

STATE OF SOUTH DAKOTA
GOVERNMENT ACCOUNTABILITY BOARD

In the Matter of

GOVERNMENT ACCOUNTABILITY
COMPLAINT 2021-03

**MOTION TO DISMISS
AND
RESPONSE TO COMPLAINT 2021-03**

COMES NOW, Governor Kristi Noem, in her capacity as Governor of the State of South Dakota (the "Governor"), and for her Motion to Dismiss and Response to Complaint 2021-03 ("Response"), states as follows:

BACKGROUND

On or about September 28, 2021, Attorney General Jason Ravensborg ("Attorney General") submitted Complaint 2021-03 ("Complaint") to the Government Accountability Board ("Board"). The Complaint, which was submitted by the Attorney General in his official capacity using the resources of his public office, raises "questions" regarding the Governor's purported use of her "influence for personal gain or that of relatives" when she included her daughter, Kassidy Peters, in a July 27, 2020, meeting to discuss ways to improve the appraiser certification process. In the Complaint, the Attorney General also accuses the Governor of conspiring with State officials to retaliate against Sherry Bren, the former director of the South Dakota appraiser certification program, and suggests that the Governor somehow misappropriated public funds when the State reached a settlement agreement in an age-discrimination claim that Ms. Bren initiated against the State following her retirement. Based

upon these accusations, the Attorney General claims that Governor Noem engaged in conduct that violated SDCL 3-24-3(2), (4), (5), and (9).¹

The Complaint was initially supported by nothing more than an Associated Press news article written by Stephen Groves. At this Board's request, the Attorney General later supplemented the record with various documents from a proceeding before the Government Operations & Audit Committee ("GOAC") as well as other documents that were available online. [REDACTED]

[REDACTED]

1. SDCL 3-24-3 provides in relevant part:

The State Government Accountability Board may review and investigate any person holding a statewide office, as defined in § 12-27-1, and employees of the executive branch of the state regarding:

- (2) Documents filed under chapter 3-23 or alleged violations relating to conflicts of interest;
- (4) Allegations of malfeasance;
- (5) Allegations of misappropriation of public funds;
- (9) Allegations of use of public money not authorized by law or in violation of the constitution[.]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] As explained in more detail below, this Board need only review the documents the Attorney General submitted with his Complaint to conclude that Ms. Bren did not make the decision to enter into a Stipulation Agreement with Ms. Peters, so the Attorney General's claim that the Governor exerted influence over Ms. Bren to facilitate the Stipulation Agreement that benefited Ms. Peters is nonsensical. Secretary of Labor Marcia Hultman, who did make the decision to enter into the Stipulation Agreement, made it clear in her testimony to GOAC that she was not influenced by the Governor in any way.

The Attorney General's claim that the Governor retaliated against Ms. Bren and then misappropriated public funds when the State later reached a settlement agreement with her is equally nonsensical. Ms. Bren did not even allege retaliation—or anything about the July 27, 2020 meeting—in her claim against the State. Moreover, the settlement agreement that the Attorney General characterizes as a misappropriation of public funds *was negotiated on behalf of the State by an attorney who was under the direct supervision of the Attorney General*. Thus, even the Attorney General has a closer connection to the settlement agreement than the Governor. When considered as a whole, the vague and unsubstantiated accusations of impropriety that

form the basis of the Complaint are insufficient to support a belief that the Governor engaged in any misconduct under SDCL 3-24-7.

While the Complaint could be dismissed on that basis alone, there are several other legal deficiencies that require this Board to dismiss the Complaint outright before even addressing the merits.

First, the Attorney General cannot, in his official capacity and using the resources of his office, submit a complaint to this Board—particularly when that complaint amounts to nothing more than a political attack against Governor Noem before an election. Second, the authority of this Board to adjudicate allegations of misconduct cannot be interpreted to extend to the Governor without violating the Constitution. Third, because the Legislature has not supplied this Board with intelligible standards to apply when evaluating allegations of misconduct against the Governor, it would be an unlawful delegation of legislative power for this Board to adjudicate the Complaint. Fourth and finally, even if this Board had the authority to adjudicate the Complaint, the Attorney General's baseless accusations against the Governor are wholly insufficient to support a belief that the Governor engaged in any misconduct under SDCL 3-24-7. For these reasons, Governor Noem respectfully requests that the Complaint be dismissed in its entirety without a contested case hearing.

ARGUMENT

- I. The Complaint should be dismissed because the Attorney General did not act in good faith, and because he lacks standing to file the Complaint in his official capacity.**

SDCL 3-24-4 authorizes the filing of a complaint only by persons who are "acting in good faith." Here, the Complaint should be dismissed outright because it constitutes an abuse of this Board's complaint procedure and is a transparent attempt by the Attorney General to

launch a political attack on the Governor before an election. [REDACTED]

[REDACTED] He also abused his power as Attorney General by filing the Complaint in his official capacity using resources of his public office, which is not permitted under the applicable statutes. When these factors are considered in conjunction with the baseless accusations in the Complaint, it is evident that the Attorney General has not acted in good faith. Therefore, the Complaint should be dismissed.

