

**May 12, 2011 Advisory Letter-Questions addressed surrounding the termination
of a County Manager**

May 11, 2011

The Honorable John M. Sapien
New Mexico State Senator
1600 West Ella Drive
Corrales, NM 87048

Re: Opinion Request – County Manager Contract

Dear Senator Sapien:

You requested our advice regarding recent actions by the Sandoval County Board of County Commissioners (“Board”) that culminated in the termination of the County Manager. In particular, you ask:

- (1) If a county commission allows for telephonic appearances at its meetings, does such an appearance extend to closed sessions?
- (2) If telephonic appearances at closed sessions are allowed, what level of security is required?
- (3) If a county commission approves, adopts and enters into a contract for a county manager, and such contract requires semi-annual evaluations, can the commission hold a performance evaluation without the county manager being present?
- (4) If the county commission holds such a performance evaluation in closed session and it is improper, what are the remedies and time limits appropriate for such remedies?
- (5) If the county commission violates the Open Meetings Act by conducting such an evaluation for a contract employee, what are the remedies and time limits appropriate for such remedies?
- (6) If a county commission enters into a contract for a county manager that requires a “supermajority vote of the full Board of County Commissioners” to terminate, what are the number of votes required to form such a supermajority of the commission where NMSA 1978, Section 4-38-2 states that “for a five-member board, three members constitute a quorum for the purpose of transacting business?”
- (7) If the county commission votes to terminate such contract by a vote of three in favor and two against, does such vote count as a supermajority?
- (8) If the county commission terminates such contract and it is improper, what are the remedies and time limits appropriate for such remedies?

As discussed below, we conclude generally that a member of a county commission may appear at a closed meeting by telephone, state law does not preclude a county commission from conducting a county manager's performance evaluation in closed session without the county manager's presence, and, as commonly understood, a supermajority of a five-member commission would be four or more of the commission's members.

Before discussing your specific questions, we note that the Attorney General is limited by statute to:

giv[ing] his opinion in writing upon any question of law submitted to him by the legislature..., any state official..., or any district attorney on any subject pending before them or under their control with which they have to deal officially or with reference to their duty in office.

NMSA 1978, § 8-5-2(D) (1975) (emphasis added). This provision authorizes the Attorney General to provide legal opinions regarding the proper interpretation of state law. In contrast to a court or a jury, the Attorney General has no authority to act as a fact finder or to determine questions of fact.

Consistent with the Attorney General's statutory authority, we will address those issues you raise that can fairly be characterized as questions of law. Questions that require a factual determination are outside the scope of our authority, including those regarding the proper interpretation of the contract between the Board and the County Manager and the parties' intent at the time they entered into the contract.

According to your request, the full five-member Board held a regular meeting on April 7, 2011. Four of the members appeared in person and one member participated by telephone. During the meeting, the Board went into closed session to discuss the "Performance Evaluation of the County Manager," which was required under the County Manager's contract. The Board requested that the County Manager and Interim County Attorney leave the conference room during the closed session. When the Board convened back into open session, the Board chair reported that the performance evaluation had been discussed and no action had been taken.

The Board then turned to the next item on the agenda, which was listed as "Discussion and Motion to Vote on Contract for County Manager." A motion was made to terminate the contract. The discussion on the motion included a provision in the contract requiring a supermajority vote of the Board to terminate the contract. The Board's vote on the motion to terminate the contract was three in favor and two against. The Interim County Attorney advised the Board that the vote did not meet the contract's requirement for a supermajority vote. Nevertheless, the Board determined that the 3-2 vote was sufficient to terminate the County Manager's contract.

For purposes of addressing your questions, we have divided them into three topics. Questions 1-2 relate to a county commissioner's telephonic participation in a closed

meeting. Questions 3-5 relate to a county manager's participation in his or her performance evaluation. Questions 6-8 relate to the number of votes needed to qualify as a supermajority.

1. Participation in a Closed Meeting by Telephone.

The Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4 (as amended through 2009), permits a member of a public body "[i]f otherwise allowed by law or rule of the public body" to "participate in a meeting of the public body by means of a conference telephone or similar communications equipment...." Id. § 10-15-1(C). A member may participate in a meeting by telephone only if it is "difficult or impossible for the member to attend the meeting in person...." Id.

The term "meeting" is not qualified in Section 10-15-1(C) or elsewhere in OMA for purposes of a member's participation by telephone. OMA generally applies to all meetings of a public body, open or closed. OMA excepts a properly closed meeting only from the requirements for open, public meetings and written minutes. See NMSA 1978, § 10-15-1(H). Nothing in OMA expressly or impliedly limits a member's otherwise proper telephonic participation to open meetings of the public body. Consequently, unless a county commission's rules state otherwise, a member of the commission may appear by telephone at meeting, including closed sessions, provided the commission complies with the applicable requirements of OMA.

State law is silent regarding the proper level of security required for a member's participation in a closed session by telephone. The necessary level of security, if any, when a member participates in a closed meeting by telephone is left to the reasonable discretion of the commission.

