

BEFORE THE GWINNETT COUNTY ETHICS BOARD  
STATE OF GEORGIA

Donald Arthur (“D.A.”) King,	)	
	)	
Complainant,	)	CASE NO.
	)	2019-GCEB-0001
v.	)	
	)	
Commissioner Marlene Fosque,	)	
	)	
Respondent.	)	

**FINDINGS AND RECOMMENDATIONS**

This matter is before the Ethics Board on the Complaint of Donald Arthur (“D.A.”) King against Commissioner Marlene Fosque.

**PROCEDURAL HISTORY**

1.

Mr. King, proceeding *pro se*, initiated these proceedings on August 21, 2019 by submitting a written, verified, and sworn Complaint and supporting materials to the County Attorney and serving a copy thereof on Commissioner Fosque in accordance with Section 54-37(a)(1) and (a)(7) of the Gwinnett County Code of Ethics (“Ethics Code”).<sup>1</sup> In his Complaint, Mr. King described conduct allegedly engaged in by Commissioner Fosque which he contends constitutes violations of various provisions of Section 54-24 of the Ethics Code.

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<sup>1</sup> On August 22, 2019, Mr. King amended his Complaint. The Amended Complaint contained no substantive revisions to the initial Complaint.

2.

Upon receipt of the Complaint, the County Attorney timely caused a copy thereof to be delivered to Attorney Meredith W. Caiafa, the hearing officer appointed pursuant to Section 54-37 of the Ethics Code to evaluate the Complaint's compliance with the technical requirements of the Ethics Code.<sup>2</sup> In a written decision dated September 11, 2019, Ms. Caiafa concluded that Mr. King's Complaint was compliant.

3.

Subsequent to receipt of Ms. Caiafa's compliance determination, and in accordance with Section 54-37(a)(6) of the Ethics Code, the County Attorney forwarded copies of Mr. King's Complaint to the Board of Commissioners, the Gwinnett County District Attorney, the Gwinnett County Bar Association, and the Local Government Section of the State Bar of Georgia for purposes of making

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<sup>2</sup> Section 54-37 tasks the appointed hearing officer with determining an ethics complaint's compliance with the following requirements of the Ethics Code: (a) that it be submitted in writing to the County Attorney; (b) that it be verified and sworn under penalty of perjury or false swearing; (c) that it specifically identify all provisions of the Ethics Code which the named respondent is alleged to have violated; (d) that it set forth facts as would be admissible in evidence in an administrative proceeding; (e) that it show affirmatively that the complainant is competent to testify to the matter set forth therein; (f) that it attach all documents referenced in the complaint as well as supporting affidavits to the complaint; and (g) that it was filed within six months from the date on which the alleged violation occurred. Non-compliant complaints are dismissed at this stage. *See* Ethics Code, Sections 54-37(a)(1)-(2).

appointments to the Ethics Board. These organizations subsequently appointed Daniel J. King, Fred L. Love, David C. Will, and Shaun R. Adams, respectively. Commissioner Fosque was also notified of her right under the Ethics Code to appoint a fifth member to the Ethics Board, after which she appointed Scott A. Drake.

4.

The initial organizational meeting of the Ethics Board was noticed for and held on October 30, 2019. At that meeting, each appointee to the Board was qualified and empaneled. Ethics Board members Will and Drake were selected by the Board to serve as its Chairman and Vice-Chairman, respectively. Julie Mims, a Legal Manager in the County's Department of Law, was appointed Clerk to the Ethics Board,<sup>3</sup> and the Board approved the Procedural Rules to govern the proceedings going forward. Chairman Will executed a Notice formally advising Commissioner Fosque of her right to file a Reply to Mr. King's Complaint, which Notice was served on Commissioner Fosque through her counsel of record, Steven M. Reilly, who was present for the organizational meeting. Commissioner Fosque submitted her Reply to the Complaint on November 27, 2019.

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<sup>3</sup> The Ethics Board wishes to express its gratitude and appreciation to Ms. Mims, whose assistance throughout the entirety of this process has been invaluable.



5.

