

Opinion 07-06

December 17, 2007

OPINION OF: GARY K. KING, Attorney General

BY: Elizabeth A. Glenn, Assistant Attorney General

TO: The Honorable John Arthur Smith, New Mexico State Senator, Legislative Finance Committee Chair, 325 Don Gaspar, Suite 101, Santa Fe, NM 87501

QUESTION:

Is it appropriate for state universities to contribute to the state salaries of cabinet officers appointed by the Governor?

CONCLUSION:

Contributions by state universities to executive department officer salaries are consistent with the New Mexico Constitution only if the legislature appropriated the contributions for that purpose or if the contributions are paid in exchange for services the cabinet officers perform for the universities. Even if the contributions are constitutional, the state universities' employment of cabinet officers whose agencies oversee activities of the universities raises conflict-of-interest concerns, including under the Governmental Conduct Act, NMSA 1978, ch. 10, art. 16 (1967, as amended through 2007), which may require the cabinet officers to relinquish their university positions.

FACTS:

At the time this request was presented, The University of New Mexico ("UNM") was paying a substantial portion of the state salaries of the Secretary of Higher Education Reed Dasenbrock and Secretary of Health Alfredo Vigil. New Mexico State University ("NMSU") was paying the entire state salary of the Deputy Secretary of Higher Education William Flores. In response to press inquiries, the universities contended that their contributions to the cabinet officials' salaries were, in reality, payments to those officials for services they have performed or were performing for the universities.

ANALYSIS:

1. Appropriations for State Officer Salaries

Nothing in New Mexico law squarely prohibits state universities from contributing to the salaries of state officers and employees. Nevertheless, their authority to contribute is limited by the legislature's exclusive powers under the state constitution to appropriate money and to specify the purposes for which appropriated money is spent. See N.M.

Const. art. IV, § 30; *State ex rel. Schwartz v. Johnson*, 120 N.M. 820, 821, 907 P.2d 1001, 1002 (1995).

Legislative control over money donated or contributed to the state is ensured by statutes governing public money, which provide that, with certain exceptions not pertinent here:

All public money in the custody or under the control of any state official or agency obtained or received by any official or agency from any source ... shall be paid into the state treasury. It is the duty of every official or person in charge of any state agency receiving any money ... for or on behalf of the state or any agency thereof from any source ... to forthwith and before the close of the next succeeding business day after receipt of the money to deliver or remit it to the state treasurer.

NMSA 1978, Section 6-10-3 (2003).[1] Once in the state treasury, money may be paid out “only upon appropriations made by the legislature” that “distinctly specify the sum appropriated and the object to which it is to be applied.” N.M. Const. art. IV, § 30.

State officer salaries in particular are further limited by Article XX, Section 9, which provides: “No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever except the salary provided by law.” Thus, state officers may not receive compensation, from any source, for performing their official duties in addition to that appropriated and approved by the legislature. See *Hanagan v. Board of County Comm’rs*, 64 N.M. 103, 105, 325 P.2d 282, 283 (1958) (holding that Art. XX, § 9 precludes district attorneys “receiving fees or compensation other than the salary provided by law for services rendered the counties of their district[s]”).

Article XX, Section 9 is intended to prohibit state officers from obtaining double pay for their official duties. It does not prohibit a state officer from holding another position in addition to the state office. If a state officer held another office or employment position in addition to the state office, Article XX, Section 9 would not preclude the state officer from receiving appropriate compensation for the other office or position. See N.M. Att’y Gen. Op. No. 152 (1933) (adjutant-general of state who was also a brigadier-general of the national guard was, when called to duty as a national guard officer, entitled to pay both as adjutant-general and as officer of the guard).