A. The Complaint is a political attack filed in retaliation for the Governor publicly calling for the Attorney General's impeachment.

It is no secret that the Attorney General is politically averse to the Governor. In August 2021, the Governor publicly called for the Attorney General to be impeached for his conduct related to and after killing a pedestrian, Joseph Boever, with his car in 2020:

"If Ravensborg does not resign, as I believe he should, the Legislature can and should consider the articles of impeachment already brought in the House," continued Noem. "I have therefore instructed the state Department of Public Safety to provide Speaker Gosch a complete copy of the investigation file in the coming days to assist the House in its important work."

Press Release, Office of the Governor, *Governor Noem Issues Statement on Attorney General Jason Ravensborg's Plea Agreement* (Aug. 26, 2021), available at <https://news.sd.gov/newsitem.aspx?id=28456>.

The Attorney General filed this Complaint less than a month after the Governor publicly called for his impeachment, which suggests the Complaint was filed as retaliation.³ This conclusion is supported by the fact that, within a matter of days after filing the

[REDACTED]

Complaint, the Attorney General publicly announced that he had referred questions regarding Kassidy Peters's application for certification as an appraiser to this Board.⁴ This public announcement was a violation of SDCL 3-24-4, which states that all "*information, reports, or complaints*" must remain confidential unless and until this Board votes to conduct a contested case hearing." (Emphasis added.) In other words, the Attorney General ignored the confidentiality requirement under SDCL 3-24-2 and openly declared to the public that he had filed this Complaint, in an effort to discredit the Governor and distract from his own conduct and impending impeachment.

In fact, most recently, in an open letter to the Speaker of the House of Representatives and its members ("Open Letter"), the Attorney General attempted to use these proceedings to persuade legislators not to issue articles of impeachment against him, arguing that he could not resign as Attorney General after killing Mr. Boever with his car because of "on-going investigations of the executive office," and that impeachment would be inappropriate because "[m]y office has multiple ongoing investigations into the Governor's alleged activities and people associated with her."⁵ (Gov. Ex. 2). In his submissions to this Board, the Attorney General has claimed that the filing of this Complaint gave rise to a conflict of interest that necessitated the retention of independent "investigation counsel," so it is fair to presume that the "ongoing investigations" the Attorney General references in his letter are the proceedings before this Board.

4. [https://www.dakotanewsnow.com/2021/10/06/ag-refers-questions-surrounding-noems-meeting-with-daughter-appraiser-officials-goverment-accountability-board/.](https://www.dakotanewsnow.com/2021/10/06/ag-refers-questions-surrounding-noems-meeting-with-daughter-appraiser-officials-goverment-accountability-board/)

5. [https://www.dakotanewsnow.com/2022/04/12/ravnsborg-releases-letter-asking-legislators-not-impeach-him-tuesdays-vote/.](https://www.dakotanewsnow.com/2022/04/12/ravnsborg-releases-letter-asking-legislators-not-impeach-him-tuesdays-vote/)

In his Open Letter, the Attorney General also implies that the Governor called for his impeachment in retaliation for his investigation into her conduct when, in fact, the opposite is true—the Attorney General filed this Complaint within a month *after* the Governor called for his impeachment. The Attorney General's attempt to use these proceedings to mislead the public and defend against his own impeachment is beyond the pale.

By vaguely suggesting that the Governor engaged in misconduct or even criminal activity, the Attorney General has raised unfounded suspicions regarding the Governor's conduct and the subject matter of this Complaint, which should have remained confidential. The Governor is now in the difficult position of wanting to counter the public suspicion that has resulted from the Attorney General filing this Complaint, while being statutorily prohibited from doing so in order to maintain confidentiality, all while she is a candidate on the ballot facing both primary and general election challengers. This Board was established to address corruption in State government and to hold certain public officials accountable for abusing their authority. It was not intended to create a venue for State officials to damage their political opponents, improperly influence elections and maintain their grip on political power—which is precisely what the Attorney General is attempting to do.

■ [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]

C. The Attorney General abused his power by filing the Complaint in his official capacity using resources of his public office.

The Attorney General's decision to use the resources of his public office to compile a Complaint against the Governor—who he views as a political opponent—is deeply troubling. It is also an abuse of this Board's statutory complaint procedure, which does not contemplate the filing of a complaint on behalf of a State entity. Indeed, it is abundantly clear that the Attorney General did not commence these proceedings in his individual capacity. The Complaint was submitted with a letter printed on the Attorney General's official letterhead, and it was signed by Jason R. Ravensborg in his capacity as Attorney General. All subsequent correspondence with this Board has also been on the Attorney General's official letterhead. The exhibits attached to the Complaint were prepared and compiled using resources of the Attorney General's Office, [REDACTED]

[REDACTED] In the letter submitted with the Complaint, the Attorney General repeatedly speaks on behalf of his "office," and he proposed that this Board coordinate with the Attorney General's Office to organize investigative resources using third parties he has hand-selected.⁶

