

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

November 15, 2022

The Honorable Brian Egolf
Speaker of the House
State Capital, Suite 104
Santa Fe, New Mexico 87501

Re: Opinion Request – Governor’s Authority to Remove Public Regulation Commission Members

Dear Speaker Egolf:

You have requested our advice regarding the governor’s authority to remove members of the Public Regulation Commission (“PRC”) appointed to serve terms of office beginning on January 1, 2023. Those members will be the first to be appointed by the governor under an amendment to Article XI, Section 1 of the New Mexico Constitution approved by the voters at the general election held in 2020. See S.J.R. Nos. 1 & 4, 2019 N.M. Laws. In particular, you ask whether the legislature’s power to remove PRC members by impeachment as provided in Article XI, Section 1 restricts the governor’s constitutional authority to remove appointed state officers.

As discussed in more detail below, based on our examination of the relevant constitutional, statutory and case law authorities, as well as the information available to us at this time, we conclude that, although not clearly reflected in its language, Article XI, Section 1’s provisions for the removal of appointed PRC members by impeachment were intended to preclude the governor from removing PRC members under Article V, Section 5 of the state constitution.

Currently, the PRC consists of five members elected from districts provided by law. N.M. Const. art. XI, § 1(A). Beginning on January 1, 2023, the PRC will consist of three members. The governor will nominate the members “from a list of qualified nominees submitted to the governor by the public regulation commission nominating committee,” and will appoint the members, “by and with the consent of the senate.” *Id.* § 1(B). In addition to changing the process for selecting PRC members, the amendments to Article XI, Section 1 added a provision governing the removal of members. It provides: “A commission member may be removed by impeachment for accepting anything of value from a person or entity whose charges for services to the public are regulated by the commission, malfeasance, misfeasance or neglect of duty.” *Id.* § 1(E).

The change from a PRC comprised of elected members to one comprised of members appointed by the governor implicates the governor's constitutional authority to remove state officers. In pertinent part, Article V, Section 5 provides that the governor "shall nominate and, by and with the consent of the senate, appoint all officers whose appointment or election is not otherwise provided for *and may remove any officer appointed by him unless otherwise provided by law.*" (Emphasis added.) See also *State ex rel. New Mexico Judicial Standards Comm'n v. Espinosa*, 2003-NMSC-017, ¶¶ 23-25, 73 P.3d 197 (governor's removal authority under Art. V, § 5 applied to executive appointees on the Judicial Standards Commission, absent any express limit in the constitutional or statutory provisions governing the Commission). For appointed members of the PRC, the governor's authority to remove them under Article V, Section 5 depends on whether the removal provisions in Article XI, Section 1(E) sufficiently restrict that authority.

As a preliminary matter, the rules governing the interpretation of statutes also apply to the interpretation of the constitution. See *State ex rel. Richardson v. Fifth Jud. Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 17, 160 P.3d 566. Like statutory interpretation, the "overarching goal in construing the New Mexico Constitution is to ascertain the intent and objectives of the drafters." *Pirtle v. Legislative Council Comm.*, 2021-NMSC-026, ¶ 34, 492 P.3d 586. See also *State ex rel. Franchini v. Oliver*, 2022-NMSC-016, ¶ 4, 516 P.3d 156 (primary goal of constitutional interpretation "is to identify and give effect to the intent of its framers and the electorate").

Under the rules of statutory construction, the text of a statute "is the primary, essential source of its meaning." NMSA 1978, § 12-2A-19 (1997). When a court cannot determine the legislature's purpose from the language used in a statute, it "look[s] beyond the language to the purpose of the statute to ascertain legislative intent." *Pirtle*, 2021-NMSC-026, ¶ 17. "Genuine uncertainty" about the legislative purpose may be found "in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent..." *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 2, 871 P.2d 1352.

As quoted above, Article XI, Section 1(E) provides that a PRC member "may be removed by impeachment" for specified reasons. This language authorizes the removal of appointed PRC members by impeachment, but does not expressly make impeachment the exclusive method of removal. Absent this or other express limitation on the governor's removal authority, Section 1(E) may be reasonably interpreted as merely providing an alternative method of removal to the governor's authority under Article V, Section 5. This interpretation focuses on the language providing that a member "may be removed by impeachment" for the grounds specified in the provision. As written, the provision only provides that removal by impeachment is limited to the specified grounds and does not similarly limit the governor's removal authority under Article V, Section 5.

In contrast, constitutional and statutory provisions governing the removal of other state officers specify grounds for removal that apply regardless of how the officers are removed. For example, Article XII, Section 13, which governs the boards of regents of state educational institutions,

provides: “[m]embers of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member.” N.M. Const. art. XII, § 13(E). The New Mexico Supreme Court held that this language “limits the reasons and the manner in which a regent may be removed” and restricts the governor’s authority to remove regents under Article V, Section 5. *Denish v. Johnson*, 1996-NMSC-005, ¶ 53, 910 P.2d 914. *See also* NMSA 1978, § 10-16G-3 (a state ethics commissioner “may be removed only for incompetence, neglect of duty or malfeasance in office,” after “notice of hearing and an opportunity to be heard”); *Espinosa*, 2003-NMSC-017, ¶¶ 28-29 (discussing other constitutional and statutory provisions that expressly limit the governor’s removal authority).

