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RECEIVED

AUG 27 2007

MENDOCINO COUNTY GRAND JURY
POST OFFICE BOX 629
UKIAH, CA 95482

ENDORSED-FILED

AUG 22 2007

CLERK OF MENDOCINO COUNTY
SUPERIOR COURT OF CALIFORNIA

~~LAREN CRUTCHER~~

8 SUPERIOR COURT, STATE OF CALIFORNIA

9
10 COUNTY OF MENDOCINO

11 In the matter of,
12 KENDALL SMITH,

NO. SCUK CVG 07-99517

13 **RESPONSE TO ORDER TO INITIATE
ACTION TO RECOVER MONEY DUE THE
COUNTY (*Penal Code §932*)**

14 This brief is in response to the demand of the Grand Jury of the County of Mendocino
15 pursuant to *Penal Code §932* that the District Attorney of Mendocino County "institute and
16 maintain an action" to recover money due to the County from Supervisor Kendall Smith. The
17 basis of the Grand Jury's recovery claim in the amount of \$3,087.81 is that the supervisor
18 was reimbursed for expenses she did not incur or was not entitled to over a two-year period.

19 For the reasons set forth below, the District Attorney is unable to institute an action
20 against Supervisor Kendall Smith.

21 **CIVIL REIMBURSEMENT**

22 There is no jurisdiction in the Superior Court to bring a recovery action because the
23 amount claimed is less than \$5,000. The option remains for the Grand Jury to seek
24 reimbursement from Supervisor Smith by way of instituting a small claims action. Grand Jury
25 Foreman Dennis Scoles could institute the matter, as attorneys are barred in the small claims
26 court. However, evidence of "specific intent to defraud" would need to be proved for the
27 County to prevail. In the evidence provided, the District Attorney found nothing to support a
28 "specific intent to defraud" in Supervisor Smith's claims.

HEREDITH J. LINTOTT
DISTRICT ATTORNEY

ELIZABETH NORMAN
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August 22, 2007

Dennis Scoles, Foreman
Mendocino County Grand Jury
Post Office Box 629
Ukiah, California 95482

Re: Opinion of Criminal Charges – Supervisor Kendall Smith

Dear Foreman Scoles:

This letter is in response to the demand of the Mendocino County Grand Jury pursuant to *Penal Code* §932, that the District Attorney of Mendocino County “institute and maintain an action” to recover money due the county from Supervisor Kendall Smith. The basis of the Grand Jury’s recovery claim in the amount of \$3,087.81 is that the supervisor was reimbursed for expenses she did not incur or was not entitled to over a two-year period.

The District Attorney has formally responded to the Grand Jury, indicating a civil action cannot be brought by the District Attorney. For the reasons set forth below, the District Attorney submits the opinion that criminal charges against Supervisor Kendall Smith are not supported by the evidence.

**THE PRESENTATION OF TRAVEL CLAIMS BY
SUPERVISOR KENDALL SMITH DO NOT CONSTITUTE
A CRIMINAL VIOLATION OF THE LAW**

Government Code §83232.4 outlines the remedies available for misuse of public funds or falsifying expense claims as follows:

Penalties for misuse of public resources or falsifying expense reports in violation of expense reporting policies may include, but are not limited to, the following:

- (a) The loss of reimbursement privileges.
- (b) Restitution to the local agency.
- (c) Civil penalties for misuse of public resources pursuant to §8314.
- (d) Prosecution for misuse of public resources, pursuant to *Penal Code* §424.

As the District Attorney is charged with prosecution of crime within the County of Mendocino, this opinion will address solely criminal violations. *Penal Code* §424 applies to: "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys," who misappropriates public funds.

In addition to *Penal Code* §424, *Penal Code* §72 "Presenting False Claim to Public Board or Officer" is applicable as a potential criminal charge. Section 72 provides in pertinent part:

Every person who, *with intent to defraud*, presents for allowance or for payment . . . to any county, . . . authorized to allow or pay the same if genuine, any false or fraudulent claim . . . is punishable either by imprisonment in the county jail for a period of not more than one year, . . . or by imprisonment in the state prison

At issue in this matter is the interpretation of the Mendocino County Board of Supervisors' Travel & Meal Policy, specifically §2(d) which states: "Supervisors with meetings 'back-to-back' may elect to stay over night rather than drive back and forth and will be reimbursed not to exceed the mileage rate that would have been charged for travel."

It is alleged that Supervisor Smith submitted claims for round trip mileage reimbursement on occasions she stayed overnight in Ukiah rather than returning to her home in Fort Bragg.

A. Misappropriation of Public Funds (*Penal Code* §424)

It is the position of the Grand Jury that Supervisor Smith submitted improper travel claims for a period of over two years. There is nothing in the Order to Initiate Action and the accompanying documents which indicate Supervisor Smith was "charged with the receipt, safekeeping, transfer, or disbursement of public moneys." The gist of this crime is that the public official in question *controls public funds*, and misuses the funds for nonpublic purposes. *Webb v. Superior Court of Tulare County* (1988) 202 Cal.App.3d 872.

The Court of Appeal, in *Webb* at page 866, outlined the type of cases typically charged pursuant to *Penal Code* §424:

That section is more often used in situations where a public employee or official, in the course and scope of his or her employment, receives money and converts the money to his or her own use rather than turning it over to the public entity. (See, for example, *People v. Best* (1959) 172 Cal.App.2d 692 [342 P.2d 314] [bail money accepted by police officer who never turned money over to city]; *People v. Griffin* (1959) 170 Cal.App.2d 358 [338 P.2d 949] [deputy municipal court clerk accepted bail money but failed to deliver it to court].) Another typical scenario is where the employee in his or her official capacity, having access to public moneys and having the authority to disburse the public moneys for certain purposes, embezzles the money to his or her own purpose.

In my capacity as Clerk of the Board, since the spring of 1999 I have been auditing and processing all Supervisor requests for reimbursement submitted through our department. I have carefully applied the Board's Travel policy throughout this time, and when warranted, I have denied claims, or otherwise sought clarification if a claim was presented without the information/documentation. I have worked with 9 different elected officials on these matters.

I consider my relationship with the previous Auditor/Controller to have been one of mutual respect and trust, due in part to our joint belief of "attention to detail" and the "application of policy and procedure."

I emphatically assert that my interpretation and application of the Board's Travel Policy has been consistent, and appropriate, throughout the years that I've been charged with this responsibility. I do not recall any recent or previous discussion with the Auditor as to my "misinterpreting" the policy, nor do I recall any claims for reimbursement rejected throughout the years due to faulty or careless processing.

The recent attention of the Grand Jury in their review and "interpretation" of the Board's Travel Policy has caused me great concern; specifically, with regard to the "back to back" meeting element. Methods utilized by current Board members in selecting this option are consistent with their predecessors – as the records reflect. Furthermore, if the current policy "interpretation" differs from the process that has been carefully applied throughout the past nine years, then the County is doing a disservice to its elected Board members for not having brought forward their concerns. It is irresponsible to knowingly allow a flawed policy to remain in place, and to then punish those who believe they are abiding by such a policy.

A handwritten signature in black ink, appearing to read "W. J. ...", is written across the middle of the page.