356).

<sup>15</sup> See Complaint (No. 2023-14) at 5; Complaint (No. 2023-15) at 2.

<sup>16</sup> Response and Motion to Dismiss (#8) at 10-13.

<sup>17</sup> 2023-NMSC-002.

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court order dismissing criminal charges alleging violations of Subsections (A), (B), and (C) of Section 10-16-3 of the Governmental Conduct Act.<sup>18</sup>

Subsections 10-16-3(A)-(C) of the Governmental Conduct Act provide:

A. A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

C. Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.<sup>19</sup>

The issue in *Gutierrez* was whether violations of these provisions “[are] punishable as criminal violations and, if so, whether . . . [the provisions] are unconstitutionally vague.”<sup>20</sup> The court answered the first question in the negative, finding that the legislature “[did not] intend[] for violations of Subsections (A)-(C) of Section 10-16-3 to be subject to criminal penalty.”<sup>21</sup> Because it concluded that the statutes could not be enforced through criminal proceedings, the court declined to answer the constitutional vagueness question.<sup>22</sup>

Page argues the complaint should be dismissed for lack of probable cause because *Gutierrez* forecloses all claimed violations of Subsections (A)-(C) of Section 10-16-3, even violations alleged in civil proceedings before the State Ethics Commission.<sup>23</sup> I reject this argument for two reasons.

First, the argument requires extending *Gutierrez*'s holding to civil proceedings, and the case simply cannot be read to support that proposition. The *Gutierrez* analysis of Section 10-16-

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<sup>18</sup> *Id.* ¶¶ 33, 39.

<sup>19</sup> NMSA 1978, § 10-16-3(A)-(C) (2011).

<sup>20</sup> 2023-NMSC-002, ¶ 1.

<sup>21</sup> *Id.* ¶ 21.

<sup>22</sup> *Id.*

<sup>23</sup> *See* Response and Motion to Dismiss (#8) at 10-11.

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3 is grounded in principles of criminal law: ultimately, the court found that the statutes were no enforceable in criminal proceedings because they “[do] not express conduct that would constitute a *criminal actus reus*.”<sup>24</sup> As the court elsewhere put it, a statute needs to have “a sufficiently defined actus reus” to support the imposition of criminal sanctions for its violation.<sup>25</sup> None of this can be said about civil penalties imposed by the State Ethics Commission: for starters, the Commission is under an affirmative obligation to “advise” and “educate” everyone subject to the Governmental Conduct Act of their duties under the Act.<sup>26</sup> And before the Commission can adjudicate or impose a penalty, the respondent to an administrative complaint is entitled to correct any violations that are unintentional or for good cause.<sup>27</sup> Because any respondent found to have violated the Act will have rejected a 10-day opportunity to correct their violation, and the available sanction for the violation is a comparatively minor \$250 civil penalty, the fair notice concerns in the Supreme Court’s opinion with regard to criminal proceedings to enforce the Act do not carry so much force in civil proceedings before the State Ethics Commission.<sup>28</sup>

Second, to the extent Page’s arguments may have merit, it would not be proper for the Commission’s general counsel to have the final say on whether Section 10-16-3(A)-(C) of the Governmental Conduct Act is subject to adjudication and enforcement by the State Ethics Commission. Ultimately, the Commission must decide whether the Supreme Court’s holding in *Gutierrez* as to criminal applications of Subsections 10-16-3(A) - (C) should be extended to civil administrative proceedings before the Commission, either by (i) issuing a formal advisory opinion to that effect; or (ii) by issuing a final decision affirming a hearing officer decision.<sup>29</sup> If the Commission decides that *Gutierrez* does not preclude the general counsel from investigating and the Commission from adjudicating violations of Section 10-16-3 of the Governmental Conduct Act, then that decision may be reviewed by a district court and the appellate courts.<sup>30</sup>

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<sup>24</sup> 2023-NMSC-002, ¶ 33 (emphasis added).

<sup>25</sup> *Id.* ¶ 37.

<sup>26</sup> NMSA 1978, § 10-16-13.1(A) (2019).

