

C A M P A I G N F O R ACCOUNTABILITY

May 9, 2016

By Facsimile: 785-296-6296

The Honorable Derek Schmidt
Attorney General of Kansas
120 SW 20th Ave., 2nd Floor
Topeka, KS 66612

Re: Request for Investigation of Brian Newby

Dear Attorney General Schmidt:

Campaign for Accountability (“CfA”) respectfully requests that you investigate former Kansas Election Commissioner Brian Newby for official misconduct in violation of K.S.A. § 21-6002 by knowingly submitting to the Johnson County Election Office multiple claims for false expenses, for flagrant misuse of public funds in violation of K.S.A. § 21-6005, and for conspiracy in violation of K.S.A. § 21-5302.

Background

For 10 years, from January 2005 until November 13, 2015, Mr. Newby served as the election commissioner charged with overseeing elections in Johnson County, Kansas. Currently he is the executive director of the U.S. Election Assistance Commission (“EAC”).

Following his departure, pursuant to a request made by the Johnson County Board of Commissioners, Johnson County Audit Services performed a transition audit of the Johnson County Election Office, focusing on, among other things, “management practices in the areas of travel, purchase card use, discretionary spending, inventory control, special election billing, cash collection and deposit activity,” and issued a report of its findings.¹ The report documented weaknesses in the Election Office’s system of internal controls and included numerous examples of Mr. Newby’s blatantly illegal conduct.

Improper Claims for Business Travel Expenses

The audit uncovered improper payments totaling \$5,288 for 36 of a total of 45 trips taken by Mr. Newby between January 2010 and August 2015. Johnson County Audit at 5. These included per diem overpayments, unjustified flight and hotel upgrades, travel expenses without documentary proof, and unallowable transportation expenses. *Id.* The audit concluded “80% of all his [Mr. Newby’s] travel events contained improper payments.” *Id.* at 6.

¹ Johnson County Audit Services, Performance Audit, No. 2016-01, March 17, 2016 (hereinafter “Johnson County Audit”), available at <http://www.jocogov.org/sites/default/files/documents/AUD/Election%20Office%20Transition%20Audit%20Published.pdf>.

In claiming longer travel times than he actually traveled, Mr. Newby received per diem overpayments of \$273.50. Johnson County Audit at 7. On three occasions, he claimed full days of travel when he had not travelled at all. Further, contrary to the Johnson County's business expense policy, Mr. Newby did not return to the County any of the overpayments. *Id.* When confronted about the overpayments, Mr. Newby claimed they were balanced out by the instances when he had not claimed the per diem. The report noted Mr. Newby's "logic was inaccurate," and referred to one occasion when Mr. Newby's flight change fee exceeded the cost of the extra night at the hotel that otherwise would have been incurred. *Id.*

The audit also found Mr. Newby spent an unjustified \$396.50 of county money on flight and hotel room upgrades. *Id.* In a similar vein, Mr. Newby improperly used a limousine service to and from the local airport 34 times at a cost of \$3,735. Johnson County Audit at 8. At the same time, however, the county paid Mr. Newby a monthly car allowance of \$300, which was intended to cover these kind of costs. *Id.* Further abusing the travel reimbursement process, Mr. Newby received reimbursement of \$190.72 for personal mileage in the Kansas City metropolitan area. *Id.*

Intentional Overrides of the P-Card Guidelines

Auditors also found Mr. Newby had improperly used his government issued purchasing card ("P-Card"). On 31 occasions, Mr. Newby knowingly used the P-card of the former assistant election commissioner, including on dates when Mr. Newby was travelling alone. Johnson County Audit at 8. Indeed, the P-card of the former assistant election commissioner was used to make 72% of all of the office's P-Card expenditures. *Id.* at 11. Because Mr. Newby reviewed and approved the former assistant election commissioner's P-Card purchases, while the county manager reviewed all of Mr. Newby's purchases, Mr. Newby was able to circumvent review of most of his charges. *Id.* at 8. This was the scheme Mr. Newby used, for example, to obtain a car allowance, something that Treasury and Financial Management personnel who review travel reimbursements would have denied. *Id.*

