

Opinion No. 75-49

September 10, 1975

BY: OPINION OF TONEY ANAYA, Attorney General

TO: Mr. Sam Graft Director State Park and Recreation Commission 141 E. DeVargas Santa Fe, New Mexico 87503

QUESTIONS

FACTS

Lease agreements which previously covered the marina, lodge and store operations at Conchas Lake were terminated by the State Park and Recreation Commission following breach of these contracts. Subsequently, the Commission gave public notice of these openings and accepted bids from interested parties.

QUESTIONS

Is it a conflict of interest for a current state legislator to bid on and enter into a concession contract in the form of a lease with the State Park and Recreation Commission?

CONCLUSION

No. See Analysis.

OPINION

{*134} ANALYSIS

In answering this question, it is necessary to consider Article IV, Section 28, New Mexico Constitution, and the provisions of the Conflict of Interest Act, Sections 5-12-1, **et seq.**, NMSA, 1953 Comp. The pertinent portion of Article IV, Section 28, states:

{*135} ". . . nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term."

This constitutional provision does not prevent a current state legislator from entering into the type of contract about which this inquiry has been made. The law authorizing the State Park and Recreation Commission to enter into concession lease contracts is presently compiled as Section 4-9-9, NMSA, 1953 Comp., being Section 9, Chapter 57, Laws of 1935. Amendments insignificant to this inquiry were passed with respect

thereto in 1961, 1963 and 1973. Obviously, since the authorization was passed long before the current term for which a legislator has been elected, the time exclusion imposed by the constitution is not prohibitive in this instance.

The provision of the Conflict of Interest Act, **supra**, specifically relating to legislators and state contracts is Section 5-12-9, **supra**. This section provides that:

"A state agency shall not enter into any contract of purchase with a legislator or with a business in which such legislator has controlling interest, involving services or property in excess of one thousand dollars (\$ 1,000) where the legislator has disclosed his controlling interest, unless the contract is made after public notice and competitive bidding. As used in this section, contract shall not mean a 'lease.'"

For several reasons, this provision likewise is not prohibitive of the contemplated lease. First, the section expressly exempts leases. Secondly, if it were a "contract of purchase," the statutory requirements of public notice and competitive bidding have been satisfied. See Opinion of the Attorney General No. 67-133, dated November 13, 1967.

The only other section of the Conflict of Interest Act, **supra**, which might possibly be relevant to this inquiry is Section 5-12-6, **supra**, which states that:

"No legislator or employee shall use confidential information acquired by virtue of his state employment or office for his or another's private gain."

"Confidential information" is defined as information which by law or practice is not available to the public. Section 5-12-2(B), **supra**. The facts reveal that all information concerning the granting of the new contracts was public knowledge. Thus, the restriction contained in this section is not an issue.

Finally, mention should be made of Section 2-1-4, NMSA, 1953 Comp., which prohibits a legislator from receiving compensation for services performed as an officer or employee of the state, except the compensation to which he is entitled as a member of the legislature. A legislator would not acquire status as either an officer or employee of the state solely on the basis of the contract which is contemplated in this instance. Compare Opinion of the Attorney General No. 75-21, dated March 18, 1975.

Thus, we conclude that a present member of the state legislature may bid on and enter into a concession lease agreement with the State Park and Recreation Commission.

By: Nicholas R. Gentry

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