

## November 21, 2014 Advisory Letter — Opinion Request – Parole Board Member Conflicts

Sherry Stephens, Director  
New Mexico Adult Parole Board  
45 Penitentiary Road  
Santa Fe, NM 87508

**Re:** Opinion Request – Parole Board Member Conflicts

Dear Ms. Stephens:

You have asked our opinion on potential conflicts arising when an Adult Parole Board (“Board”) member who has had previous personal or professional contacts with an inmate sits on the three-member panel that evaluates the inmate at a parole hearing. Based on our legal review and analysis, we conclude that if an actual conflict exists between a Board member and an inmate appearing before a panel, the Board member should be excused from participating in any hearing involving that inmate.

The Board is created under the Parole Board Act (“Act”), NMSA 1978, Sections 31-21-1 to -26. The fifteen members are appointed by the Governor, with the approval of the Senate, and serve terms of six years. § 31-21-24(A), (B). The Act requires that Board members have “academic training or professional experience ... to serve as members of the board.” § 31-21-24(D). Further, no member of the Board shall be “an official or employee of any other federal, state or local government entity.” *Id.* Parole matters are decided by a panel of three board members appointed on a rotating basis by the chair of the Board. § 31-21-24(G). A decision by a majority vote of two board members is required to grant, deny, revoke a parole, set parole conditions or approve a parole plan. If only two board members are present at any hearing and a tie vote results, then the matter is deferred and resubmitted to the full Board for a decision. NMAC 22.510.9.8.

Due to the statutorily required academic training or professional experience for membership on the Board, it is possible for a conflict to exist between a Board member and an inmate appearing before the Board. According to your request, the membership of the Board currently consists of:

- a. Two retired Victim Advocates from the District Attorney’s Office;
- b. Three retired persons from New Mexico Probation and Parole;
- c. Two persons from the U.S. Probation and Parole;
- d. Three retired Police Officers;
- e. Two persons with no previous experience with criminal matters; and

f. The Executive Director of La Piñon Sexual Assault Recovery Service.

Board members are public officials and, therefore, subject to the Governmental Conduct Act (“GCA”), NMSA 1978, §§ 10-16-1 to -18. Board members must disclose any real or potential conflicts that arise during the performance of their duties as Board members. Section 10-16-3(A) of the GCA requires a public official to use his or her position only to “advance the public interest and not for personal benefit.” Further, subpart (C) of Section 10-16-3 requires a public officer to make “[f]ull disclosure of any real or potential conflicts of interest.” These provisions suggest that should a Board member appointed to a panel reviewing an inmate’s parole have a conflict with that inmate appearing before the panel, the easiest solution would be to have that Board member recuse himself from the panel.

The Act requires the Board to evaluate and determine whether granting parole is “in the best interest of society and the inmate.” § 31-21-10(A)(3). During these deliberations, the inmate is entitled to procedural due process under the Fifth and Fourteenth Amendments of the U.S. Constitution. As stated in Reid v. New Mexico Bd. of Optometry:

At minimum, a fair and impartial tribunal requires the trier of fact to be disinterested and free from any form of bias or predisposition regarding the outcome of the case. ... The inquiry is not whether the Board members are actually biased or prejudiced, but whether, in the natural course of events, there is an indication of a possible temptation to an average man sitting as a judge to try the case with bias for or against any issue presented to him.

1979-NMSC-005, ¶ 7, 92 N.M. 414 (citations omitted).

The Reid court went on to say that while this procedure has traditionally been applied to the judicial process, it is “imperative” that agencies also use the same procedures. Id. at ¶ 8.

Because of the similarities between the judicial and administrative hearing processes noted in Reid, it is useful to look to the rules governing judicial conduct for guidance on potential conflicts. Specifically, under the New Mexico Constitution, Article VI, § 18, judges should not sit in a case if one of four conflicts arises: (1) the judge is related to a party; (2) the judge was a lawyer in the case at an earlier stage of the proceedings; (3) the judge presided over the case at a lower level court; or (4) the judge has an interest in the case. A judge may also be disqualified from a case if there is a personal bias or prejudice against a party. New Mexico has adopted the reasoning from the Supreme Court of the United States in U.S. v. Grinnell Corp., 384 U.S. 563 (1966), which stated “[t]he alleged bias to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case.” Id. at 583.

Applying this analysis to the Board, a conflict that would justify excusing a Board member from participating on a panel would concern interactions with an inmate, personal or professional, outside the parole hearing. An example of conflicting interests would be if a Board member is a retired parole officer who reported a parolee for violating the terms of parole, and now that same inmate is before the panel that is to decide whether to grant parole again. Other examples might include parole hearings where the Board member was related to the inmate, had been the arresting officer in an incident involving the inmate, or had advised a victim of a crime involving the inmate.

If we may be of further assistance, please let us know. Your request was for a formal opinion on the matter discussed above. Such an opinion would be available to the general public. Although we are providing you our legal advice in the form of this letter instead of a formal Attorney General's Opinion, 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,

Mona Valicenti  
Assistant Attorney General