Auditors also found that Mr. Newby misused his P-Card for purchases that lacked a "sufficient business justification," and submitted P-Card expenses that lacked "adequate supporting documentation." *Id.* at 11. This included, *inter alia*, hotel expenses and flight information. Johnson County Audit at 12. Further, the assistant election commissioner's P-card was used for 73 purchases, totaling \$24,005, for which no supporting documentation was provided. *Id.* at 13. Mr. Newby was able to get away with this abuse because his office processed these undocumented purchases with no review or subject only to his approval. *Id.*

For the period June 2013 through October 2015, just before Mr. Newby's departure, he and his staff used County P-Cards for 1,324 transactions at a total cost of \$322,403.23.
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Johnson County Audit at 12. The P-Card of the assistant election commissioner was used to make 348 purchases on Amazon.com totaling \$38,111.73. *Id.* at 12. Mr. Newby confirmed to auditors that he used the same Amazon account to make both business and personal purchases, and that "it was possible" he might have used the assistant election commissioner's purchase card, which had been saved online in violation of county policy, to make purchases. *Id.*

The former assistant election commissioner's P-Card was used for another 73 P-Card purchases totaling \$24,005, which lacked any supporting documentation. *Id.* at 13. 36 of these were processed without review while the remaining 37 were approved by Mr. Newby without any supporting documentation. *Id.*

Questionable Office Spending

Under Mr. Newby's leadership, his office also made a significant number of questionable expenditures totaling at least \$39,600.76 between June 2013 and October 2015. *Id.* at 15. These expenditures fell into five categories: (1) equipment (\$2,976.33); (2) books, periodicals, and subscriptions (\$8,925.37); (3) car lease (\$5,784); (4) management consulting services (\$3,500); and (5) conference expenses (\$18,415.06). Johnson County Audit at 15-16. In making their findings, the auditors relied in part on the criteria used by the Department of Defense's Inspector General for fraud, waste, and abuse. *Id.* at 16.

The first category of questioned expenses – equipment – included such diverse purchases as a Google Glass Explorer (a kind of wearable computer) at a cost of \$2,506.99, an Amazon Fire phone costing \$649, and a GoPro Hero4 camera priced at \$479.98. *Id.* at 17.² Mr. Newby justified these expenditures as useful to determining their "impact on the election process," and said he bought them "to learn how they work, then find a use for them at the Election Office." The auditors concluded, however, these expenses "did not serve a bona fide purpose and were purchased without an end-use business requirement in mind." *Id.*

An examination of the nearly \$41,000 Mr. Newby spent or authorized for books, periodicals, and newspapers between June 2013 and July 2015 did not appear to support the mission of the Election Office. Johnson County Audit at 19-20. The majority of the total books purchased appeared to have never been read, *id.* at 18, and by his own admission Mr. Newby purchased 10 percent of the books for his personal use. *Id.* at 19.

² The other questioned costs within the meaning of the Office of Management and Budget Circular No. A-133 were a Google camera (\$245.38); a GoPro remote control (\$79.99); and a Selfie stick (\$14.99).

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Mr. Newby's lease of a Chevrolet Traverse for \$32,040, for which he made three payments between January 2011 and December 2012, cost the county \$5,784 more than it would have paid had Mr. Newby purchased a similarly equipped Chevrolet Traverse outright from the lowest bidder at \$26,256. Johnson County Audit at 20. The auditors concluded "Johnson County taxpayers did not receive any value for the additional cost of \$5,784[.]" *Id.*

Similarly, in February 2015, Mr. Newby hired a management consultant at a total cost of \$3,500, which the auditors found excessive. *Id.* Although the contract called for the consultant to conduct workshops that would, *inter alia*, "facilitate identification of strengths and areas for improvement," the consultant conducted only one workshop, scheduled for 4 ½ hours including lunch that was attended by only five employees. *Id.* Given that Mr. Newby previously had taught leadership courses to graduate students, the auditors concluded Mr. Newby could have offered the same training at no cost to Johnson County. Johnson County Audit at 21. Further, the contract between the consultant and the Election Office was "informally written" and "identified anticipated outcomes that were not clear and did not materialize." *Id.* Auditors later discovered the management consultant was a former co-worker of Mr. Newby. *See id.*

