



NEW MEXICO STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-02

February 5, 2021¹

QUESTION PRESENTED

The requester is a member of the legislature and serves as a volunteer member on the board of directors of a nonprofit organization that assists victims of sexual assault and advocates on their behalf. The nonprofit organization receives contract and grant money from federal, state, and local governments. How should the requester and the non-profit organization “handle any [of the nonprofit’s] applications for state funds?” Additionally, the request asks whether a legislator may vote on legislation on sexual assault laws and appropriations for programs helping victims of sexual assault.

ANSWER

The Governmental Conduct Act does not prohibit a legislator from sitting on the board of a nonprofit organization that receives state contracts or grants. Article IV, Section 28 of the New Mexico Constitution, however, prohibits the nonprofit organization from seeking a contract with the state during the legislator’s term and for one year after the end of the legislator’s term if the contract is authorized by legislation passed during the legislator’s term.

May the requester vote on legislation on sexual assault laws and appropriations for programs helping victims of sexual assault? As a general matter, yes. But the GCA and Article IV, Section 28 could be implicated depending on the specific provisions contained in the legislation.

¹This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory opinion. NMSA 1978, § 10-16G-8(C).

ANALYSIS

The request asks two questions: (1) how should the non-profit organization handle its applications for state funds?; and (2) may a legislator vote on legislation that affects the nonprofit's work, such as legislation on sexual assault laws or appropriations for programs assisting sexual assault victims? In answering these questions, the Commission provides an overview of how relevant ethics laws and constitutional provisions apply to legislators who serve on the boards of nonprofits which have contracts with state and local governments. The Commission then applies those laws to the specific questions raised by the request.

I. Overview of applicable ethics laws and constitutional provisions

The Government Conduct Act (GCA), NMSA 1978, Sections 10-16-1 to -18 does not prohibit a legislator from serving on the board of a nonprofit that holds contracts with the state, but may apply to a legislator's votes on legislation directly affecting the nonprofit or to a legislator's representation of the nonprofit before state agencies. Separately, Article IV, Section 28 of the New Mexico Constitution might prohibit a nonprofit from entering into contracts authorized by laws passed during the legislator's term of office.

A. GCA

Unpaid membership on the board of directors of a nonprofit is not a financial interest subject to disclosure or regulation under the GCA. *See* § 10-16-2(F) (defining "financial interest" as "an ownership interest in business or property" or "any employment or prospective employment for which negotiations have already begun"); *see also* § 10-16-2(D) (defining "employment" as "rendering of services for compensation in the form of salary as an employee").²

While a legislator is not prohibited from holding membership on the board of a nonprofit, the GCA sets out guidelines that a legislator should consider in assessing whether to recuse from votes that might impact the nonprofit on whose board they serve:

- A legislator may not use "the powers and resources of public office" to "obtain personal benefits or pursue private interests." § 10-16-3(A).

²For similar reasons, nonprofit board membership is not subject to regulation under the Financial Disclosure Act, NMSA 1978, Sections 10-16A-1 to -8. *See* NMSA 1978, § 10-16A-2(C) (adopting GCA definition of "financial interest"). And although the Procurement Code defines "financial interest" to include board membership on a nonprofit organization, *see* § 13-1-57(A), its restrictions on conflicted transactions apply only to employees of state agencies involved in procurement. *See* §§ 13-1-190 & 13-1-194.

- A legislator must make full “disclosure of real or potential conflicts of interest,” and at “all times reasonable efforts shall be made to avoid undue influence and abuse of office in public service.” § 10-16-3(C).
- A legislator may not receive money or the promise thereof that is conditioned upon or given in exchange for promised performance of an official act, *see* § 10-16-3(D), where an “official act” means “an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority,” § 10-16-2(H).
- “A legislator shall not appear for, represent or assist another person in a matter before a state agency, unless without compensation or for the benefit of a constituent, except for legislators who are attorneys or other professional persons engaged in the conduct of their professions and, in those instances, the legislator shall refrain from references to the legislator’s legislative capacity except as to matters of scheduling, from communications on legislative stationery and from threats or implications relating to legislative actions.” § 10-16-9(B).

