



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2021-07

April 2, 2021¹

QUESTION PRESENTED²

May legislators who are respondents to administrative complaints pending in the State Ethics Commission vote on proposed legislation that affects the State Ethics Commission?

ANSWER

Yes.

ANALYSIS

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

²The State Ethics Commission Act requires a request for an advisory opinion to set forth a “specific set of circumstances involving an ethics issue.” *See* NMSA 1978, § 10-16G-8(A)(2) (2019). “When the Commission issues an advisory opinion, the opinion is tailored to the ‘specific set’ of factual circumstances that the request identifies.” State Ethics Comm’n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)).). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On March 1, 2021, the Commission received a request for an informal advisory opinion that detailed the issues as presented herein. The request was submitted by a public official who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1). The executive director provided an informal advisory opinion in response to the request on February 25, 2021. The Commission now issues that guidance as a formal advisory opinion. *See* 1.8.3.9(B)(3) NMAC.

The Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended 2019), does not require a legislator to recuse from a vote on legislation that implicates a conflict of interest. This is a function of not only the Act’s definitions and text but also the protection conferred on Members by Article IV, Section 13 of the New Mexico Constitution. Two sections of the Governmental Conduct Act are relevant.

First, section 10-16-4(B) provides that “a public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer’s or employee’s financial interest . . . [that is not] proportionately less than the benefit to the general public.” § 10-16-4(B). Legislators, however, are expressly excluded from the definition of a “public officer or employee.” See § 10-16-2(I). Accordingly, the disqualification requirement in section 10-16-4(B) does not require a legislator to recuse from any vote.

Second, section 10-16-3(A) also bears on the question of recusal. Unlike section 10-16-4(B), section 10-16-3(A) applies to legislators. That section provides:

A legislator or public officer or employee shall treat the legislator’s or public officer’s or employee’s government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

§ 10-16-3(A). Under this provision, a legislator may not use the powers and resources of their legislative office “to obtain personal benefits or pursue private interests.” *Id.* In view of the New Mexico Court of Appeals’ recent opinion in *State v. Gutierrez, et al.*, this provision is not merely aspirational, but rather is enforceable through criminal (and civil) penalties. See 2020-NMCA-045, ¶¶ 9, 33–36, 472 P.3d 1260, *cert. granted* (Sept. 8, 2020). Whether a legislator uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a question of fact. § 10-16-3(A); see, e.g., *State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113 (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence). Furthermore, whether a particular use of “the powers and resources” of a legislator’s office results in “personal benefits” to the legislator or advances their “private interests” is also a question of fact.

Like section 10-16-4(B), section 10-16-3(A) does not require recusal on any vote affecting a legislator's interests, because a legislator may cast their vote "only to advance the public interest," consistent with their duty to treat their position "as a public trust." § 10-16-3(A). A legislator's *voluntary* recusal on matters affecting their interest, however, is certainly an action available to legislators to demonstrate that they are not using the powers of their legislative offices "to obtain personal benefits or pursue private interests." § 10-16-3(A). Voluntary recusal from voting on matters affecting a legislator's interest would likely defeat a section 10-16-3(A) claim that a legislator used the powers of their office to obtain personal gain.

Moreover, it is doubtful that the State Ethics Commission could adjudicate or pursue a section 10-16-3(A) claim against a legislator for casting a vote in either house. Article IV, Section 13 of the New Mexico Constitution provides:

Members of the legislature shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses, and on going to and returning from the same. And they shall not be questioned in any other place for any speech or debate or for any vote cast in either house.

N.M. Const. art. IV, § 13. This provision very likely confers on Members of the New Mexico House and Senate an immunity similar to the immunity the Speech or Debate Clause provides to Members of Congress.³ Article IV, Section 13 formed part of the original 1911 New Mexico Constitution and follows the text of the federal Speech or Debate Clause. *Compare* U.S. Const., art. I, § 6, cl. 1, *with* N.M. Const.

³The Speech or Debate Clause provides Members of Congress and their aides with immunity from civil and criminal actions, whether brought by private individuals or the executive branch, for legislative acts taken in the course of their official responsibilities. *See Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 502–03 (1975); *Gravel v. United States*, 408 U.S. 606, 615–17 (1972). Regarding the scope of immunity for legislative acts (and motives for legislative acts), *see, e.g., United States v. Helstoski*, 442 U.S. 477, 489 (1979); *Doe v. McMillan*, 412 U.S. 306, 313–18 (1973); *Gravel*, 408 U.S. at 613–29; *United States v. Brewster*, 408 U.S. 501, 507–29 (1972); *United States v. Johnson*, 383 U.S. 169, 174–85 (1966); *Kilbourn v. Thompson*, 103 U.S. 168, 201–205 (1881); *see also United States v. Menendez*, 831 F.3d 155, 166–67 (3d. Cir. 2016). In light of the federal case law, the legislative acts for which Article IV, Section 13 confers immunity are not coextensive with all of the powers and resources of a legislator's public office; accordingly, please be aware that the immunity provided by Article IV, Section 13 does not completely eclipse the application of section 10-16-3(A) to legislators. Casting a vote on the floor of a legislative chamber, however, is the legislative act *par excellence*.

art. IV, § 13. In addition to the language it copies from the Speech or Debate Clause, Article IV, Section 13 also states that Members “shall not be questioned in any other place . . . *for any vote cast in either house.*” N.M. Const. art. IV, § 13 (emphasis added). This addition makes manifest in the New Mexico Constitution what, in 1881, the United States Supreme Court held to be encompassed by the Speech or Debate Clause—namely, that the constitutional protection extends to a legislator’s act of voting. *See Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Because legislators are immune from any criminal or civil action “for any vote cast,” N.M. Const. art. IV, § 13, neither the State Ethics Commission nor a prosecutor could pursue an action against a legislator for not recusing on a vote. Nor could the Commission adjudicate an administrative claim based on the predicate that a legislator cast a vote.

CONCLUSION

Legislators who are respondents to administrative complaints pending in the State Ethics Commission may vote on proposed legislation that affects the State Ethics Commission.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. GARREY CARRUTHERS, Commissioner
RONALD SOLIMON, Commissioner
JUDY VILLANUEVA, Commissioner
FRANCES F. WILLIAMS, Commissioner