The next meeting of the Ethics Board was noticed for and held on December 9, 2019. The purpose of this meeting was to conduct a pre-hearing conference on the parties' proposed exhibits, witnesses and subpoena requests in accordance with the Board's Procedural Rules. No objections were received by the Ethics Board to any party's proposed exhibits, witnesses and subpoena requests. Similarly, in the weeks following the pre-hearing conference, the parties submitted various unopposed motions to supplement their exhibit/witness lists and/or subpoena requests, which motions were granted. All subpoenas requested by the parties were issued by Chairman Will on behalf of the Board.

### **THE EVIDENTIARY HEARING**

6.

The evidentiary hearing on Mr. King's Complaint was conducted on January 23, 2019. Witnesses were sequestered at the request of Mr. Reilly, Commissioner Fosque's counsel, at which point opening statements were presented. Mr. King opened his case by playing video excerpts from his comments during the July 31, 2019 Community Engagement Forum hosted by Commissioner Fosque on the Gwinnett County Sheriff's 287(g) Program and from the Commissioner's subsequent comments regarding Mr. King's participation in the July 31 Forum during the Board of Commissioners' August 6, 2019 meeting. Mr. King then called

as witnesses Deputy Shannon Volkodav<sup>4</sup> (Public Information Officer for the Gwinnett County Sheriff's Office), Everett Robinson (a member of the Dustin Inman Society's Board of Advisers), and Sheriff Butch Conway (Gwinnett County Sheriff's Office).

7.

Mr. Reilly was then granted leave to call two witnesses out of order as part of Commissioner Fosque's case to accommodate the witnesses' schedules: Adelina Nicholls (Executive Director of the Georgia Latino Alliance for Human Rights) and Stephanie Cho (Executive Director of Asian Americans Advancing Justice). Ms. Nicholls and Ms. Cho completed their testimony and were excused from the hearing, at which point Mr. King called Commissioner Fosque as a witness and rested his case after presenting his own testimony. Commissioner Fosque rested her case after Mr. Reilly called her back to the witness stand to present direct testimony. All exhibits previously submitted by the parties were admitted into the record, including the three additional exhibits tendered by Commissioner Fosque at the hearing.

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<sup>4</sup> Mr. King did not previously identify Deputy Volkodav as a witness but was granted leave to present her testimony as part of an approved stipulation with Mr. Reilly, pursuant to which he was permitted to introduce three exhibits not previously identified on Commissioner Fosque's exhibit list.

8.

The hearing was concluded after each party presented closing arguments. The Ethics Board then voted to go into executive session for purposes of deliberation. The meeting was subsequently adjourned, and the Ethics Board met again on January 24 to resume deliberations. On January 27, the Board met one last time to conclude its deliberations and finalize its written findings and recommendations.

### **FINDINGS**

9.

Having deliberated upon the evidence and argument presented by the parties during the hearing, the Ethics Board makes the following findings based on a preponderance of the evidence.

10.

Commissioner Fosque was elected to the Board of Commissioners in November 2018 and sworn into office in January 2019. After hearing from constituents and others regarding concerns about the Gwinnett County Sheriff's Office's 287(g) Program,<sup>5</sup> and subsequently determining that there had been no prior

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<sup>5</sup> The 287(g) Program refers to an agreement between the Sheriff's Office and the U.S. Immigration and Customs Enforcement (ICE) pursuant to Section 287(g) of the Illegal Immigration Reform and Immigrant Responsibility Act. Under this program, arrestees brought to the Gwinnett County Jail have their immigration status checked, with those found to be in the country unlawfully having detainers placed on them for ICE. Following disposition of local charges, ICE takes custody of them pursuant to the detainer.



effort in the County to bring the Program's supporters and opponents together to present their respective positions, she decided to organize and host a Community Engagement Forum for that purpose. In describing this Forum, the record reflects that Commissioner Fosque stated as follows: "Our Sheriff's Department has participated in the 287(g) Program for about 10 years, yet no one has brought the two sides together to decide what are the benefits of 287(g) and decide what is [its] impact. I'm a newly elected Commissioner, so I'm trying to do new things. I pray at the end of this discussion, [attendees and participants] walk away with a different perspective, or at least a new perspective."