The facts in the request are not detailed enough to say whether the legislator’s votes on pending legislation or work for the nonprofit implicates these statutory provisions. But it is worth noting that these provisions may require disclosure, *see* § 10-16-3(B), and possibly recusal, *see* § 10-16-3(A), if the legislator is asked to vote on legislation that may result in a direct benefit to the nonprofit on whose board the legislator serves. Although the request indicates that the legislator may vote on legislation amending sexual assault laws and increasing state funding for programs that help victims of sexual assault, analysis of whether the GCA permits the legislator to vote on this legislation turns on the specific legislation in question and whether it would result in a direct financial benefit to the nonprofit.

The request indicates that the legislator’s work for the nonprofit is unpaid, and as a result the legislator generally may represent the nonprofit in its dealings with state agencies. When conducting such representation, however, the legislator should avoid making reference to the legislator’s official status outside of matters related to scheduling or using legislative stationery in dealings involving the nonprofit. *See* § 10-16-9(B).

B. Article IV, Section 28 of the New Mexico Constitution

Article IV, Section 28 of the New Mexico Constitution provides:

No member of the legislature shall, . . . during the term for which he was elected nor within one year thereafter, be

interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

According to the request, the nonprofit on whose board the legislator sits holds some contracts with state and local governments. These contracts may be prohibited if (1) they were entered into during the legislator's term of office and for one year after the end of that term; (2) they were authorized by legislation passed during the legislator's term; and (3) the legislator has a direct or indirect interest in the contract.

Even though the legislator is not paid for serving on the board of the nonprofit, the membership alone is likely sufficient to confer an "indirect" interest in contracts between the nonprofit and government agencies. In a thorough opinion on this issue which the Commission finds persuasive, the Attorney General's office found that a legislator's membership on the board of a nonprofit could constitute a prohibited "indirect" interest in a government contract because by "actively participat[ing] in the affairs of the organization," the legislator has an implied interest in the welfare of that organization that could conflict with the legislator's duty to exercise the powers of legislative office only in furtherance of the public trust. *See* Attorney General Opinion No. 90-17 (1990).

But just because a legislator may have an indirect interest in a contract between a nonprofit and a government entity does not mean that the contract is a prohibited emolument under Article IV, Section 28. To perform that analysis, the Commission would need to know the effective date of the contracts and consider whether they were "authorized" by a law passed during the legislator's term. *See State ex rel. Baca v. Otero*, 1928-NMSC-021, ¶ 11, 33 N.M. 310 (stating that an appropriation for a contract does not "authorize" the contract for purposes of determining whether the contract is a prohibited emolument; instead, whether the contract is "authorized" by a law passed during a legislator's term is based on the law authorizing the specific contract); *see also State ex rel. Stratton v. Roswell Indep. Schs.*, 1991-NMCA-013, ¶ 37, 111 N.M. 495 (citing *Otero*, 1928-NMSC-021) ("*Otero* held that an appropriations bill does not 'authorize' a contract of employment with the state within the meaning of this provision."). Because the request does not provide these facts, the Commission offers no opinion on whether Article IV, Section 28 prohibits the nonprofit's government contracts.

II. Application

How should the requester and the non-profit organization "handle any [of the nonprofit's] applications for state funds?" Under the Governmental Conduct Act, the requester is prohibited from representing the nonprofit for pay in its applications

for state funds. *See* § 10-16-9(B). According to the request, the legislator does not receive pay for serving on the nonprofit's board, so representation is not prohibited outright. But the legislator is generally prohibited from making reference to the legislator's official status or using legislative stationary during the course of the representation.

May the requester vote on legislation on sexual assault laws and appropriations for programs helping victims of sexual assault? As a general matter, yes. But the GCA and Article IV, Section 28 could be implicated depending on the specific provisions contained in the legislation.

CONCLUSION

The GCA and Article IV, Section 28 do not prohibit a legislator from serving on the board of a nonprofit. However, the GCA may restrict the legislator's ability to represent a nonprofit in its dealings with state agencies. And Article IV, Section 28 may restrict the nonprofit's ability to enter into contracts authorized by laws passed during the legislator's term.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
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