Under Mr. Newby's leadership the Election Office hosted and paid for the Midwest Election Officials Conference ("MEOC") in 2015 at a cost of \$18,415.06. *Id.* at 21. Mr. Newby was unable to explain why his office incurred costs that typically are recouped through the conference registration fees, such as conference space rental and audiovisual equipment rental. Johnson County Audit at 21. This led the auditors to conclude "Johnson County taxpayers did not receive reasonable value for the expenses incurred to support the MEOC conference." *Id.*

Deficient Inventory Controls

Mr. Newby's failure to maintain accurate and current inventory records, contrary to countywide policies, procedures, and standards, resulted in the "off book" acquisition of a significant amount of IT equipment including: (1) 16 laptops; (2) 14 tablets; (3) two book readers; (4) four GPS navigators; (5) one Apple iWatch; (6) two video cameras; (7) an Amazon Echo; (8) one baby monitor; (9) seven wireless TV adapters; and (10) four wireless routers. Johnson County Audit at 23-24.³³ Mr. Newby justified his excessive IT purchasing practices in part with the explanation that he customarily buys several computers at once for his own use "because he drops them often and wants to have a spare if needed." *Id.* at 24

³³ Appendix III to the audit contains a complete list of IT items the auditors inventoried.

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Violations of Kansas Law

As you know, § 21-6002(a)(6) of the Kansas Code makes it unlawful for a public officer or employee, “under color of the officer’s or employee’s office or employment, to “knowingly submit[] to a governmental entity a claim for expenses which is false[.]” This official misconduct is treated as a “level 7 nonperson felony” if the amount in question is \$25,000 or more. *Id.* at K.S.A. § 21-6002(c)(i). The statute further defines presenting a false claim as one that is “false in whole or in part,” is presented “to a public officer or body authorized to audit, allow or pay such claim,” and “with the intent to defraud.” K.S.A. § 21-6004(a). The statute also criminalizes allowing the payment of a false claim where the public officer or employee “knows such claim or demand is false or fraudulent.” *Id.* at K.S.A. § 21-6004(b).

As outlined above and in the detailed Johnson County Audit, as commissioner of the Election Office, Mr. Newby submitted for payment or allowed the payment of numerous false claims totaling tens of thousands of dollars. He quite clearly viewed the funds of the Election Office as his personal piggy bank, making unjustified expenditures that ranged from flight and hotel upgrades to Google glasses and an Apple iWatch. These actions, which continued unabated over the course of his tenure as commissioner and violated written policies and procedures, constitute flagrant violations of K.S.A. §§ 21-6002 and 21-6004.

Mr. Newby’s conduct also appears to have violated the prohibition on misusing public funds, defined under Kansas law as:

Knowingly using, lending or permitting another to use public money in a manner not authorized by law, by a custodian or other person having control of public money by virtue of such person’s official position.

K.S.A. § 21-6005(a).

Mr. Newby’s improper claims for business travel expenses, the thousands of dollars he spent using his and the former assistant commissioner’s P-cards and purchasing unnecessary IT equipment, and his paying a former colleague \$3,500 for consulting work of little to no value, all constitute a misuse of public funds in violation of the law.

Further, by using the assistant election commissioner's P-card, by approving fraudulent expenditures made with the assistant commissioner's P-card, and by overpaying a former colleague for minimal work, Mr. Newby also appears to have engaged in conspiracy in

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violation of K.S.A. § 21-5302. Similarly, by approving the assistant election commissioner's unjustified P-card purchases, Mr. Newby may have engaged in obstructing apprehension or prosecution pursuant to K.S.A. § 21-5913, which prohibits assisting anyone who has committed a crime also from avoiding arrest.

Conclusion

Government officials who violate the public trust must be held accountable for their actions. Throughout his tenure as election commissioner, Mr. Newby systematically looted his office, misappropriating citizens' hard-earned taxpayer dollars for his personal financial benefit. Johnson County Audit Services has done an impressive and commendable job documenting Mr. Newby's numerous misdeeds. Now, it is incumbent upon your office to review the audit and open a criminal investigation into Mr. Newby's blatantly illegal conduct.

Thank you for your prompt attention to this matter.

Sincerely,



Anne L. Weismann
Executive Director