2. Presence of County Manager During Performance Evaluation

Among the topics OMA permits a public body to discuss in a closed meeting are "limited personnel matters." NMSA 1978, § 10-15-1(H)(2). For purposes of OMA, "limited personnel matters" means discussion of hiring, promotion, demotion, dismissal, assignment or resignation of or the investigation or consideration of complaints or charges against any individual public employee...." A public body's final actions on personnel must be taken in open session. See id. The Attorney General's Office has interpreted the limited personnel matters exception to allow a public body to conduct employee performance evaluations in closed session. See N.M. Attorney General's Open Meetings Act Compliance Guide, p. 21, Example 40 (7th ed. 2010).

OMA does not address or govern the procedures a public body follows to conduct a performance evaluation, including whether the public body can conduct a performance evaluation in the absence of the affected employee. In general, OMA does not address whether and when it is proper for a public body to permit the presence of persons other than the public body's members during a closed meeting. See OMA Guide, p. 33. Accordingly, we conclude that OMA does not prohibit a public body from conducting or

discussing an employee's performance evaluation in a closed session without the participation of the employee.

Our conclusion on this issue is limited to the application of OMA. The propriety of the Board's decision to exclude the County Manager from its closed discussion of the County Manager's performance evaluation depends on all the specific facts and circumstances, including the terms of the County Manager's contract and the County's rules and policies. As discussed above, these matters are outside the scope of our statutory authority to provide advice.

3. Supermajority Vote

State law provides that "a board of county commissioners shall consist of either three or five qualified electors" and "[f]or a five-member board, three members constitute a quorum for the purpose of transacting business." NMSA 1978, § 4-38-2(A) (2002). This statutory provision permits a five-member county commission to take action and conduct business if at least a quorum of three members is present at a meeting.

Your request posits a contract for county manager that may be terminated with a "supermajority vote of the full Board of County Commissioners." For purposes of this letter, we assume that this provision of the contract would apply if the county commission decided to terminate the county manager's contract before the end of the contract's term.

Section 4-38-2(A) generally permits a five-member board of county commissioners to conduct business with a minimum of three members. Although Section 4-38-2(A) describes a quorum of a county commission, it does not require that the quorum act by a majority vote or otherwise specify the number of votes necessary for the quorum to take action. We do not believe that Section 4-38-2(A) necessarily precludes a county commission from entering into a contract requiring the participation of more than three members to terminate the contract before the end of the contract term.

As commonly understood, the term "majority" means "[a] number that is more than half of a total." Black's Law Dictionary 966 (7th ed. 1999). See also Webster's Third New Internat'l Dictionary 1363 (unabridged 1986) (defining "majority," in pertinent part, as "a number greater than half of a total"). Without more, the term "majority" usually means a simple majority or one more than half of a total. See Webster's Third New Internat'l Dictionary 1363 (defining "majority rule" as a "political principle providing that a majority usu. constituted by fifty percent plus one of the members of a politically organized group shall have the power to make decisions binding upon the whole group"). A "supermajority" is "a majority substantially greater than 50%." Black's Law Dictionary 966.

Although New Mexico law does not define "majority" or "supermajority" vote, statutory provisions governing the voting process by various public bodies are consistent with the common understanding of the terms. For example, the Municipal Code provides that

“[u]nless otherwise provided by law, a question before the governing body [of a municipality] shall be decided by a majority of vote of the members present.” NMSA 1978, § 3-12-2(C). The mayor is not counted when determining the number of votes needed for purposes of “a requirement that a certain fraction or percentage of the members of the entire governing body ... or other similar language other than the requirement of a simple majority vote for the measure....” *Id.* § 3-12-2(E). Under these provisions, a requirement for a vote of a percentage of the entire governing body other than a simple majority vote would be a supermajority vote. See also NMSA 1978, § 73-27-6 (2010) (requiring “the affirmative vote of at least a majority of a quorum [of the seven-member Eastern New Mexico Water Utility Authority Board] present ... for any action to be taken” except for specified non-delegable duties which “shall only be effective upon resolution passed by a supermajority of five members of the board”).

In the situation you describe, and based on the common understanding of the terms “majority” and “supermajority,” a majority of a five-member county commission would be any number greater than one-half of the board’s members. A simple majority would consist of three members and a supermajority would consist of at least four members. A requirement for a “supermajority vote of the full Board of County Commissioners” would require the affirmative vote of at least four of the five members of the commission.

Our discussion regarding the term “supermajority vote” in the County Manager’s contract is not intended to show that the Board acted unlawfully or improperly when it terminated the contract on a 3-2 vote. As discussed above, this office is not authorized to provide a conclusive or binding opinion regarding the proper interpretation of the terms employed in a county’s contract. Although the term “supermajority vote” has a common meaning, as discussed above, whether the Board properly applied the supermajority vote requirement in its contract with the County Manager depends on the understanding and intention of the parties to the contract. It is possible that the parties intended a meaning of the term that differs from common usage. If so, that intention likely would control in the interpretation of the contract. See, e.g., Manuel Lujan Insur., Inc. v. Jordan, 100 N.M. 573, 575, 673 P.2d 1306 (N.M. 1983) (“[t]he central objective in construing a contract is to ascertain and give effect to the intentions of the parties”).

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's 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,

ELIZABETH A. GLENN
Deputy Attorney General