11.

Commissioner Fosque determined that the Forum should be structured as a panel discussion, with three panelists addressing the benefits of the 287(g) Program and three panelists addressing its negative impact. The Commissioner felt that having three panelists on each side of the issue increased the possibility that different perspectives would be presented. To secure three panelists to address the benefits of the 287(g) Program, the Commissioner coordinated with the Sheriff's Office; dealing most directly with Deputy Volkodav, the Sheriff's Public Information Officer.

12.

Both the Sheriff and Deputy Volkodav testified to having some reservations regarding the Forum due to the intensity of the controversy surrounding the 287(g) Program. Despite her misgivings, however, Deputy Volkodav expressed her respect and admiration for what Commissioner Fosque was attempting to accomplish and, with the Sheriff's approval, worked to identify panelists as requested. Deputy Volkodav, Bryan Cox (Communications Director for ICE's Southern Region), and Mr. King were eventually selected by the Sheriff's Office for the panel.

13.

The Forum was scheduled to take place on July 31, 2019. To address the "negative impact" side of the 287(g) Program, Commissioner Fosque had received tentative commitments from representatives of the aforementioned Georgia Latino Alliance for Human Rights and Asian Americans Advancing Justice, as well as from Project South. Shortly before the Forum, however, these representatives requested information regarding the other panelists, which prompted Commissioner Fosque to contact and obtain that information from Deputy Volkodav on July 30, 2019. Upon notifying these representatives of the names of the panelists invited by the Sheriff, all three withdrew from the Forum, citing Mr. King's involvement as the reason.



14.

In an effort to salvage the Forum, Commissioner Fosque contacted the Sheriff's Office that same day, July 30, 2019, to discuss options for having the event go forward without Mr. King on the panel. The Sheriff declined to remove Mr. King from the panel, believing that it would be inappropriate and unprofessional to retract the invitation on the eve of the Forum. On July 31, the same day as the Forum, Commissioner Fosque was able to secure three replacement panelists to represent the "negative impact" side of the 287(g) debate, and the Forum went forward as scheduled.

15.

Excerpts from the video recording of the Forum viewed during the hearing demonstrate that Mr. King attracted some negative outbursts from some attendees, and the record reflects that at least one of the replacement panelists secured by Commissioner Fosque directed some negative comments to Mr. King. The Ethics Board notes that it was Mr. King's presence on the panel that elicited the negative reactions. He did not engage in any provocative conduct at the Forum, but acknowledges that he often receives such comments at events of this nature. It does not appear, however, that these or any other negative reactions were sufficiently disruptive as to prevent the Forum from being conducted. The record further reflects that Commissioner Fosque's initial post-Forum assessment was that she was

confident it had “opened the eyes of both pro- and anti-287(g) attendees, that it “accomplished an opening up of perspectives on how 287(g) operates, as well as the emotions about the impact,” and that while the Forum may not have changed minds, she felt it accomplished her goal of presenting an opportunity for attendees to “just to listen to different viewpoints” and to “educate people” regarding the program.

16.

Due to the reactions of her initial three panelists, as well as negative comments made by some Forum attendees and post-Forum comments she received, Commissioner Fosque conducted internet research on Mr. King – whom she was not familiar with prior to the eve of the Forum. Her research included reviewing information on (or available through) the websites of both the Southern Poverty Law Center (SPLC) and the Dustin Inman Society, among other sources. Commissioner Fosque testified that after completing her research she felt responsible – despite her good intentions – for having created a situation through her Forum that had upset some members of the community. The Commissioner further testified that, given the unanticipated controversy, she felt compelled to publicly clarify that it was the Sheriff, rather than her, who had invited Mr. King to participate as a panelist at the Forum.

17.

On August 6, 2019, at a Board of Commissioners meeting, Commissioner Fosque, reading from a prepared statement, announced that she had some remarks to make regarding the Forum. After explaining the purpose of the Forum, she quoted public comments recently made by President Trump “condemn[ing] racism, bigotry, and white supremacy” and stating that “hate has no place in America,” adding that “hate does not belong in Gwinnett County.” The Commissioner then proceeded to quote or refer to statements from the SPLC and Anti-Defamation League, revealed through her internet research, regarding the Dustin Inman Society being an “anti-immigrant hate group” and Mr. King “spew[ing] hatred.”

