

AZ ATTY GENERAL

☒ Turndown/Decline ☐ Further/Follow-up Request
☐ **POST-FILING** Further/Follow-up Request

Attorney Assigned: Theodore Campagnolo
Case Agent: Kathleen Kempley

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Phoenix, AZ 85007

Departmental Report #: N/A

LF#: P002-2013-000380

Suspect: Krieger, Alan

Charges: Conflict of Interest, A.R.S. §38-503

REASONS FOR TURNDOWN: Code# 6113

(See Code #'s on Last Page)

VICTIMS' RIGHTS COMPLIANCE: ☐ YES ☐ NO ☒ NOT A VICTIM CASE

Additional Comments:

This matter was submitted to our office by way of a complaint from the Yuma City Council against the suspect Alan Krieger, arising out of his position as Mayor of the City of Yuma. Special Agent Kathleen Kempley was assigned to investigate the complaint. Special Agent Kempley conducted a professional, exhaustive and independent investigation to determine which allegations, if any, were criminal in nature and should be presented to a prosecutor for a charging review. Her determination was that only the conflict of interest allegations (A.R.S. §38-503) rose to the level of possible criminal misconduct. Special Agent Kempley submitted the case for a charging review on July 10, 2013. I reviewed the investigative submittal, and I then staffed it with a senior prosecutor in the office. I then discussed my review, staffing results and my conclusions with Fraud & Special Prosecutions Section Chief Michael Benchoff. Based upon my charging review and staffing, criminal prosecution is declined based on a determination that there is not a reasonable likelihood of conviction. This determination is based on a conclusion that the allegations against the suspect do not rise to the level of a "substantial interest" involving a pecuniary or proprietary interest, as required by A.R.S. §38-503.

On or about February 1, 2012, the City of Yuma, pursuant to a City Council vote of 4-2-1 (with the suspect abstaining), retained the law firm of Gust Rosenfeld, PLC as Special Legal Counsel to assist the City Council in conducting an investigation of the allegations, both civil and criminal in nature, against Alan Krieger. David A. Pennartz of Gust Rosenfeld was assigned to conduct the investigation. Mr. Pennartz, on behalf of Gust Rosenfeld, issued a report on May 14, 2012, in which he reached a different conclusion as to the conflict of interest allegations. With due respect to Mr. Pennartz, he is not a criminal prosecutor, and he was not bound by the threshold determination of criminal prosecutors to initiate prosecution only if there is a reasonable likelihood of conviction.

The law is clear that a criminal conflict of interest does not exist merely because a public officer acts in a way that appears to be a conflict in the eyes of the public. Rather, a criminal conflict of interest can only exist if it meets the specific terms of the statute. *State v. Ross*, 214 Ariz. 280, 284, 151 P.3d 1261, 1265, ¶24 (App. 2007). The State must base its decision on the application of the facts to the law without having to rely on speculation or contingent theories. After a thorough review of all the evidence and the applicable law, the alleged conflicts of interest do not meet the specific terms of the statute. This declination pertains only to the criminal allegations, and does not comment in any way on the non-criminal issues discussed in the Gust Rosenfeld report.

A.R.S. §38-503 provides that:

- A. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any contract, sale, purchase or service to such public agency shall make known that interest in the official records of such public agency and shall refrain from voting upon or otherwise participating in any manner as an officer or employee in such contract, sale or purchase.
- B. Any public officer or employee of a public agency who has, or whose relative has, a substantial interest in any decision of a public agency shall make known such interest in the official records of such public agency and shall refrain from participating in any manner as an officer or employee in such decision.

A.R.S. §38-502(11) defines a "substantial" interest as any pecuniary or proprietary interest that is not a "remote" interest. "Remote" interest is defined in A.R.S. §38-502(10). The Arizona Supreme Court has held that a "pecuniary interest" means "money," and a "proprietary interest" means "ownership." *Hughes v. Jorgenson*, 203 Ariz. 71, 74, 50 P.3d 821, 824, ¶14 (2002).