<sup>27</sup> NMSA 1978, § 10-16-13.1(B) (2019).

<sup>28</sup> Compare *Gutierrez*, 2023-NMSC-002, ¶ 37 (“[C]riminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable.” (quoting *Swafford v. State*, 1991-NMSC-043, ¶ 41, 112 N.M. 3) (quotation marks omitted)), with § 10-16-13.1(B), and 1.8.3.14(P) NMAC (2021) (“If the hearing officer finds by a preponderance of the evidence that the respondent’s conduct as alleged in the complaint constituted a violation of the Governmental Conduct Act and was either unintentional or for good cause, then the hearing officer shall give the respondent 10 days to correct the violation, pursuant to Subsection B of Section 10-16-13.1 NMSA 1978, before taking any action . . .”).

<sup>29</sup> See 1.8.3.15 NMAC (2021).

<sup>30</sup> See 1.8.3.15(G) NMAC (providing that a party may seek certiorari review of Commission decisions under Rule 1-075 NMRA).

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**II. The complainants' allegation that Page violated the Governmental Conduct Act is not supported by probable cause.**

Having concluded that *Gutierrez* does not bar the Commission from investigating and adjudicating claimed violations of Section 10-16-3(A)-(C) of the Governmental Conduct Act, the question is whether the complainants' allegation that Page violated Section 10-16-3(A) & (B) is supported by probable cause. As explained below, I conclude that it is not.

**A. Subsection 10-16-3(A)**

Subsection 10-16-3(A) of the Governmental Conduct Act provides:

A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

To allege a violation of Subsection 10-16-3(A), the complainants must allege that Page used "the powers and resources of public office . . . to obtain personal benefits or pursue private interests."<sup>31</sup> But the complaints do not allege that Page's criticisms of Grizzle and Holston were motivated by some desire to obtain a personal benefit or to benefit some private interest. The closest the complainants come to making such an allegation is the suggestion in Grizzle's complaint that Page criticized Grizzle at a public meeting of the NMMI Board of Regents in order to "air personal grievances in a public setting."<sup>32</sup> This is too thin an allegation to support a violation of Section 10-16-3(A), which requires that an official act be motivated by a desire to obtain or benefit a personal interest. For her part, Holston does not allege that Page's criticism of her qualifications was motivated by any personal interest; rather, she alleges that Page's motivations ultimately boil down to the same motivation behind his earlier criticisms of Page.<sup>33</sup> Even if Page sought to air a "personal grievance,"<sup>34</sup> that alone does not support an inference of a violation, because airing a personal grievance, standing alone, is not evidence that Page used the powers and resources of his office as Regent for the purpose of obtaining or benefitting a personal interest, either his or another's. Accordingly, I conclude that the complainants' allegation

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<sup>31</sup> See § 10-16-3(A); see also *State v. Gutierrez et al.*, 2020-NMCA-045, ¶ 33, *rev'd on other grounds*, 2023-NMSC-002 ("[Subsection 10-16-3(A)] (1) mandates the use of the powers and resources of a legislator's, public officer's, or public employee's public office only for the benefit of the people of New Mexico, and (2) prohibits legislators, public officers, and public employees from exploiting their powers and resources for private gain.").

<sup>32</sup> Complaint at 6.

<sup>33</sup> See Complaint (No. 2023-15) at 2 (appearing to suggest that Page's criticisms were related to the Board of Regents' efforts to remove Page for criticizing Grizzle).

<sup>34</sup> For his part, Page maintains that his criticism of Grizzle was motivated by an earnest belief that Grizzle had no legitimate reason to seek information about Page's employment history. See Response and Motion to Dismiss (#8) at 4.

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that Page violated Subsection 10-16-3(A) of the Governmental Conduct Act is not supported by probable cause.