SDCL 3-24-4 only authorizes "[a]ny *person* acting in good faith" to file a complaint with this Board. (Emphasis added.) The statute does not authorize the Attorney General—a constitutional officer whose powers and duties are set forth by the Legislature—to file a

[REDACTED]

complaint on behalf of his public office. See S.D. Const. art. IV, § 7; SDCL ch. 1-11. See also *Edgemont Sch. Dist. 23-1 v. S. Dakota Dep't of Revenue*, 1999 S.D. 48, ¶ 15, 593 N.W.2d 36, 40 ("[A school district] is a legislative creation It is not a 'person,' within the meaning of any bill of rights or constitutional limitation. It has no rights, no functions, no capacity, except such as are conferred upon it by the [L]egislature."). The Legislature did not confer upon the Attorney General's Office the right to file a complaint with this Board. The Attorney General's attempt to use his public office for this purpose is improper and contrary to the plain meaning of SDCL 3-24-4.

The Attorney General also improperly attempted to commandeer this Board's investigative authority from the outset. This Board is authorized to employ staff as *it* deems necessary—not as the Attorney General, who is the complainant, deems necessary. SDCL 3-24-11. To allow a complainant to decide who conducts the investigation into his own complaint is absurd and contrary to the procedure set forth under Chapter 3-24. So too is the Attorney General's suggestion that these lawyers should be appointed as Special Assistant Attorneys General under SDCL 1-11-5, but "with the understanding that counsel would be accountable only to the Board." This proposal would upend this Board's entire investigative procedure. While SDCL 3-24-5 authorizes this Board to refer a complaint to the Division Criminal Investigation ("DCI") for investigation, it certainly does not contemplate this Board deputizing or supervising Special Assistant Attorneys General. The Attorney General has either completely failed to review the statutes regarding this Board's investigative procedure, or he is attempting to avoid those statutes so his chosen attorneys will handle the investigation under the auspices of this Board. In either event, the Attorney General's Complaint was not filed in good faith and should be dismissed.

II. Construing the authority of this Board to adjudicate allegations of official misconduct by the Governor violates the Constitution.

This Board cannot adjudicate the propriety of the Governor's conduct without violating the separation of powers doctrine. The Constitution establishes a system of government in which power is divided among three distinct branches: legislative (Article III), executive (Article IV), and judicial (Article V). S.D. Const. art. II. The powers and duties of each branch are specifically prescribed in the Constitution, and the separation of these powers among the three branches "has been a fundamental bedrock to the successful operation of our State government since South Dakota became a state in 1889." *Gray v. Gienapp*, 2007 S.D. 12, ¶ 19, 727 N.W.2d 808, 812.

This Board, as a creature of statute, must necessarily exist within the confines and limitations of the structure set forth by our Constitution. Under our State's system of executive power, the Governor's official actions may only be reviewed (1) by the Legislature pursuant to its constitutional power of impeachment and removal from office, S.D. art. XVI, § 3; or (2) by the judiciary when the Governor exceeds her constitutional authority. *See Craig v. Jensen*, 66 S.D. 93, 278 N.W. 545, 549 (S.D. 1938) ("In this proceeding, therefore, we review the action of the Governor for two purposes only: First, to determine whether he acted in excess of his jurisdiction; and, second, whether he acted in excess of the powers or authority conferred upon him by law."). Because the Complaint seeks to have this Board issue and adjudicate a formal charge of official misconduct against our State's chief executive, and because there is no constitutional provision that would authorize this Board to adjudicate the propriety of the Governor's conduct, let alone to reprimand or direct her to engage in coursework or community service, the Attorney General's Complaint seeks action by this

Board that would violate the Constitution, and it should therefore be dismissed. *See* SDCL 3-24-8.

A. The Constitution reserves review of the Governor's official actions to the Legislature.

An adjudication by this Board would first conflict with Article XVI, § 1 of the South Dakota Constitution, which sets forth the Legislature's power of impeachment and removal from office. Aside from a criminal charge against the Governor in her individual capacity, Article XVI sets forth the exclusive constitutional process for adjudicating the propriety of the Governor's official conduct. There is no provision in our State's Constitution that would authorize this Board to adjudicate such claims. In the absence of such a constitutional grant of authority, the Complaint must be dismissed. *Wilson*, 2000 S.D. 133, ¶ 15, 618 N.W.2d 513, 519 ("[S]tatutes must conform to the Constitution, not vice versa.") (internal quotations omitted).

B. Constitutional limits on the judiciary apply with equal force to this Board's authority to review the Governor's official conduct.

Here, the Attorney General is asking this Board to pass on the propriety of the official actions of the Governor following a contested case hearing, which the South Dakota Supreme Court has acknowledged is synonymous with an "adjudication." *In re Union Carbide Corp.*, 308 N.W.2d 753, 757 (S.D. 1981). But the contested case hearing is governed by SDCL chapter 1-26, meaning this Board's adjudication could be appealed to circuit court and then to the South Dakota Supreme Court. Thus, ultimately, the Attorney General's Complaint would necessarily require the judicial branch to review and address the propriety of the Governor's official actions.

