

January 10, 2014 Advisory Letter — Luna Community College Board of Trustee's anti-nepotism policy

The Honorable Tomás E. Salazar
New Mexico State Representative
Box 66
Las Vegas, NM 87701

Re: Advisory Letter — Luna Community College Board of Trustee's anti-nepotism policy

Dear Representative Salazar:

You have asked for our advice on whether (1) there are statutory or other legal requirements with which the nepotism policy established by the Luna Community College must comport, and (2) whether the College's nepotism policy actually comports with those requirements. First, we conclude that as a public entity formed under the laws of the state, the Luna County Community College is subject to the Governmental Conduct Act ("GCA") and the state's anti-nepotism law, NMSA 1978, Section 10-1-10 (1925). Second, we conclude that the College's nepotism policy comports both with the GCA and Section 10-1-10.

Centrally located in Las Vegas, New Mexico, the Luna Community College was established by the Community College Act, NMSA 1978, Section 21-13-4.2(A). The College falls under the purview of the state "and is part of post-secondary public educational system commissioned and empowered to serve the people of its service area." See Luna Community College, Faculty Policy and Procedure Manual 3 (2006). The Luna Community College is governed by a board of trustees, who are elected pursuant to Section 21-13-8. The Board of Trustees is composed of seven members each residing from one of the seven school districts served by the College. See Luna Community College, Faculty Policy and Procedure Manual 3 (2006). These districts include: Las Vegas City School District, West Las Vegas, Maxwell, Mora, Santa Rosa, Springer, and Wagon Mound. See id.

In November 2010, the Board of Trustees adopted an anti-nepotism policy, which states in pertinent part:

5.11.2. The College shall not initially employ or approve the initial employment in any capacity of a person who is the relative of a current Board member, administrator, or employee of the College, except in limited circumstances.

5.11.3. The term "relative" is defined as a member of an individual's family, within the third degree, including anyone related by consanguinity, affinity or by virtue of having parented a child together. "Relative" shall include the following categories related to the individual by blood, by marriage or by virtue of having parented a child together: sibling, parent, grandparent, great-grandparent, and spouse,

biological parent of the individual's child(ren), child, step-child, grandchild, great-grandchild, uncle, aunt, nephew, and niece.

5.11.4. No individual shall be employed by the College where such individual is a Relative of, or engaged in a consensual cohabiting relationship with, the immediate supervisor of the position to be filled. Nor shall an existing employee be transferred or otherwise assigned to a department where a Relative or an individual engaged in a consensual cohabiting relationship with the employee would hold supervisory rank over the employee. Any violation of this policy, by virtue of a promotion, transfer or reassignment must be corrected within one (1) month through the transfer, reassignment, resignation or discharge of one or more of the related employees. Failure by an employee to disclose the presence of a Relative in a supervisory or subordinate position shall result in disciplinary consequences up to and including termination.

Luna Community College, Employee Handbook 26 (2010).

The Luna Community College is bound by the Governmental Conduct Act and the State's anti-nepotism statute

1. The Governmental Conduct Act

In 2011, the GCA was amended to extend its application to a broad array of government actors including elected or appointed officers of a local government agency. See Section 10-16-2(I). A "local government agency" is defined as "a political subdivision of the state or an agency of a political subdivision of the state." Section 10-16-2(G). Luna Community College is a political subdivision of the state. See N.M. Att'y Gen. Op. 06-01 (2006) (stating that technical and vocational schools (which includes community colleges), "like [public] school districts, are [] political subdivisions of the state and not part of the state's executive or judicial departments"). Accordingly, the College's officers and employees are covered by the GCA.

Section 10-16-3 of the GCA provides that:

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

C. Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

Section 10-16-4 of the GCA provides that "[i]t is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position." Here, "financial interest" is "an

interest held by an individual or the individual's family that [includes]...any employment or prospective employment for which negotiations have already begun." Sections 10-16-2(E), (F). An "official act" is "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority." Section 10-16-2(H).

2. The anti-nepotism statute

Section 10-1-10 (1925) mandates that:

It [is] unlawful for any person elected or appointed to any public office or position under the laws of this state or by virtue of any ordinance of any municipality thereof, to employ as clerk, deputy or assistant, in such office or position, whose compensation is to be paid out of public funds, any persons related by consanguinity or affinity within the third degree to the person giving such employment, unless such employment shall first be approved by the officer, board, council or commission, whose duty it is to approve the bond of the person giving such employment....

Because Luna Community College is a political subdivision formed under the laws of the state (see NMSA 1978, §§ 21-13-1 through -25), persons "elected or appointed" to any College office or position are covered by Section 10-1-10.

The Luna Community College's Nepotism Policy Comports with the GCA and Section 10-1-10

A comparison between the Luna Community College's anti-nepotism policy and state statutes addressing nepotism shows that the College's policy comports with and, in several respects, is more comprehensive than state law.

First, the College's anti-nepotism policy prevents the College from initially employing "in any capacity" a person who is a relative of *any* College board member, administrator or employee. In contrast, the state's anti-nepotism law only limits the authority of persons holding elected and appointed public positions to hire their own relatives. See Section 10-1-10. The GCA's prohibition applies to an even more limited class of public employees. As discussed above, the GCA prohibits a public officer or employee from taking an "official act" for the primary purpose of enhancing his or her "financial interest," which includes an employment interest held by the public employee or the employee's family. Accordingly, the GCA only prohibits a public officer or employee from hiring a family member if the employment resulted from the officer's or employee's "official act," i.e. the employment decision was left to the officer or employee's discretion, and was for the primary purpose benefiting the family member.

Second, the prohibitions in the College's policy and Section 10-1-10 cover a broad category of relatives, specifically, those who are related by consanguinity (blood) or affinity (marriage) within the third degree. This category extends beyond a person's immediate family (spouse, children, parents, siblings) to encompass relatives such as

great grandparents and great grandchildren. For purposes of the GCA, “family” is defined as “an individual’s spouse, parents, children or siblings, by consanguinity or affinity.” Section 10-16-2(E). Thus, unlike the College’s policy and state anti-nepotism statute, the GCA’s restrictions on the employment of relatives apply only to immediate family.

The final and most significant difference between the College’s policy and state law is its prohibition against the employment of an individual who is a relative of or in “a consensual cohabitating relationship” with a person who holds a supervisory position over the individual. Neither Section 10-1-10 nor the GCA prohibits, limits or otherwise addresses the employment of a person who is in a “consensual cohabitating relationship” with another government employee.

We are not aware of any law prohibiting Luna Community College from adopting a nepotism policy more stringent than required by the GCA or Section 10-1-10. In fact, the GCA specifically provides that “[n]othing in the [GCA] shall be construed to preclude a state agency or local government agency from adopting and publishing ordinances, rules or standards that are more stringent than those required by the [GCA].” Section 10-16-11.1. We therefore conclude that the College’s nepotism policy comports with state law.

Your request to us was for an Attorney General Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

CHARLES B. KRAFT
Assistant Attorney General