**B. The complaints' allegation that Page violated Subsection 10-16-3(B) and (C) is not supported by probable cause.**

The complaints allege Page violated Subsection 10-16-3(B) of the Governmental Conduct Act, which provides: “Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.”<sup>35</sup> The Commission has consistently interpreted Subsection 10-16-3(B) in conjunction with Subsection 10-16-3(C), which Subsection 10-16-3(C) of the Governmental Conduct Act imposes a duty on legislators, public officers, and public employees to disclose real or potential conflicts of interest, and requires them to take “reasonable efforts . . . to avoid undue influence and abuse of office in public service.” NMSA 1978, § 10-16-3(C). A public officer who abuses their office in public service necessarily fails to take reasonable efforts to avoid the abuse of office. Accordingly, when considering alleged violations of Subsection 10-16-3(C), the dispositive question in this proceeding is whether Page “abuse[d] [his] office in public service.”

While the Governmental Conduct Act does not define “abuse of office,” the common law informs the meaning of the statutory term.<sup>36</sup> The abuse of office was (and remains) a civil action at common law. It is also known as “malfeasance in office,” “official misconduct,” and the “abuse of the public trust.”<sup>37</sup> Notwithstanding the several names that courts have given it, the claim for abuse of office is straightforward: it is a claim for the breach of a fiduciary duty, as applied to public officers who have a fiduciary relationship with the public.<sup>38</sup>

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<sup>35</sup> NMSA 1978, § 10-16-3(B) (2011).

<sup>36</sup> See *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618 (“[W]hen determining the meaning of a statute, courts will often construe the language in light of the preexisting common law.” (citing 2A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 45.02 (1992))).

<sup>37</sup> See Abuse of Public Office, *Black’s Law Dictionary* (11th ed. 2019).

<sup>38</sup> It is “beyond dispute” that public officials owe fiduciary duties to the public. See *Skilling v. United States*, 561 U.S. 358, 407 n.41 (2010); see also, e.g., *United States v. Carter*, 217 U.S. 286, 306 (1909) (observing that a fiduciary duty is applicable to public officials); *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 2013) (“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest.” (citation omitted)); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (“Elected officials generally owe a fiduciary duty to the electorate.” (citing *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941)); *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978) (reversing dismissal of federal common law breach of fiduciary duty claim the government asserted against federal officials, concluding “[t]he action pursued here is a proper tool, based on common law notions of principal-agent relations, for controlling the possible loss of impartial public administration”); *Marjac, LLC v. Trenk*, No. CIV A 06-1440 JAG, 2006 WL 3751395, at \*15 (D.N.J. Dec. 19, 2006) (denying a motion to dismiss a breach of fiduciary duty claim against elected officials that stand in a fiduciary relationship with their constituents); see also generally *Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221–22 (N.J. 1952) (describing the fiduciary duties that public officers owe to the public and observing that the duties may be enforced in the civil courts (citations omitted)).



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Central among the duties that a fiduciary owes are the duty of care and the duty of loyalty. As a fiduciary, a public official owes the public a duty of care—i.e., the duty to exercise reasonable diligence in the performance of their office.<sup>39</sup> Moreover, as a fiduciary, a public official owes the public a duty of loyalty—i.e., the duty to use the powers and resources of the public’s office for the public’s benefit only and, thus, to refrain from putting the official’s interests before the public’s interest.<sup>40</sup>

When the Legislature required public officers to avoid the “abuse of office in public service,” § 10-16-3(C), that statutory language is informed by the common law fiduciary duties that public officers owe the public.<sup>41</sup> Indeed, the Legislature has confirmed that a public officer’s government position is “a public trust,” reinforcing that, by virtue of their government position, public officers have fiduciary duties to the public. *See* § 10-16-3(A). Accordingly, a public officer engages in the “abuse of office in public service” in violation of Subsection 10-16-3(C) when that public officer uses their government office in a way that breaches a fiduciary duty that the public officer owes to the public.<sup>42</sup>

Subsections 10-16-3(B) & (C) also impose a duty on legislators, public officers, and public employees to disclose real or potential conflicts of interests and to undertake “reasonable efforts . . . to avoid undue influence and abuse of office in public service.”<sup>43</sup> Subsection (B) details the duty’s scope of application (i.e., to whom the duty applies), and Subsection (C) provides the duty’s specific content (i.e., what the duty requires). Therefore, a violation occurs when a legislator, public official, or employee either (i) fails to disclose a real or potential conflict of interest, or (ii) has abused his or her office.