But the judiciary cannot do so. The South Dakota Supreme Court has declared that the judiciary "should carefully avoid anything which would appear like an improper interference with the actions of the Governor in the discharge of [the executive] function," as doing so would constitute a violation of the separation of powers doctrine. *Craig v. Jensen*, 66 S.D. 93, 278 N.W. at 548. It should only involve itself in questions whether the Governor has exceeded her constitutional authority. *See id.* at 549 ("In this proceeding, therefore, we review the action of the Governor for two purposes only: First, to determine whether he acted in excess of his jurisdiction; and, second, whether he acted in excess of the powers or authority conferred upon him by law.").

This Board's adjudication of the Governor's conduct would violate the separation of powers doctrine for the same reasons adjudication by the judiciary would. As the South Dakota Supreme Court has declared, "[e]ach branch, so long as it acts within the limitations set by the [C]onstitution, may exercise those powers granted to it by the [C]onstitution without interference by the other branches of government." *Gray v. Gienapp*, 2007 S.D. 12, ¶ 17, 727 N.W.2d at 812 (quoting *State ex rel. Walter v. Gutzler*, 249 N.W.2d 271, 273 (S.D.1977)). Indeed, not only would this Board's adjudication of the propriety of the Governor's conduct unduly interfere with the Governor's executive function, but, as discussed above, that is a question that is reserved to the Legislature under Article XVI. Ultimately, if the judiciary is constitutionally barred from adjudicating the propriety of the Governor's conduct and is instead limited to the question whether she has exceeded her constitutional authority, then it follows that this Board is likewise barred from such an incursion into executive authority, and the Attorney General's Complaint should therefore be dismissed.

C. Adjudication of the Attorney General's Complaint would place the Governor's executive function at the mercy of a subordinate agency.

This Board's placement in our system of State government is ambiguous, as the Legislature did not specifically allocate its powers and duties to any principal department as contemplated under Article IV, § 8 of the South Dakota Constitution. This Board is an "agency" as that term is defined under SDCL 1-26-1(1), and it has been granted a quasi-judicial function. SDCL 1-32-1(3). However, its members are appointed by the Governor, and this Board is "attached" to the Attorney General's Office "for administrative and budgetary support."

The executive branch is composed of principal departments under the direct supervision of the Governor, S.D. Const. art. 4, § 8, as well as five constitutional officers and their respective offices: attorney general, secretary of state, auditor, treasurer, and commissioner of public lands, S.D. Const. art. IV, § 7. Unless otherwise provided by the Legislature, the Governor is tasked with "supervis[ing] the official conduct of all executive and ministerial officers." SDCL 1-7-1(1). Thus, if this Board is viewed as an executive or administrative agency, then this Board's adjudication of the Complaint would place the Governor at the mercy of a subordinate executive agency. And yet, the executive power of our State government is constitutionally vested in the Governor, S.D. Const. art. 4, § 1, and subjecting the Governor to scrutiny by a subordinate agency would turn our State's governmental hierarchy on its head.

The relief that the Attorney General's Complaint seeks is analogous to a circuit court formally issuing an order against a justice of the South Dakota Supreme Court for an action taken in the justice's official capacity. As the Supreme Court of Florida observed when

considering disciplinary measures were taken against a circuit court judge by the Florida Board of Governors:

The independence of the Executive and Judicial Departments would certainly contemplate that if their actions are to be questioned and reviewed, it should not be by those whom they direct or over whose conduct they have supervision but by the people or representatives of the people to whom they owe allegiance.

In re Investigation of Circuit Judge of Eleventh Judicial Circuit of Fla., 93 So. 2d 601, 605 (Fl. 1957). Ultimately, regardless of whether this Board is viewed as part of the Attorney General's Office, the judiciary, or an entirely independent entity,⁷ its adjudication of the Governor's official conduct is constitutionally prohibited.

The Attorney General will no doubt argue that SDCL 3-24-3 specifically authorizes this Board to review and investigate "any person holding a statewide office" as that term is defined in SDCL 12-27-1. But the South Dakota Supreme Court has repeatedly held that "[i]f a statute can be construed so as not to violate the Constitution, that construction must be adopted." *State v. Orr*, 2015 S.D. 89, ¶ 9, 871 N.W.2d 834, 837 (quoting *State v. Outka*, 2014 S.D. 11, ¶ 24, 844 N.W.2d 598, 606) (additional quotation omitted). Furthermore, although the "office of the Governor" is listed within the definition of "statewide office" under SDCL 12-27-1(20), the text of several more specific statutes under SDCL chapter 3-24 makes clear that the Governor is not subject to discipline by this Board. See *Peterson ex rel. Peterson v. Burns*, 2001 S.D. 126, ¶ 28, 635 N.W.2d 556, 567 ("A rule of statutory construction is that the more specific statute governs the more general statute.") (quoting *Faircloth v. Raven Indus., Inc.*, 2000

7. The Constitution does not contemplate the establishment of such an independent entity – it authorizes only three branches of government, each of which is vested with specific functions, powers, and duties. If this Board is not encompassed within one of those three branches, then it is operating as a fourth branch of government in violation of the Constitution.

