



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2022-09

August 5, 2022¹

QUESTION PRESENTED²

An individual serves as an appointed officer of a public post-secondary educational institution. The individual's spouse is an employee of the institution. May the officer participate in the review and approval of a contract that will increase the wages paid to the officer's spouse?

ANSWER

No.

ANALYSIS

The Governmental Conduct Act, NMSA 1978, Sections 10-16-1 to -18 (1993, as amended through 2019) prohibits a public official from taking an official action that directly benefits a financial interest, including a financial interest held by the official's spouse. Accordingly, the Governmental Conduct Act prohibits an appointed official of a public post-secondary educational institution from taking or

¹ This 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) (2019).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." NMSA 1978, § 10-16G-8(A)(2) (2019). On July 6, 2022, the Commission received a request for an advisory opinion that detailed the issues as presented herein. *See* 1.8.1.9(A) NMAC. The request was submitted by a person with authority to request an opinion. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

participating in an official act that would increase the wages paid to the official's spouse.

The Governmental Conduct Act defines “public officer or employee” as “any elected or appointed official or employee of a state agency or local government agency who receives compensation in the form of salary or is eligible for per diem or mileage but excludes legislators[.]” *See* § 10-16-2(I). A member of the governing body of a post-secondary educational institution is eligible to receive per diem and mileage reimbursements, *see* NMSA 1978, §§ 10-8-4(A) (2021), and therefore is a “public officer or employee” subject to the Governmental Conduct Act.

The facts set forth in the request implicate Section 10-16-4 of the Governmental Conduct Act. Section 10-16-4 provides:

A. It is unlawful for a public officer or employee to take an official act for the primary purpose of directly enhancing the public officer's or employee's financial interest or financial position. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony. . . .

B. 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, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

C. No public officer during the term for which elected and no public employee during the period of employment shall acquire a financial interest when the public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the officer's or employee's official act.

The Governmental Conduct Act defines “financial interest” to include “any employment or prospective employment for which negotiations have already begun,” and includes any financial interest so defined that is held by the official or

the official's family. *See* NMSA 1978, §§ 10-16-2(E), (F) (2011).³ Accordingly, to the extent an official act would directly enhance a public officer's financial interest or a financial interest held by the public officer's family, Subsections A and B of Section 10-16-4 of the Governmental Conduct Act would prohibit and disqualify the public officer from engaging in the official act.

Applying this rule to the facts set out in the request, when a public official employed by or serving on the governing board of a public post-secondary institution is considering a decision to approve a contract that would increase wages paid to the institution's employees, the decision is an "official act" governed by the Governmental Conduct Act. *See* § 10-16-2(H) (defining "official act" as "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority"). If the public officer's spouse is an employee of the public post-secondary institution whose wages would be increased by the decision, Section 10-16-4 of the Governmental Conduct Act prohibits the official from participating in the matter.

Finally, Section 10-16-4 does not disqualify a public official "from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public." *See* § 10-16-4(B). But the official actions described in the request benefit university employees, not the general public. Accordingly, this safe harbor is likely unavailable to a public official participating in the decision to increase wages paid to the institution's employees.

CONCLUSION

When the spouse of an appointed officer of a public post-secondary educational institution is an employee of the institution, the officer may not participate in the review and approval of a contract that will increase the wages paid to the officer's spouse.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner

³ The Governmental Conduct Act defines "family" as the "spouse, parents, children or siblings, by consanguinity or affinity," of a public official or employee. NMSA 1978, § 10-16-2(E) (2011).

STUART M. BLUESTONE, Commissioner
HON. GARREY CARRUTHERS, Commissioner
HON. CELIA FOY CASTILLO, Commissioner
RON SOLIMON, Commissioner
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