18.

Commissioner Fosque went on to state that she “rebuke[d], denounce[d], deplore[d] and condemn[ed]” Mr. King’s participation in the Forum, that he should not have been invited to the Forum, that Mr. King did not bring value to the discussion, that his views do not represent Gwinnett County’s standards, that he does not speak for her or for any residents of the County, that the County does not want “this type of hatred and distraction,” and that, in her opinion, the Sheriff was wrong for inviting someone “known for spewing hatred and bigotry and racism” to represent the Sheriff’s Office in a public forum. The archived video recording of the August 6, 2019 meeting of the Board of Commissioners reflects the comments made



by Commissioner Fosque, and there is no dispute between the parties as to whether they were made.

## ANALYSIS

19.

The Complaint alleges violations of six provisions of Section 54-24 of the Ethics Code.<sup>6</sup> In Count I, Mr. King alleges that Commissioner Fosque engaged in conduct that violated Section 54-24(1) which, in relevant part, provides that “[a]ll County Commissioners shall ... [u]phold the ... laws ... of ... the State ... and never be a party to their evasion.” In support of this Count, Mr. King contends that

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<sup>6</sup> As a prior Ethics Board observed in *Turner v. Hunter*, 2017-GCEB-0001 (Jun 6, 2017), it seems apparent from a review of the Ethics Code as a whole that its primary purpose is to eliminate public corruption, actual or perceived conflicts of interest, financial misconduct, political recrimination or favoritism, retaliation and coercion, undue influence, and the like, whereas Section 54-24 – the only section of the Ethics Code upon which Mr. King’s Complaint is based – may have been intended only to set forth general aspirational standards. As previously noted, however, Mr. King’s Complaint survived dismissal under Section 54-37(a)(3). *See* footnote 2, *supra*. Perhaps more importantly, the *Turner* complaint – which was similarly based on Section 54-24 – was sustained (for the most part) by that Ethics Board, and the Board of Commissioners subsequently upheld its findings and recommendations, thereby implicitly confirming that, in enacting the Ethics Code, it intended that ethics complaints could be predicated on alleged violations of Section 54-24. For this reason, and because the Ethics Code, by its express terms, is to “be construed broadly to effectuate its purposes,” *see* Section 54-25(a), the Ethics Board finds that Mr. King’s exclusive reliance on Section 54-24 of the Ethics Code does not affect the viability of his Complaint. If the Board of Commissioners again approves this interpretation – whether explicitly or implicitly – the Ethics Board respectfully recommends that the training mandated by Section 54-40 of the Ethics Code be updated to align with (and perhaps provide examples of) this application of Section 54-24.

Commissioner Fosque's statements at the August 6, 2019 Board of Commissioners' meeting constitute actionable defamation, such that she therefore failed to uphold and/or evaded Georgia's defamation law in violation of Section 54-24(1).

20.

Count II of the Complaint similarly alleges that Commissioner Fosque, through her comments at the August 6, 2019 Board of Commissioners' meeting, "placed her own anger, bias, and loyalty to her political party above [her loyalty] to the highest moral principles and [to] the County by defaming [Mr. King] with her inflammatory remarks" in violation of Section 54-24(2). Thus, Mr. King has predicated both Counts I and II of his Complaint on Commissioner Fosque's alleged defamatory conduct.

21.

Upon careful review and consideration of Subsections (1) and (2) of Section 54-24, the Ethics Board does not believe that either subsection can reasonably be interpreted as providing that an alleged violation of any Georgia law automatically constitutes a violation of the County's Ethics Code. Indeed, even negligence resulting in personal injury or property damage would violate Georgia law, yet simple negligence – as an unintentional tort – normally would not be viewed as meeting any relevant definition of unethical conduct. *See, e.g., State v. Tullis*, 213 Ga. App. 581 (1994) (police officer who committed misdemeanor by stealing candy

bar did not also commit felony violation of oath of office by failing “to uphold laws of the State of Georgia”).