A.R.S. §38-510 provides that an intentional or knowing violation of A.R.S. §38-503 is a class 6 felony, and that a reckless or negligent violation of A.R.S. §38-503 is a class 1 misdemeanor. A.R.S. §38-510 further provides that a finding of guilt on a violation of A.R.S. §38-503 shall result in the forfeiture of the person's public office or employment.

The following are the three areas that were determined by the criminal investigation to raise possible conflicts of interest:

1. The suspect's actions prior to and including the Council's decision of February 1, 2012 to initiate an investigation of the suspect, and to hire an outside firm to assist in the investigation;
2. The suspect's actions prior to and including the August 17, 2010 Council meeting pertaining to the project known as "Avenue 3½ E Design"; and
3. The suspect's actions prior to and including the Council's decision of February 1, 2012 as to Ordinance O2011-39 defining and establishing criteria for the enactment of a local preference.

I. THE CITY COUNCIL'S DECISION TO INVESTIGATE THE SUSPECT

There is no dispute that the suspect voted upon or otherwise participated in some motions pertaining to initiating an investigation of the suspect, as follows. On January 4, 2012, a motion to place

discussion and possible action to investigate Alan Krieger on the January 18, 2012 agenda was unanimously passed. The suspect initially voted against the motion, but then changed his vote.

On January 18, 2012, in response to a suggestion by the suspect to move this issue to an earlier part of the agenda, a motion was made by a Council member to adhere to the set order of the agenda. The vote passed 6 to 1, with the suspect voting against the motion. When the agenda item came up, the suspect was allowed to provide a statement as to the various allegations against him, based on the city attorney's statement that "State law allows the Mayor to respond to allegations." When the suspect had completed his statement, a motion was made to recess to executive session for the Council to receive legal advice on this matter. The motion to recess to executive session passed 4 to 3, with the suspect being one of the dissenting votes. After executive session, the matter was brought to a vote. Prior to the vote, however, it was noted by one of the Council members that the city attorney had declared a conflict and could not provide legal advice to the City Council on this issue. The basis for the city attorney's conflict was not provided on the record. The motion to initiate an investigation of the suspect was defeated by a vote of 3 to 4, with the suspect being one of the dissenting votes.

On January 25, 2012, Councilman Thomas made a motion to reconsider the issue at the Council meeting on February 1, 2012. Although the suspect participated in the discussion, he abstained from the vote. The motion passed by a unanimous vote of 6 to 0, with the suspect abstaining.

At the meeting on February 1, 2012, the suspect was again allowed to respond to the allegations against him, based on the city attorney opining that State law allows a mayor or council member to respond to criticism. Following the conclusion of his statements, and upon the agenda item coming before the Council, the suspect participated in the discussion. Prior to the vote, the suspect stated that he was not declaring a conflict, but that he would step down from his seat on the Council and sit in the audience. The vote to investigate the suspect and to retain Gust Rosenfeld to assist in the investigation was passed by a vote of 4 -2, with the suspect not voting.

Having considered the facts and applicable law, it is this office's determination that the motion to investigate the suspect may have involved his personal interests, but it did not involve a substantial pecuniary or proprietary interest as those terms have been defined by statute and the Arizona Supreme Court. The argument raised by Gust Rosenfeld and others was that the suspect's annual mayoral salary of \$12,000 was a pecuniary interest. While it is true that the suspect's salary does involve "money," which is a pecuniary interest, it is not a "substantial" interest as it pertains to the specific motion. This is because an investigation of the suspect by a private law firm would not in and of itself, regardless of the outcome, remove him from the office of Mayor. His salary would not be affected even if such an investigation resulted in adverse findings. In this regard, it is interesting to note that the suspect remains the Mayor of Yuma, even after the issuance of the Gust Rosenfeld report.