S.D. 158, ¶¶ 11, 18, 620 N.W.2d 198, 202-03; *Dahn v. Trowsell*, 1998 S.D. 36, ¶ 14, 576 N.W.2d 535, 539).

Interpreting SDCL 3-24-1 to allow this Board to review and investigate the Governor's official action also leads to unreasonable results. *Martinmaas v. Engelmann*, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 610 (recognizing that, in construing statutes, "it is presumed that the Legislature did not intend an absurd or unreasonable result") (quoting *Moss v. Guttormson*, 1996 S.D. 76, ¶ 10, 551 N.W.2d 14, 17). After all, the Governor is granted the authority to appoint members of this Board, with some restrictions, and to determine each member's initial term on this Board. SDCL 3-24-1; SDCL 3-24-2. If this Board determines "that a violation has occurred," then it has the authority to "[m]ake a specific recommendation to the Governor." SDCL 3-24-8. If the Legislature had intended to subject the Governor to discipline by this Board, then it would not have granted the Governor such an integral role in the disciplinary process or given her authority over the appointment of Board members. Thus, in accordance with well-established principles of statutory construction, the statutes authorizing this Board to review and investigate statewide officers must be interpreted to exclude the Governor.

This is not to suggest that the Governor is unaccountable for official misconduct. As detailed above, the Governor's official actions may be reviewed (1) by the Legislature pursuant to its constitutional power of impeachment and removal from office or (2) by the judiciary when the Governor exceeds her constitutional authority. The Governor understands the duties of her office and the standard of conduct the people of South Dakota rightfully expect from her. While the accusations that the Attorney General has made against the Governor in the Complaint are false, and the Governor can counter each of the Attorney

General's baseless accusations, this Board is simply not the proper venue for her to do so. For this reason, the Complaint should be dismissed.

III. It would be an unlawful delegation of legislative power for this Board to adjudicate the Complaint because the Legislature has not enacted any intelligible standards to be applied.

If an executive agency is to lawfully perform a quasi-judicial function without violating separation of powers, the Legislature must first supply the agency with intelligible standards to be applied. *See State v. Moschell*, 2004 S.D. 35, ¶¶ 16-18, 677 N.W.2d 551, 559 (recognizing that legislation that delegates authority is unlawful if it "fails to supply intelligible standards as guides in the exercise of the power delegated"). As the South Dakota Supreme Court has explained, "A statute or ordinance which in effect reposes an absolute, unregulated, and undefined discretion in an administrative agency bestows arbitrary powers and is an unlawful delegation of legislative powers." *Hogen v. South Dakota State Bd. of Transp.*, 245 N.W.2d 493 (S.D. 1976) (quotations omitted). Without intelligible standards, this Board will have to define and interpret the law, which is a purely judicial function. *See In re West River Assoc., Inc.*, 2004 S.D. 11, ¶ 25, 675 N.W.2d 222, 230. Because there are no non-criminal rules or standards that would apply to the Governor's official conduct, the Complaint must be dismissed. Each of the subsections of SDCL 3-24-3 that form the basis of the Complaint are addressed in more detail below.

A. There are no standards, rules, or policies regarding alleged conflicts of interest that would apply to the Governor.

One of the statutes the Attorney General cites in his Complaint is SDCL 3-24-3(2), which grants this Board authority to review and investigate "[d]ocuments filed under Chapter 3-23 or alleged violations relating to conflicts of interest[.]" When read in context, SDCL 3-24-3(2) appears to extend only to the conflicts of interest that are described under the

preceding Chapter 3-23, which is aptly entitled "Conflicts of Interests." Chapter 3-23 applies only to members of the specific "authorities, boards, or commissions" that are listed under SDCL 3-23-10, and neither the Governor nor her office is listed.

Moreover, the conflicts of interest that are prohibited under Chapter 3-23 arise only when a contract involves the State, State agencies, or political subdivisions that are subject to the oversight or approval of the specific "authority, board, or commission" to which the member belongs. None of those statutes would apply to the Governor or the conduct alleged in the Complaint.

Even if SDCL 3-24-3(2) is broadly interpreted to extend beyond the specific conflicts of interest identified under Chapter 3-23, the only other conflict of interest rules or statutes that might apply to the Governor involve public agency procurement of contracts under SDCL chapter 5-18A. *See* SDCL 5-18A-17 (prohibiting state officers from having interests in or deriving benefits from public contracts). However, the Complaint does not involve contracts "for the procurement of supplies, services, or construction," SDCL 5-18A-1, so the rules in chapter 5-18A do not apply. In the absence of such rules and statutes, this Board has no intelligible standard to apply when reviewing the Governor's conduct. To make a finding that the Governor engaged in misconduct, this Board would need to establish entirely new conflict of interest rules to apply to the Governor—rules that do not exist under current South Dakota law. But Chapter 3-16 does not grant this Board authority to promulgate rules and, even if it did, no such rules can be adopted or applied without undergoing a hearing and proper judicial review. *House of Seagram, Inc. v. Assam Drug Co.*, 176 N.W.2d 491, 495 (S.D. 1970) (noting that administrative rules "can only be adopted after a hearing and must be

subject to judicial review to assure procedural due process of law"). Therefore, the Attorney General's claims regarding an alleged conflict of interest should be dismissed.