22.

In the event the Board of Commissioners chooses to construe Section 54-24 as encompassing Georgia’s defamation law, the Ethics Board further finds that, based on the evidentiary record, Mr. King constitutes a “limited-purpose public figure” with regard to the debate on immigration enforcement, including section 287(g). *See Atlanta Journal-Constitution v. Jewell*, 251 Ga. App. 808 (2001); *see also Sparks v. Peaster*, 260 Ga. App. 232 (2003) (finding that local political activist was limited public figure). This finding triggers the requirement that Mr. King establish by clear and convincing evidence – rather than a mere preponderance of the evidence – that Commissioner Fosque’s comments were motivated by actual malice. *See Jewell*, 251 Ga. App. at 816-20. The Ethics Board concludes that the record fails to support such a finding. Accordingly, for each of the foregoing reasons, the Ethics Board finds that the Ethics Code violations alleged in Counts I and II of the Complaint are NOT SUSTAINED.<sup>7</sup>

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<sup>7</sup> In light of this conclusion, the Ethics Board deems it unnecessary to address whether defenses relating to privilege or opinion would apply to Commissioner Fosque’s comments as provided in Title 51, Chapter 5 of the Georgia Code and interpretive case law.



23.

In Count III of his Complaint, Mr. King alleges that Commissioner Fosque engaged in conduct that violated Section 54-24(3) of the Ethics Code. This provision requires that “[a]ll County Commissioners shall ... [p]ossess a commitment to integrity, transparency and full disclosure before undertaking any official action.” Based on its review of the record, the Ethics Board finds no support for this alleged violation and therefore Count III is NOT SUSTAINED.

24.

In Counts IV and V of his Complaint, Mr. King alleges that Commissioner Fosque engaged in conduct that violated sub-sections (4) and (11) of Section 54-24 of the Ethics Code. These provisions require that “county commissioners ... shall ... [g]ive to the performance of [their] duties [their] earnest effort and best thought [and] never engage in conduct which is unbecoming of a member [of the Board of Commissioners].”<sup>8</sup> These two counts of Mr. King's Complaint are SUSTAINED for the following reasons.

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<sup>8</sup> Section 54-24(11) also prohibits a commissioner from engaging in conduct “which constitutes a breach of public trust.” Mr. King has not alleged a violation of this aspect of Section 54-24(11), and the Ethics Board notes that the record provides no support for such a finding in any event.

25.

The Ethics Board commends Commissioner Fosque for her initiative and her well-intentioned efforts to facilitate a civil and productive discourse between opposing sides of a highly controversial and divisive issue. In addition, her ability to salvage the Forum after three panelists withdrew at the last moment speaks volumes for her commitment and capabilities. The Ethics Board also believes that Commissioner Fosque was justified in her desire to address the “fall out” associated with Mr. King’s participation in the Forum and even to clarify her role (or lack thereof) in Mr. King’s being invited to serve as a panelist. How she chose to go about accomplishing this, however, cannot be reconciled with the standards of conduct contemplated by Section 54-24(4) and (11). As such, the Ethics Board finds that her comments at the August 6, 2019 meeting went beyond their stated purpose and crossed the line into conduct which these provisions of Section 54-24 seek to proscribe.

26.

In particular, Commissioner Fosque’s comments, which were based only on highly negative information about Mr. King and the Dustin Inman Society, went beyond merely observing his controversial status, clarifying her role in his selection as a panelist, and lamenting its impact on other Forum participants and attendees. While the Commissioner testified that her comments were not intended to reflect her

personal beliefs regarding Mr. King – in fact, she testified that even now she does not know whether they accurately describe him or his organization – her choice of words and the manner in which she delivered them at the August 6, 2019 meeting can reasonably be interpreted otherwise. In short, the Ethics Board believes that the Commissioner could have effectively accomplished her stated goals by presenting a balanced, holistic view of the circumstances precipitating her comments and without straying from established norms of civil discourse.

27.