At most, the results of a private investigation may or may not cause citizens to cast their vote against the suspect in the next Mayoral election, and may or may not cause the suspect and his family to be subjected to embarrassment or ridicule. Pursuant to the law, these are interests that are abstract, contingent and pertain to general sympathy, feeling or bias. They are "remote" rather than "substantial" interests, and are not criminally actionable. See *Yetman v. Naumann*, 16 Ariz. App.

314, 317, 492 P.2d 1252, 1255 (1972). The State finds this situation similar to the Graham County Sheriff's situation in *Hughes v. Jorgenson*, in which the Sheriff was accused of changing a police report and giving favorable treatment to his sister, who had been arrested by one of his deputies. The Arizona Supreme Court held that the Sheriff's actions did not involve non-speculative economic benefits or detriments, and did not qualify as a statutory conflict of interest. *Hughes*, 203 Ariz. at 75, 50 P.3d at 825, ¶20. The Supreme Court specifically held that the loss of electoral votes to the Sheriff or the possible fines that could have been imposed against his sister were remote and not pecuniary interests under the statute. *Id.* at 73-74, 50 P.3d at 823-24. Under a similar analysis in this case, even the possibility that an investigation by a private law firm might result in a complaint being filed with a police agency, as ultimately occurred in this case, and the possibility that a prosecution could be initiated, is too remote and contingent based on the nature of the motion itself.

Although the issue of whether a suspect's vote affected the ultimate outcome is not an element of the offense, it certainly must be a consideration when a prosecuting office is considering the reasonable likelihood of a criminal conviction. If the alleged infraction would not have affected the ultimate outcome, then a jury or judge may find that it was harmless error and not worthy of conviction. See, e.g., *Arizona Farmworkers Union v. Agricultural Employment Relations Board*, 158 Ariz. 411, 413, 762 P.2d 1365, 1367 (App. 1988) (finding that participation in a discussion, in which the official subsequently disqualified himself, was harmless error). In this case, if the suspect had abstained or disqualified himself on January 18, 2012, the vote would have been 3 to 3. A tie vote would still have resulted in the defeat of the motion, thus raising a question of harmless error.

Another disconcerting factor in the State's consideration was the fact that the City Attorney declared a conflict and could not provide guidance to the Council as to the propriety or impropriety of the suspect voting on this issue. The fact that legal advice was not available to the Council is not an element of the offense, but the absence of such on a contentious issue is a consideration in the State's overall determination.

Also asserted in regard to the proposed investigation were claims that the suspect violated the "participation" element under A.R.S. §38-503 by making threats, veiled or otherwise, to three Council members outside of Council meetings to allegedly convince them to vote against the investigation. The allegations are as follows: The suspect told all three Council members in his office that he kept files on the council members, with the implication that he would use the information against them, if they voted to investigate him.

One of these Council members told Special Agent Kempley that she took this as a threat and that it influenced her vote. However, this Council member voted in favor of the motion to investigate, both on January 18, 2012 and February 1, 2012.

Another Council member was told by the suspect that if the investigation against him went forward, he would "take her down" and that things were probably going to get ugly for that Council member. This Council member stated to Special Agent Kempley that the comments scared her and influenced her vote, although the same Council member in open meeting stated that the "threats" would not influence her vote. This Council member voted against the motion to investigate, both on January 18, 2012 and February 1, 2012, on the ground that a referral to the Attorney General's Office would be preferable to avoid the cost of a private law firm.

As to the third Council member, it is interesting to note that his folder was empty, thereby diluting the threat value. Additionally, the suspect threatened to disclose divorce proceedings and child support issues of the third Council member if things did not go the way the suspect wanted them to go. This Council member later told Special Agent Kempley that the threat to disclose or the disclosure of this information would not have affected his vote. He voted to initiate the investigation on February 1, 2012.

There was no evidence that the suspect followed through on any of his statements to these Council members. Although such verbal strong-arm tactics by the suspect appear to be completely unprofessional and ill-advised, as well as personally offensive to those who were the targets of his comments, they are not criminally actionable under the conflict of interest statute. Because the State has concluded that the suspect did not have a criminal conflict of interest due to no substantial pecuniary interest in regard to the motion, his bombastic "threats" to others cannot, by themselves, create a conflict of interest.