To avoid violating Article XX, Section 9, the state universities’ contributions to the cabinet officers’ salaries must have been either appropriated for that purpose by the legislature or paid as compensation for the officer’s services to the universities. It appears unlikely that the legislature included the universities’ contributions in its appropriation for the cabinet officers’ salaries. Possibly for this reason, the universities have characterized their contributions to the cabinet officers’ state salaries as payments for services the officers separately have provided or are providing to the universities. Specifically, we understand that UNM’s contribution of \$60,000 to the Secretary of

Health is in exchange for his duties as a faculty member for UNM's medical school; UNM's contribution of \$99,750 to the Secretary of Higher Education represents severance pay or a paid sabbatical the Secretary was entitled to under his provost contract when he left UNM to assume his cabinet post; and NMSU is paying the Deputy Secretary of Higher Education's entire salary of \$220,000, the same amount he earned as provost, in exchange for his services as a tenured faculty member of NMSU. If the universities' can demonstrate that their contributions to the cabinet officers' salaries are paid to the officers in return for the officers' services to the universities, the contributions may be constitutionally permissible.

2. Conflict of Interest

Even if they pass constitutional muster, the universities' contributions to the cabinet officers' salaries raise conflict-of-interest questions because of the officers' close ties to the participating state universities. These concerns are heightened with respect to Secretary Vigil and Deputy Secretary Flores, who allegedly received their contributions in exchange for services the officers provided to the universities.[2] At the same time they were being paid by the universities, these cabinet officers were heading state agencies with significant review and oversight responsibilities with respect to the universities. The Department of Health licenses and regulates health facilities, including UNM Hospital, under the Public Health Act. See NMSA 1978, § 24-1-5 (2005). The Department of Higher Education has extensive review and approval authority over the finances, budgets and programs of state educational institutions, including NMSU. See, e.g., NMSA 1978, §§ 21-1-26, 21-1-26.3, 21-1-26.7, 21-1-26.9 to -12, 21-1-27 to -27.4, 21-1-32 to -33.[3] These oversight responsibilities implicate state laws prohibiting incompatible employment and may prevent Secretary Vigil and Deputy Secretary Flores from retaining their university positions while they serve as cabinet officers.

A. Incompatible Employment

State statutory and common law principles preclude a state officer from holding another employment if the two positions are physically or functionally incompatible. A position is deemed physically incompatible with a state office if the position causes the officer to fail for at least 30 successive days to perform the duties of the state office during ordinary working hours. NMSA 1978, §§ 10-6-3, (1943), 10-6-5 (1979). A state officer who holds another physically incompatible employment position is deemed to have abandoned the state office. *Id.* § 10-6-3.

The statutory prohibition against physically incompatible employment is rarely an insurmountable barrier to dual employment by state officers. In previous opinions, the Attorney General's Office has advised that a state officer who is also employed by a public educational institution may properly retain both positions by taking necessary leave. See N.M. Att'y Gen. Op. No. 06-01 (2006) ("AG Op. No. 06-01") (office of state legislator was not physically incompatible with the position of Luna Technical-Vocational Institute president if the Institute granted the president a leave of absence during legislative sessions); letter from Assistant Attorney General David A. Stevens to State

Senator Linda M. Lopez (Mar. 8, 2005) (Secretary of Indian Affairs' state office and his employment with UNM were not physically incompatible, assuming Secretary took an appropriately-granted leave of absence from UNM).

Assuming that an employment position held by a state officer is not physically incompatible with the office, the state officer may still be precluded from serving in both positions if they are functionally incompatible. Functional incompatibility is a common law doctrine. It exists when the functions of two positions are inconsistent, "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*, 22 N.M. 400, 403-04, 163 P. 248, 249 (1917) (quoting *People v. Green*, 58 N.Y. 295). In *Haymaker*, the New Mexico Supreme Court held that the same person could not be both a member of a school board and its clerk where, as a board member, she had voted herself into the clerk's position, fixed her salary as clerk and approved warrants for payment of her salary.

As described above, the Secretary of Health and Deputy Secretary of Higher Education administer agencies with significant licensing and oversight authority over the universities that employ them. Under these circumstances, the cabinet officers could encounter a "contrariety and antagonism" in attempting to fairly and impartially discharge the duties of their state and university positions. In both cases, each position could cause some benefit to accrue to the other. The Secretary of Health's interest in his faculty position with UNM's medical school could easily diverge from his interest, as Secretary of Health, in effectively handling matters affecting UNM Hospital's license to operate as a health facility. Similarly, the Deputy Secretary of Higher Education's employment and affiliation with NMSU are potentially at odds with his Department's ability to make unbiased decisions concerning NMSU's budget and programs.