- 1) There is no allegation or evidence suggesting Page failed to disclose a real or potential conflict of interest in violation of Subsection 10-16-3(C).

The complaint does not allege, nor have I seen evidence tending to establish, that Page is subject to a conflict of interest that ought to have been disclosed in relation to any action (or failure to act) regarding Grizzle or Holston’s employment. I therefore conclude there is no

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<sup>39</sup> *Cf.*, e.g., *Air Line Pilots Ass’n, Inter. v. O’Neill*, 499 U.S. 65, 75 (1991) (discussing the fiduciary duty of care that a labor union, as a fiduciary, owes its represented employees).

<sup>40</sup> *See*, e.g., *Moody v. Stribling*, 1999-NMCA-094, ¶ 27, 127 N.M. 630 (“A fiduciary duty is a duty of loyalty.” (citations omitted)); *Kueffer v. Kueffer*, 1990-NMSC-045, ¶ 12, 110 N.M. 10 (“A fiduciary is obliged to act primarily for another’s benefit in matters connected with such undertaking. A fiduciary breaches this duty by placing his interests above those of the beneficiary.” (citations and quotation marks omitted)); *cf.* UJI 13-2406, Duty of loyalty; definition (“A lawyer has a duty of loyalty to a client. A lawyer breaches the duty of loyalty by putting the lawyer’s own interests, or the interests of another, before those of the client.”).

<sup>41</sup> *Sims*, 1996-NMSC-078, ¶ 23.

<sup>42</sup> *See Abuse*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/abuse> (defining “abuse” to mean “to put [something] to a wrong or improper use”).

<sup>43</sup> §§ 10-16-3(B)-(C).

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probable cause to conclude that Page failed to disclose a real or potential conflict of interest in violation of Subsections 10-16-3(B) and (C).

- 2) There is no allegation or evidence suggesting Page abused his public office in violation of Subsection 10-16-3(C).

There also is no probable cause to find that Page engaged in a prohibited abuse of office as there is no evidence he breached some legal duty arising from his public office. The complaints allege that Page abused his office by “airing personal grievances” towards Grizzle at a public meeting in retaliation for Grizzle filing IPRA requests with Page’s employer, the University of New Mexico; and by questioning Holstun’s qualifications to serve as NMMI’s internal auditor. But just as there is nothing in the law that prohibits a public employee from submitting a public records request for any reason (or no reason) at all, there is nothing in the law that prohibits a public official from taking otherwise lawful action in response to the request, absent further evidence or allegation of some illegal motive.

Likewise, there is nothing per se improper about a public officer questioning an applicant’s suitability for a position of employment with the officer’s agency. Unless there is some evidence or allegation that the public officer’s motivation behind these lawful acts is illegal (such as an intent to discriminate based on an employee’s protected status or to enrich himself), a public officer cannot abuse his office by taking otherwise lawful actions in response to another’s lawful actions.<sup>44</sup>

In sum, in the absence of any allegation or evidence that Page breached a clear and applicable legal duty, or took some otherwise lawful action with unlawful (i.e., discriminatory or corrupt) intent, the allegation that Page abused his office in violation of the Governmental Conduct Act by inquiring into the purposes of Grizzle’s IPRA request and Holstun’s qualifications at a public meeting is not supported by probable cause.

### **Conclusion**

For the reasons set out above, I conclude the Complaint is not supported by probable cause. I respectfully request that you transmit my conclusions to a hearing officer with instructions to dismiss the complaint pursuant to NMSA 1978, Section 10-16G-10(E).

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<sup>44</sup> With regard to Grizzle’s claim that Page retaliated against him for submitting a public records request with Page’s employer, it is worth noting that legislative efforts to prohibit lawful retaliatory conduct towards individuals who submit public records requests have failed. *See* Senate Bill 87 (2021 Reg. Sess.) (proposed bill that would prohibit retaliatory action by a public body against a person who submits a records request).

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Walker Boyd