The Ethics Board further notes that Mr. King was invited to participate as a panelist at the Forum, albeit not by Commissioner Fosque. This is a highly relevant consideration, as the Commissioner’s August 6, 2019 comments could reasonably affect the willingness of other persons to volunteer their time and otherwise contribute to similar County-sponsored events, including in particular those designed to explore different takes and perspectives on issues – controversial or otherwise – that are important to County residents. In the same vein, it is also highly relevant that Mr. King’s invitation was extended by the Sheriff, who was attempting to secure panelists qualified to address the “benefits” side of the Section 287(g) debate at Commissioner Fosque’s request. The Ethics Board believes that the Commissioner’s comments at the August 6, 2019 Board of Commissioners meeting could also have a chilling effect on the willingness of other officials to provide



similar assistance to important events in the future, which is certainly not in the best interests of the County or its residents.

28.

While the overwhelming majority of Commissioner Fosque's actions in conceiving, planning, salvaging, and conducting the Forum are highly commendable and reflect a welcomed commitment to the County and its residents, her August 6, 2019 comments fall short of the "earnest effort and best thought" required by Section 54-24(4) and amount to "conduct ... unbecoming to a member [of the Board of Commissioners]" within the meaning of Section 54-24(11). For these reasons, the Ethics Board is compelled to sustain these two counts of Mr. King's Complaint.

29.

Finally, in Count VI of his Complaint, Mr. King alleges that Commissioner Fosque engaged in conduct that violated Section 54-24(16) which requires that "[a]ll County Commissioners shall ... [u]phold these principles, ever conscious that public office is a public trust and is an honor, not a right." The Ethics Board finds that this alleged violation, presented in the context of this case, is duplicative of Section 54-24(4) and (11) and that, as previously noted, the record does not support a finding that Commissioner Fosque breached the public trust in any event. Accordingly, this alleged violation is NOT SUSTAINED.

## NON-BINDING RECOMMENDATIONS

30.

With regard to the sustained violations of Section 54-24(4) and (11) of the Ethics Code, the Ethics Board recommends that the Board of Commissioners issue a WRITTEN WARNING to Commissioner Fosque. *See* Ethics Code, Section 54-38(d)(1). In recommending a warning rather than a reprimand, the Ethics Board relied on various mitigating factors, including what it believes were the Commissioner's good intentions in holding the Forum, which reflect a genuine commitment to the County and its residents, as well as her willingness to take on such a highly controversial and volatile issue within just months of being sworn into office, which reflects initiative and a desire to improve the status quo for County residents sooner rather than later. While the Ethics Board found violations of the Ethics Code and hopes that its findings provide useful guidance to all current and future County officials, it urges the Board of Commissioners to avoid imposing any penalty that could have an adverse effect on the willingness of Commissioner Fosque and any other current or future commissioner to take affirmative and decisive action in service to the County and its residents.<sup>9</sup>

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<sup>9</sup> The Ethics Board also reiterates its recommendation regarding training as described in footnote 6, *supra*.

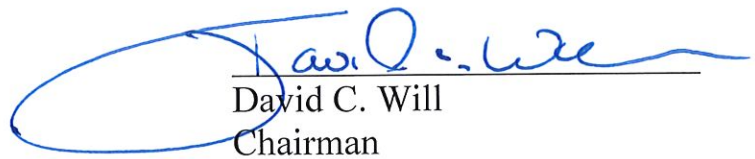
## CONCLUSION

The Clerk of the Ethics Board is hereby directed to provide these findings and recommendations to the Board of Commissioners, to Commissioner Fosque, and to Complainant in accordance with Section 54-37(b)(5) of the Ethics Code.

Issuance of the foregoing findings and recommendations concludes the session for which the Ethics Board was specifically empaneled. Accordingly, each member of the Ethics Board having fully and faithfully discharged his/her duties and responsibilities under the Ethics Code with respect to the subject Complaint, their appointments are hereby expired. *See* Ethics Code, Section 54-37(d)(3).

Respectfully submitted, this 27th day of January 2020.

FOR THE ETHICS BOARD:

  
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David C. Will  
Chairman