Having said this, the State was sufficiently concerned with the suspect's tactics towards the Council members that it reviewed State law to determine if the suspect's comments may have violated some other criminal statute. After a thorough search, the State was unable to find a criminal statute that would encompass the suspect's verbal actions under the circumstances in which they occurred.

For all of these reasons, the State declines to initiate prosecution on this ground.

II. AVENUE 3½ E DESIGN – AUGUST 17, 2010

Avenue 3½ E Design was the name of a project to obtain certain parcels of land through eminent domain in order to obtain a right of way to improve the public roadway, utility infrastructure and other related public purposes, specifically to create a traffic loop around the main gate of Marine Corps Air Station-Yuma. At the time, the suspect's wife owned, through a revocable living trust, a parcel of land within the original area of the Avenue 3½ E Design. On July 3, 2007, Ordinance O2007-35, which sought to approve such eminent domain, was considered by the City Council. At the July 3, 2007 meeting, the suspect, who was a Council member at the time, declared a conflict, due to his wife's property ownership within the area covered by the Ordinance, and he abstained from voting. The Ordinance passed by a vote of 5 to 0. At a Council meeting on June 4, 2008, a motion to reconsider an action to modify the Avenue 3½ E alignment as to certain parcels was considered. At that time, the suspect was not on the City Council, and, therefore, did not vote or participate as a member of the Council. He appeared in the audience and stated his support of the motion, but asked certain questions. It is also unclear from the record whether the parcels affected by this motion pertained to the suspect's wife's parcel.

On August 17, 2010, when the suspect was Mayor, a discussion arose about implementing certain changes to the plan, based on design concepts presented to the Council. After much discussion, no action was taken. Although there was no vote taken on August 17, 2010, the allegation against the suspect is that he "otherwise participated in any manner" on an issue in which he allegedly had a conflict due to the parcel of land owned by his wife in trust. The statute is clear that a pecuniary or proprietary interest of a public official's wife is included within the public official's obligations

under the conflict of interest statute. Therefore, the State had to determine if there was a property interest, and, if so, whether it was a substantial property interest. The Gust Rosenfeld report included a Right-of-Way Status Report dated November 26, 2007, purportedly provided by the City, which listed the suspect's wife's property as one of 42 parcels that would be affected by the Avenue 3½ E Design Ordinance. Thus, it appears that the suspect correctly declared a conflict as to the July 3, 2007 vote.

However, the City apparently did not provide to Gust Rosenfeld nor to Special Agent Kempley a letter bearing the City of Yuma's letterhead from Deborah Vining, Real Property Agent, dated June 8, 2009. In that letter, which referenced Avenue 3½ E, the suspect's wife was notified that Ordinance O2009-33, enacted on May 20, 2009, had amended Ordinance O2007-35, the latter of which had been the Ordinance upon which the suspect had declared a conflict. The letter from the City further stated that Ordinance O2009-33 had excluded the suspect's wife's parcel from any future acquisition by the City. Based on this letter, the suspect's conflict had disappeared as of May 20, 2009. When the suspect participated in the discussion about the Avenue 3½ E Design on August 17, 2010, he had no conflict to declare, as a matter of law.

Assuming that this did not vitiate the alleged conflict, there would still be legal obstacles to pursuing this allegation. First, the wife's parcel was one of 42 parcels affected by Ordinance O2007-35. Case law indicates that if a public official's vote or participation in a matter would not affect him any differently from other similarly situated persons, the interest may be remote and not actionable under the statute. *See Shepherd v. Platt*, 177 Ariz. 63, 65-66, 865 P.2d 107, 109-10 (App. 1994). Secondly, discussion occurred at the August 17, 2010 meeting, but no decision was made. A.R.S. §38-503(B) prohibits "participating in any manner...in such decision." A strict reading of the statute suggests that the suspect's participation in the discussion was not criminally actionable, because no decision was made on August 17, 2010.