B. Aside from criminal malfeasance, there is no standard for evaluating allegations of malfeasance against the Governor.

Another statute the Attorney General cites in his Complaint is SDCL 3-24-3(4), which grants this Board authority to review and investigate "allegations of Malfeasance." This statute is codified under Title 3, "Public Officers and Employees," which also contains Chapter 16, entitled, "Malfeasance, Misfeasance and Nonfeasance in Office." SDCL Ch. 3-16. When read in context, it appears the allegations of malfeasance that this Board is authorized to review and investigate are those defined under Chapter 16. But none of these statutes apply to the Governor or the conduct alleged in the Complaint.

For example, Chapter 16 contains statutes that make it a Class 2 misdemeanor to: (a) willfully fail to perform an official duty required by law, SDCL 3-16-1; (b) keep records or property belonging to the State at an unauthorized location, SDCL 3-16-2; or (c) sell or lease property to an entity in which the officer may become interested, SDCL 3-16-7. None of these statutes would even remotely apply in this case. Under SDCL 3-16-8 and SDCL 5-18A-17.4, it is a Class 1 misdemeanor for a State officer to solicit any benefit in exchange for influencing a contract entered into by the State agency that the officer serves. These statutes cannot apply in this case because the Governor did not solicit any benefit or influence any contract entered into by an agency she serves. Thus, while this Board has no authority to adjudicate whether a criminal statute has been violated, none of the above criminal statutes could be implicated by the conduct alleged in the Complaint.

Finally, Chapter 16 contains a statute that prohibits any "department, bureau, board, or commission of the [S]tate or any of its political subdivisions" from retaliating against State

employees for reporting certain misconduct. SDCL 3-16-9. However, that statute does not apply to the Governor because she is not a "department, bureau, board, or commission." Nor would it extend to the conduct alleged in the Complaint, which does not involve any allegation of reported misconduct.

There are no statutes that have been enacted to guide this Board in determining what constitutes malfeasance on the part of the Governor. In this proceeding, this Board has no Constitutional or statutory authority to enact new rules dictating what official conduct of the Governor would qualify as malfeasance. Therefore, the Attorney General's claim of malfeasance should be dismissed.

C. Aside from criminal statutes, there is no standard for evaluating allegations of misappropriation against the Governor.

SDCL 3-24-3(5) grants this Board authority to review and investigate "[a]llegations of misappropriation of public funds[.]" Similarly, SDCL 3-24-3(9) authorizes this Board to review and investigate "[a]llegations of use of public money not authorized by law or in violation of the Constitution." The Attorney General cites both these statutes in his Complaint, but he fails to explain how public funds were misappropriated by the Governor or used without legal authorization.

Under Title 3, the only statute that addresses the misappropriation of public funds is SDCL 3-14-2, which requires public officers to deliver all public money and property to his or her successor upon expiration of the public officer's term. SDCL 3-14-2. That statute is clearly not at issue.

Even if this Board were to look beyond Title 3, there are no other non-criminal statutes that would apply to the Governor's conduct as alleged in the Complaint. As explained

previously, the misappropriation of public funds is a criminal offense under SDCL 4-3-19, but this Board does not have authority to review or adjudicate allegations of criminal violations against the Governor. Even if it did, SDCL 4-3-19 applies only when a public officer receives public money and then either withholds it or appropriates it to her use or the use of another who is not legally entitled to it. The Complaint does not allege that the Governor received any public money, so SDCL 4-3-19 cannot apply.

Based on the allegations in the Complaint, it is not clear how the Attorney General is alleging the Governor misappropriated funds. To the extent he is alleging that the settlement agreement the State reached with Ms. Bren was a misappropriation of public funds, there is no statute that would have prohibited the State from settling the case. The settlement agreement was executed by a duly authorized State officer at the direction of Director Ambach, who has the "sole discretion" to "determine the disposition or payment" of any covered claim against the State. SDCL 3-22-11.

The payment that was ultimately made to Ms. Bren was fully authorized by the necessary State officers and, as a matter of law, could not have been a misappropriation of public funds. The Attorney General may not like the terms of the settlement agreement that expended public funds, but that does not mean the State officers who negotiated and facilitated the settlement payment to Ms. Bren were somehow guilty of misappropriating public funds. It is reckless and irresponsible for the Attorney General to suggest otherwise without any legal or factual support. If the Complaint is not dismissed, the State officers the Attorney General has disparaged (who are not parties in this proceeding and have no opportunity to defend themselves) will be faced with the public humiliation that comes with

having the Attorney General accuse them of, or at the very least imply, unethical and/or criminal conduct.