Although interpreting Article XI, Section 1(E) to provide an alternative method of removal appears reasonable based on the provision’s language, we believe that the legislature’s general constitutional impeachment authority and the legislative history of Article XI, Section 1(E) create “genuine uncertainty” about its underlying intent. First, appointed PRC members are already subject to impeachment under Article IV, Section 36 of the state constitution, which provides that [a]ll state officers . . . shall be liable to impeachment for crimes, misdemeanors and malfeasance in office. . . .” Appointed officers who are subject to removal by impeachment may also be removed by the governor under Article V, Section 5. *See State ex rel. Ulrick v. Sanchez*, 1926-NMSC-060, ¶¶ 5-9, 255 P. 1077. Because impeachment was already an alternative to the governor’s removal authority when Article XI, Section 1 was amended, there was no apparent need for the drafters to provide that alternative again in Section 1(E). *See State ex rel. Bird v. Apodaca*, 1977-NMSC-110, ¶ 12, 573 P.2d 213 (when construing a statute, courts “assume that the Legislature is well informed as to existing statutory and common law and that it does not intend to enact useless statutes”) (citations omitted). This suggests that the drafters included Article XI, Section 1(E) to make removal by impeachment the sole method of removal for appointed PRC members, in contrast to the alternative method of removal provided in Article IV, Section 36 for all state officers.

Second, a review of the legislative history of Section 1(E) also supports the view that the provision was intended to supplant the governor’s removal authority.¹ The proposed amendments to Article XI, Section 1 were introduced during the 2019 regular legislative session by two Senate joint resolutions that were later combined during the committee hearing process. *See* Senate Judiciary Committee Substitute for S.J.R Nos. 1 & 4, 54th Leg., 1st Sess. (N.M. 2019). As introduced, the resolution provided in what is now Section 1(E) that a PRC member “may be removed only for malfeasance, misfeasance or neglect of duty, after a hearing before the supreme court. . . .” When the Senate Judiciary Committee considered the resolution, it amended the grounds for removal by adding “accepting anything of value from a person or entity regulated by [the PRC].” During its discussion of the amendment, the Commission confirmed that the removal provisions of the resolution were intended to specify the grounds for removal and preclude the governor from removing a PRC member. Recording of SJC hearing on S.J.R. Nos. 1 & 4, at 5:34-5:36 & 5:42-5:43 p.m. (Feb. 25, 2019)) (available at nmlegis.gov under “Webcast”).

Subsequently, when the resolution was debated in the Senate, a sponsor of the resolution explained that the changes to the selection process for and terms of PRC members were intended to “take politics out” of the PRC. He also referred to the removal provision, which at that point still provided for removal after a hearing before the Supreme Court. He noted that the provision was based on Article XII, Section 13’s provisions for removing regents, and would preclude removal of PRC members “at the will of the executive.” Recording of Senate debate on S.J.R. Nos. 1 & 4, at 6:27-6:30 p.m. (Mar. 2, 2019) (comments of Sen. William H. Payne). Later during the meeting, an amendment to Section 1(E) was introduced that provided for removal of PRC members by impeachment instead of the Supreme Court. *Id.* at 7:14-7:25 p.m. (comments of Sen. Joseph Cervantes). The only reason given for the amendment was the view of some senators that impeachment was the more appropriate process for removing PRC members, and the amendment was passed without debate. Although the amendment to Section 1(E) arguably created the ambiguity regarding the provision’s effect on the governor’s removal authority, there was no discussion or other indication at the time it was passed suggesting that the amendment affected or was intended to affect the drafters’ original intent to preclude the governor from removing PRC members under Article V, Section 5.

As discussed above, the language of Article XI, Section 1(E), by itself, makes reaching a definitive conclusion about the provision’s intended effect on the governor’s constitutional removal authority difficult. But, based on evidence of legislative intent beyond the provision’s language, particularly its legislative history, we believe the drafters intended Article XI, Section 1(E) to provide the exclusive means of removing PRC members and to supplant the governor’s authority to remove executive officers that would otherwise exist under Article V, Section 5.

Of course, our conclusion does not prevent a party from initiating a lawsuit to challenge the effect of Article XI, Section 1(E). Based on the language of Article XI, Section 1(E), a court reviewing the issue could easily reach a different conclusion regarding the relationship between the legislature’s constitutional authority to remove PRC members by impeachment and the governor’s authority to remove executive appointees. Fortunately, Article V, Section 5 permits restrictions on the governor’s removal authority if “otherwise provided by law.” This would allow the legislature to mitigate the possibility of an unfavorable judicial interpretation by enacting a law clarifying the purpose of Article XI, Section 1(E). *See Espinosa*, 2003-NMSC-017, ¶ 31 (where constitutional provisions governing the Judicial Standards Commission were silent, the legislature was “in a position to exercise its authority under Article V, Section 5 to limit the Governor’s removal authority”).

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Please note that this opinion is a public document. As such, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,



Sally Malavé
Director, Open Government Division

Cc: PRC Nominating Committee

ⁱ New Mexico courts will examine the legislative history of a statute to discern its legislative intent, provided it is limited to the history or contemporaneous statements of legislators while the legislation was in the process of enactment. Statements of legislators, *after* the passage of the legislation, however, are generally not considered competent evidence to determine the intent of the legislative body enacting a measure.” See *State ex. Rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 35, 117 N.M. 346 (internal quotations and citations omitted).