Regardless, it appears clear that no conflict existed as of May 20, 2009, based upon the passage of Ordinance O2009-33. The State declines to initiate prosecution on this ground.

III. LOCAL PREFERENCE ORDINANCE O2011-39 – FEBRUARY 1, 2012

On February 1, 2012, Ordinance O2011-39 was considered by the City Council, the purpose of which was to create a 5% preference for businesses located within the city limits. Troy Eckard of Eckard Construction voiced his objection to the proposed ordinance prior to the vote, because his company is located approximately 1,000 feet outside of the city limits. Mr. Eckard claimed that such a preference was unfair, in that his company spends a great deal of money in the city limits, and he should not be penalized for being located a short distance from the city limits. The Ordinance passed by a vote of 6 to 1 on February 1, 2012, with the suspect being the sole dissenting vote.

The allegation of conflict of interest against the suspect revolves around the sale of his construction company to Eckard Construction on or about April 15, 2011, which resulted in him being an employee of Eckard Construction and the holder of a note payable to him by Eckard Construction.

Pursuant to the sale, Eckard Construction purchased the assets of Al Krieger Construction Services, Inc. and was able to use the latter's license, for a total price of \$200,000. In return, the suspect and his wife were given one-year employment agreements, both of which allowed for termination with or without cause. The employment agreements both provided, in part, that the suspect and his wife would be paid a monthly salary of \$833.34, with the suspect's ability to earn commissions on projects subject to a project-by-project negotiation. On February 1, 2012, the suspect and his wife were still employees of Eckard Construction, and approximately \$55,000 was still owed to the suspect from the original purchase price.

As to the suspect's employment status, the State has concluded that applicable law would hold that it is a remote interest, not subject to prosecution under A.R.S. §38-503. The enactment of the local preference, in and of itself, would not reasonably or logically have caused any financial gain or loss to the suspect. He was not in a managerial position in which he might have a financial stake in Eckard Construction's contracts with the city. The suspect stood in the place of any other employee of Eckard Construction. In order to allege a conflict based on the suspect's employment, one would have to speculate as to endless possibilities of how the passage of the Ordinance would affect his employment. A substantial pecuniary or proprietary interest cannot be speculative. Case law has held that a public official who is an employee of a business that comes before a public agency generally has a remote interest. See *Arizona Farmworkers Union v. Agricultural Employment Relations Board*, 158 Ariz. 411, 413, 762 P.2d 1365, 1367 (App. 1988) (finding that public official would not gain or lose financially from the decision simply by virtue of his employment). Any loyalty that the suspect may have toward his employer can be characterized as "general sympathy, feeling or bias," which is insufficient to constitute a substantial interest. See *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. 351, 357, 132 P.3d 290, 296, ¶26 (App. 2006).

A similar argument exists in regard to the suspect's outstanding loan obligation from Eckard Construction. Again, the enactment of the local preference, in and of itself, would not reasonably or logically have caused any articulable financial gain or loss to the suspect. It is reasonable to presume that Eckard Construction had other loans on its books besides just the suspect's. The contention that Eckard Construction might lose business by not being able to use the local preference is speculative. The additional contention that Eckard Construction might not pay its debts to the suspect and others, because it may lose business due to the local preference, is even more speculative. A conflict of interest prosecution cannot be based on expanding layers of speculation. Such speculation defines a contingent or remote interest. *Id.*

An argument also exists that the suspect's vote on the local preference ordinance was meaningless and had no effect on the outcome. Again, this is not an element of the offense, but it is a consideration in making a charging decision, especially when the interest appears to be remote. The vote on this issue was 6 to 1. Whether the suspect had voted or not voted, the ordinance would have passed. See *Emmett McLoughlin Realty, Inc. v. Pima County*, 212 Ariz. at 358, 132 P.3d at 297, ¶30 (agreeing that official's participation in the proceedings was immaterial to the final outcome).

For all of these reasons, the State declines to initiate prosecution on this ground.