Even viewing the allegations in the Complaint in the most deferential light possible, none of the attenuated conspiracy theories espoused by the Attorney General could rise to the level of misappropriation under the statutes enacted by the Legislature. Although the Attorney General's vague accusations against the Governor are completely baseless, this Board need not reach the merits of the Complaint. It simply has no Constitutional or statutory authority to do so.

The Attorney General has already wasted public funds by using the resources of his office to compile his frivolous and politically motivated Complaint. Additional funds will now be wasted responding to it. While the Complaint itself may be the product of the Attorney General's misuse of public funds, there are no facts or legal authority to support such a claim against the Governor. The Complaint should therefore be dismissed.

IV. The Attorney General's baseless accusations against the Governor are wholly insufficient.

Under SDCL 3-24-7, a contested case hearing may only be conducted if "a majority of the members of the [B]oard vote that there is sufficient information to believe" that the Governor "has engaged in misconduct." A complaint that merely raises "questions" regarding the Governor's conduct based upon unsubstantiated assumptions of impropriety cannot support a belief of misconduct. Yet the Attorney General relies exclusively on unsubstantiated assumptions to support his Complaint. As explained below, this Board need only review the exhibits to the Complaint to determine that the Attorney General has failed to meet his burden of providing sufficient information to support his incendiary accusations against the Governor. Therefore, the Complaint should be dismissed.

there are not enough certified appraisers who are willing to supervise those seeking credentials, and "the supervisor training model that we have today is broken and changes need to be made." (Ex. P, 4: 28-49).

Secretary Hultman had been working with the Governor to improve the broken appraiser certification process for the "past three years." (Ex. A, 4:43-49; 5:1-3). The July 27, 2020, meeting was a continuation of those efforts, and Ms. Peters was invited to provide a firsthand account of the process from an applicant's perspective. (Ex. A, 9:9-15). During the meeting, Ms. Peters described the difficulties she had encountered in finding a supervisor, and she circulated a copy of a letter from her supervisor, Kristine Juelfs, that described certain problems she had encountered in the appraisal certification process. (Ex. P., 25:26-29).

Moreover, the plan regarding Ms. Peters' application had been discussed before the July 27, 2020, meeting. Secretary Hultman testified to the GOAC that "[a]t the very end of the meeting, we discussed a possible plan forward for Ms. Peters which had been determined prior to the meeting and it was a brief discussion at the end but that plan had already been set in place." (Ex. A, 13:4-10). Secretary Hultman later clarified that she had discussions regarding the plan before the meeting, but it had not yet been memorialized in writing. (Ex. K). Ms. Mulder, the Attorney for the Department of Labor, also acknowledged that they had discussed the plan that was ultimately set forth in the Stipulation Agreement before the July 27, 2020, meeting. Ms. Mulder explained that the discussions that took place regarding the plan were "just the normal standard of doing business," and that there was nothing out of the ordinary that occurred relating to these discussions. (Ex. A, 16:10-35).

During her testimony before the GOAC, Ms. Bren even acknowledged that the plan was in place before the July 27, 2020, meeting. Specifically, Ms. Bren testified that Ms.

Mulder emailed her questions in advance of the meeting, one of which was, "Are we saying that Cassidy can take certain classes and resubmit?" Ms. Bren testified that her "jotted down response" to that question was "yes." (Ex. P, 24:25-49). Thus, Ms. Bren's own testimony supports Secretary Hultman's statement that the plan to allow Ms. Peters to complete additional classes before re-submitting her appraisal was already in place and did not change following the July 27, 2020, meeting.

The plan set forth in the Stipulation Agreement was consistent with Secretary Hultman's philosophy regarding the appraisal licensing process. At the beginning of her testimony before the GOAC, Secretary Hultman explained that she approaches applications with "the educator lens" and does not believe that the licensing process is "the time for punishment or punitive actions." She explained that this philosophy does not mean that standards are lowered, "but rather that we develop pathways to success by facilitating the knowledge and experience acquisition necessary to demonstrate competency as determined by each given occupational licensing board." (Ex. A, 3:1-20). The plan that was presented to Ms. Peters was entirely consistent with this philosophy. It clearly set forth the parameters that Ms. Peters was required to satisfy to be designated as a State-certified residential appraiser, and it included additional coursework to help Ms. Peters acquire the knowledge necessary to demonstrate competency.

Moreover, there is no fixed procedure for entering into agreements with applicants for continuing education—it is "more an internal informal practice and each agreement is specific to each applicant in each situation." (Ex. P, 14:47-49; 15:1-9). Because each applicant is unique and the appropriate plan is determined on a case-by-case basis, it was misleading for Ms. Bren to claim that the plan set forth in the Stipulation Agreement was "not normal

practice." Ms. Bren testified that when an applicant is sent a proposed denial, they are advised that they may appeal Ms. Bren's preliminary decision as well as Secretary Hultman's final decision to the Office of Hearing Examiners. (Ex. P, 13:7-27). There is no statute or rule mandating that the application at that point must be denied. The notion that Secretary Hultman would, in exercising her own judgment, prefer to grant an applicant an additional opportunity under a "stipulation agreement" instead of litigating a proposed denial in front of the Office of Hearing Examiners, should be commended, not disparaged. Given Secretary Hultman's philosophy toward licensure, the procedure followed with Ms. Peters should not be surprising.