These conflicts and the potential for divided loyalties suggest that the functions of the cabinet and university positions at issue here are incompatible and the positions should not be held by the same person. Cf. AG Op. No. 06-01 (no functional incompatibility between positions of legislator and president of technical-vocational institute because the legislature had no authority to oversee the activities of technical-vocational districts or to supervise, hire or discharge district officers and personnel, including the president).[4] Our conclusion is supported by recent amendments to the Governmental Conduct Act, as discussed below.

B. Governmental Conduct Act

The Governmental Conduct Act generally regulates financial conflicts of interest involving state officers and employees. The Act begins with ethical principles of public service requiring that state officers and employees treat their positions as a public trust, act in the public interest and do not use their positions to obtain personal or private benefits. NMSA 1978, § 10-16-3 (2007). These broad principles are followed by provisions that prohibit or regulate specific activities by state officers and employees that are clearly inconsistent with ethical public service.

In 2007, the Act was amended to prohibit certain functionally incompatible positions. See 2007 N.M Laws, ch. 362, § 8 (to be codified at NMSA 1978, § 10-16-13.2). The Act now provides, in pertinent part:

A public officer or employee shall not accept from a person over whom the public officer or employee has regulatory authority an offer of employment or an offer of a contract in which the public officer or employee provides goods, services, construction, items of tangible personal property or other things of value to the person over whom the public officer or employee has regulatory authority.

NMSA 1978, Section 10-16-13.2(E).

Section 10-16-13.2 prohibits, without qualification, a state officer from holding other employment if the officer has regulatory authority over the other position. As discussed above, the agencies headed by the Secretary of Health and the Deputy Secretary of Higher Education have significant oversight responsibilities with respect to UNM and NMSU. We believe that, under Section 10-16-13.2, those responsibilities preclude the Secretary of Health's employment with UNM and the Deputy Secretary of Higher Education's employment with NMSU.

We are confident that the cabinet officers are extremely competent and ethical individuals who are capable of serving without letting their state positions unduly influence them in their university employment and vice versa. Even so, we are concerned that the concurrent holding of a cabinet office and a position with a university regulated, to any degree, by the office raises the very conflict of interest issues addressed by the Governmental Conduct Act. This appearance of impropriety alone would lead us to encourage the Secretary of Health and Deputy Secretary of Higher Education to give up their university positions while they hold state office. We are even more convinced that this is the proper course in light of the contributions the universities reportedly have made to the officers' state salaries.[5]

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[1] "Public money" is money received by or otherwise made available to a state government officer, employee or entity. See *State v. Hearne*, 112 N.M. 208, 212, 813 P.2d 485 (Ct. App.) ("[i]n New Mexico, as a matter of law, funds made available to the University [of New Mexico] become public funds to be expended consistently with all of the regents' applicable legal duties, regardless of the original source of the funds"), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991).

[2] We understand that the Secretary of Higher Education Reed Dasenbrock is not on UNM's payroll during his tenure as a cabinet officer. Since he is not holding another

position simultaneously with his state office, the conflict-of-interest concerns raised by dual public employment are not present.

[3] The Department of Higher Education's authority to review and approve the universities' budgets potentially would include amounts NMSU budgeted for contributions to the Deputy Secretary Flores' salary and for amounts to pay the Deputy Secretary's salary as an employee of NMSU.

[4] Because the conflicting interests of the cabinet officers in their state offices and in their university positions are significant and intrinsic, we do not believe that they can be effectively addressed by walling the cabinet officers off from matters that might affect the universities that employ them. *Cf. Amador v. New Mexico State Bd. of Educ.*, 80 N.M. 336, 455 P.2d 840 (1969) (positing that a teacher that also served on the state board of education could abstain from voting to avoid incompatibility between the positions that would exist only if the teacher appealed an adverse decision by the local school board).

[5] We understand that the Governor's Office and the universities have taken steps, consistent with this opinion, to address the constitutional and conflict-of-interest problems stemming from the cabinet official's compensation and employment arrangements.