

## May 4, 2012 Advisory Letter---Service on Community College Board

The Honorable Cisco McSorley  
New Mexico State Senator  
415 Wellesley Place NE  
Albuquerque, NM 87106

**Re:** Opinion Request - Service on Community College Board

Dear Senator McSorley:

You have requested our opinion regarding the issue of eligibility of employees or students to serve on a community college board of education. Specifically, you would like to know whether a member of the Central New Mexico Community College ("CNM") governing board can be an employee or student of the college at the same time. Based upon our examination of the relevant New Mexico statutes, opinions and case law authorities, and on the information available to us at this time, we conclude that state law prohibits CNM employees from serving on the CNM Board because the two positions are functionally incompatible. On the other hand, a student, not currently employed by CNM, is permitted to serve on its governing board.

According to your opinion request, CNM officials have taken the position that NMSA 1978, Section 22-5-5(B) prohibits a person employed by the college from serving on the governing board. As you point out, Section 22-5-5(B) falls within the Public School Code. See NMSA 1978, § 22-1-1 (1967). The Community College Act, NMSA 1978, Sections 21-13-1 to -26 (1963), governs community colleges. The Public School Code, including Section 22-5-5(B), does not apply to CNM.

The Community College Act sets the minimum requirements for service on the CNM Board. It states, "Community college board members shall be over twenty-one years of age, qualified electors and residents of the community college district." NMSA 1978, § 21-13-8(A) (1963, as amended through 2008). The Community College Act is silent as to whether a Board member can be an employee of the college district. Therefore, we must look to other relevant New Mexico statutes and case law.

State law bars a public officer or employee from holding two positions when there is a (1) physical incompatibility between the two positions or (2) functional incompatibility. Physical incompatibility exists when a public employee is deemed to have abandoned the public office or position. See NMSA 1978, § 10-6-5 (1979). This occurs when the public officer or employee accepts another paid public or private employment position and "by reason of such other ... employment fail[s] for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment." See NMSA 1978, § 10-6-3 (1943).

Based on the information available to us at this time, physical incompatibility does not appear to be a relevant consideration for students or employees in this matter. The position of "student" is not an "employment" position for purposes of the statutory prohibition against holding physically incompatible offices or employment. Thus, the statute does not preclude a CNM student from serving on the CNM Board. It is possible, but unlikely, that the position of CNM employee would be physically incompatible with service on the CNM Board. A CNM employee would have a physical conflict with service as a CNM Board member only if the employee's duties caused the employee to fail to devote sufficient time to the duties of a Board member for thirty consecutive days, or vice versa.

In contrast to physical incompatibility, functional incompatibility is a non-statutory, common law doctrine. It exists where there "is an inconsistency in the functions of the two offices, as where one is subordinate to the other, or where a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both." *Haymaker v. State ex rel. McCain*, 22 N.M. 400, 403-404, 163 P. 248, 249 (1917). In *Haymaker*, the New Mexico Supreme Court concluded that the positions of school board member and clerk for the board were incompatible where the board hired and set the salary of the clerk. *Id.* at 405, 163 P. at 249.

Under NMSA 1978, Section 21-13-10(A), a community college board, "upon the president's recommendation, ... shall *employ* other administrative personnel, instructional staff or other personnel as may be needed for the operation, maintenance and administration of the community college" (emphasis added). The plain language of the Community College Act indicates that the Board makes the final employment decisions for the College. Thus, the position of CNM employee and CNM board member appear to be functionally incompatible and present a conflict of interest. This conclusion is consistent with *Haymaker* and with our previous opinions. For example, in Att'y Gen. Op. No. 6456 (1956), we concluded that the positions of county hospital board member and hospital employee were incompatible because state law empowered the hospital board with the authority to employ, set compensation and discharge hospital employees. Similarly, in Att'y Gen. Op. No. 76-39 (1976), we concluded that a county commission could not appoint one of its own members to the board of trustees of the county hospital because one office has the power of appointment and removal over the other.

The case of a student Board member is different. The Board is charged with setting the education policies of the college. NMSA 1978, § 21-13-10(A). A review of CNM's disciplinary policy indicates that the board itself does not directly exercise supervisory authority over students.<sup>1</sup> Student discipline is the responsibility of the vice president for student services for non-academic discipline and the vice president for instructional services for academic discipline.<sup>2</sup> Because, unlike employees, students are not subject to the direct supervision of the Board, we conclude there is no functional incompatibility between the positions of CNM student and CNM board member. Therefore, absent any CNM Board policy to the contrary, a student not employed at the college may serve on the board.<sup>3</sup>

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 general public.

Very truly yours,

MARK REYNOLDS  
Assistant Attorney General

1 CNM's Governing Board Handbook, Section 6.04, states: "The President and administrative staff shall develop appropriate procedures, including an appeal process, to be followed in suspending or dismissing students for substance abuse or disruptive behavior. The procedures shall be included in an official CNM publication" (available at <http://www.cnm.edu/gov/handbook/sec6/index.php#6.04>)

2 CNM Student Code of Conduct: 2008-2009, Section II (available at <http://www.cnm.edu/depts/deanstud/downloads/0809StudentCodeOfConduct.pdf>)

3 A student serving on the CNM Board, like all board members, should consult the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18, and CNM legal counsel before voting on any matter that presents a potential conflict of interest.