Nonetheless, in an effort to suggest that the Stipulation Agreement was abnormal, the Attorney General points to Ms. Bren's testimony that she knew of one application that had been denied from 2018 through 2021, which was inconsistent with Secretary Hultman's testimony that no applications had been denied during that period. (Ex. P, 15:47-48; 16:1-2). It is possible that Ms. Bren was referencing a denial that was appealed and subsequently resolved through a stipulation agreement, but such a proceeding would be confidential and beyond the scope of the claims asserted in the Complaint. Even if a single application had been denied during that period, the denial of applications was unquestionably rare. The fact that one application may have been denied from 2018 through 2021 does not support the Attorney General's allegation that Ms. Peters received special treatment. As Secretary Hultman explained, it was her policy to develop "pathways to success" and not to arbitrarily punish applicants.

Ultimately, the decision to enter into the Stipulation Agreement with Ms. Peters was Secretary Hultman's decision alone. Ms. Bren could not be influenced concerning a decision

that was not hers to make. Secretary Hultman made it clear that her decision to enter into the Stipulation Agreement was not influenced by Governor Noem or anything that took place during the July 27, 2020, meeting. Her decision was well-reasoned and consistent with her established policy and philosophy. It was not the result of any influence exerted by the Governor. Therefore, the Complaint should be dismissed.

C. The Attorney General's remaining allegations against the Governor are pure speculation and have no basis in fact.

There is not a shred of evidence to support the Attorney General's remaining allegations that the retirement of Ms. Bren was an act of retaliation by the Governor, or that the Governor somehow misappropriated public funds when the State reached a settlement agreement with Ms. Bren in her age-discrimination claim. Ms. Bren did not even allege retaliation in her claim against the State. Vague and speculative assumptions of impropriety simply cannot support a belief that the Governor engaged in any misconduct. *See* SDCL 3-24-7.

Nor is there any evidence to suggest that the Governor influenced the settlement agreement that the State entered into with Ms. Bren. By statute, Director Ambach has the "sole discretion" to "determine the disposition or payment" of any covered claim against the State. SDCL 3-22-11. The payment the State made to Ms. Bren was fully authorized by Director Ambach, and it was executed by Secretary Hultman at his direction. There is no evidence to suggest the Governor was involved in negotiations or determining the terms of the settlement agreement.

The Attorney General's claim that the settlement of Ms. Bren's age-discrimination lawsuit was not appropriately handled falls flat. By statute, Director Ambach was required to "consult with the attorney general prior to entering a negotiated settlement," and his office

received weekly status reports on the litigation and the amount that had been approved for settlement. SDCL 3-22-11. The terms of the settlement agreement were negotiated by Attorney Melanie Carpenter, who was deputized by the Attorney General and appointed for the "efficient performance of his duties." *See* SDCL 1-11-4. Thus, the attorney responsible for securing the settlement agreement—which the Attorney General now suggests was so egregious as to constitute a misappropriation of public funds—was under the direct supervision of the Attorney General himself.

In launching his political attack against the Governor, the Attorney General has disparaged several well-respected State officials and employees based on nothing more than his own unsubstantiated speculation and far-fetched conspiracy theories. He has even questioned the ethics of Attorney Carpenter, suggesting that his own deputy was somehow complicit in negotiating a corrupt settlement agreement that resulted in the misappropriation of public funds. From the perspective of the Attorney General, it seems the only State official who is completely innocent of conspiring on behalf of the Governor is the Attorney General himself.

CONCLUSION

This Board's complaint procedure was established, in part, to build public trust in State government and create a mechanism for citizens to hold certain public officials accountable for abusing their power. The Attorney General has undermined this important objective by using this Board's complaint procedure to launch a political attack against the Governor using the power and resources of his public office and, as evident from his recent Open Letter, to defend against his impending impeachment proceedings. The Complaint lacks any basis in

law or fact and is supported by little more than the Attorney General's personal speculation, prejudicial assumptions, and review of news articles.

This Board was not established to create a venue for State officials to damage their political opponents with baseless accusations of malfeasance. The Attorney General has filed his Complaint in bad faith while acting in his official capacity without the requisite authority, and he is seeking relief from this Board that is well beyond its statutory and Constitutional power to provide. Therefore, the Complaint should be dismissed outright without a contested case hearing.

Dated this 15th day of April, 2022.

REDSTONE LAW FIRM LLP



Lisa M. Prostrollo
Matthew S. McCaulley
Christopher D. Sommers
1300 W. 57th St., Ste. 101
Sioux Falls, SD 57108
(605) 331-2975
lisa@redstonelawfirm.com
matt@redstonelawfirm.com
chris@redstonelawfirm.com
Attorneys for Governor Kristi Noem