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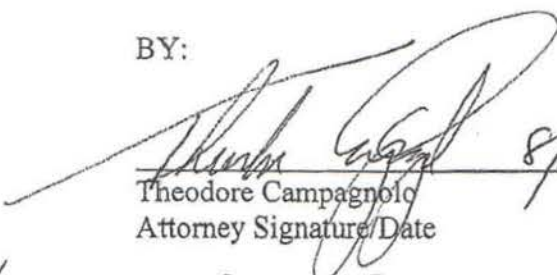
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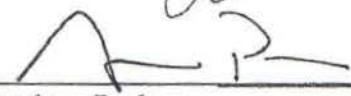
November 1, 2013


Theodore Campagnolo
Attorney Signature/Date

8/27/13


Michael Benchhoff

Fraud & Prosecutions Section Chief/Date


Andrew Pacheco
Criminal Division Chief/Date

9/9/13

NO CASE CLOSE-OUT IS NECESSARY
(Copy to yellow paper)

Closed in LF by: Stacey Cañez

DATE: 8/20/13

Doc #3516204

TURNDOWN AND FURTHER CODES

TURNDOWNS:

a.	Alibi	(6111)
b.	Analysis Negative	
	Fingerprint.....(6127) Handwriting.....(6125) Laboratory	(6126)
c.	Civil Matter not Criminal	(6107)
d.	Defendant:	
	Is a Juvenile	(6108)
	Sentenced in Other Case No Need to Prosecute This Matter	(6102)
e.	Double Jeopardy Would Result.....	(6128)
f.	Illegal Search and Seizure	(6129)
g.	Inadequate Evidence of:	
	Corpus.....(6147) Corroboration.....	(6148)
	Dominion/Control	(6150)
	Identification	(6149)
	Fraudulent Prescription.....	(6153)
	Intent.....	(6151)
	Participation.....	(6152)
h.	Inadmissibility of:	
	Confession	(6131)
	Identification	(6132)
i.	Informant Problems.....	(6119)
j.	Intoxication	(6112)
k.	Limited Resources/Offense Does Not Warrant Prosecution	(6101)
l.	Mens rea	(6110)
m.	No Crime Committed.....	(6114)
n.	No Reasonable Likelihood of Conviction	(6113)
o.	Old Case/Stale.....	(6157)
p.	Refer to Parole/Probation Officer for Consideration.....	(6103)
q.	Search Warrant/Affidavit Defective.....	(6130)
r.	Self Defense/Mutual Combat	(6109)
s.	This Case Should Be:	
	Submitted to City Prosecuting Agency	(6104)
	Referred to Other Criminal Prosecuting Agency	(6105)
	Referred to County Attorney due to lack of jurisdiction (ARS § 21-422)	(6159)
	Used as an Aid to Prosecution in Other Case(s)	(6106)
	U.S. v. Bruton	(6120)
	Declined Per Plea Agreement	(6162)
t.	Victim/Witness:	
	Credibility Problems	(6117)
	Reluctance/Refusal to Prosecute	(6116)
	Unavailable	(6118)
u.	Referred to Diversion Program	(6160)
v.	Does Not Meet Criteria for Prosecution	(6161)
w.	Agency Requests Case Not to be Filed	(6163)
x.	No False Statement	(6164)
y.	No Response to RFI	(6165)

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a.	Confirm Willingness to Prosecute.....	(6139)
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c.	Departmental Report Needs Clarification	(6155)
d.	Interview Suspect	(6158)
e.	Locate and Interview Victim/Witness	(6136)
f.	No:	
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	Lab Analysis	(6122)
	Photo Line-up	(6124)
g.	Obtain:	
	Court Records.....(6142) Positive ID of Property	(6138)
	Relevant Bank Records	(6141)
	Relevant MVD Records	(6133)
	Relevant Records (not identified above.).....	(6145)
h.	Submit:	
	Alcohol/DRE Influence Report.....(6135) Copy of Order of Protection	(6146)