STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2025-03

June 6, 2025[1]

District Legislative Aide Employment with Another State Agency

QUESTION PRESENTED[2]

The request asks whether a district legislative aide ("DLA") for a legislator is permitted to also hold full time employment with another state agency.

ANSWER

A DLA is permitted to hold full time employment with another state agency so long as the DLA meets the requirements of each position, discloses the position, and does not take any official acts in one position that would affect the other.

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[1] This 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).

[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 May 7, 2025, the Commission received a request for an advisory opinion that detailed the issues as presented herein. "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 Adv. Op. No. 2020-01, at 1-2 (Feb. 7, 2020), *available at* https://nmonesource.com/nmos/secap/en/item/18163/index.do (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. This opinion is based on current law, and the conclusions reached herein could be affected by changes in the underlying law or factual circumstances presented.

ANALYSIS

New Mexico law contemplates that a state employee may hold another position in state government, but provides certain restrictions to ensure the employee is faithfully fulfilling the duties of each position. First, an individual cannot hold two incompatible positions of state employment. Second, the Governmental Conduct Act[3] provides certain disclosure and conflict-of-interest requirements that apply when a state employee holds two positions of employment, including two positions of state employment.

I. A DLA may hold another state job that is not incompatible with the performance of the DLA's duties.

Under New Mexico law, the analysis of whether a public employee may hold two public positions turns on whether the positions are "incompatible." Incompatibility of positions takes two forms. Two positions may have "physical incompatibility," that is, whether accepting another public employment interferes with the employee's performance of the duties of the original employment. They may also have incompatibility of duties, that is, whether there is an inconsistency in the functions of two offices caused by one individual holding both positions.

A. A DLA would not be prohibited from holding another public position, provided the positions are not physically incompatible.

Section 10-6-3 provides that a public employee who accepts "any public office or employment, . . . for which a salary or compensation is authorized" is "deemed to have resigned from and to have permanently abandoned his public office and employment" if the employee "fail[s] for a period of thirty successive days or more to devote his time to the usual and normal extent during ordinary working hours to the performance of the duties of such public office and employment[.]"[4] But as the Attorney General has noted, "[t]he statutory

[3] NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023).

[4] NMSA 1978, §§ 10-6-3 (1953); 10-6-5 (1979).

prohibition against physically incompatible employment is rarely an insurmountable barrier to dual employment by state officers."[5]

A DLA would be permitted to also hold employment with another state agency so long as neither employment causes the DLA to fail to perform the duties of the other for a period of longer than thirty days. While this could pose an issue during the legislative session, for example, the Attorney General has previously reviewed a comparable situation where a legislator also held the office of president of Luna Vocational Technical Institute, explaining that "[i]f a technical vocational district board grants the president leave of absence in accordance with its own administrative procedures, thereby allowing the president to perform his legislative duties during a legislative session, physical incompatibility may not be an issue."[6] So too here. The DLA would not be deemed to abandon either public employment provided the DLA fulfills the duties of public employment for each agency or otherwise seeks appropriate accommodation to permit a leave of absence longer than thirty days.

B. A DLA would be permitted to seek another position in state government so long as the functions of the position are not incompatible with that of a DLA.

New Mexico law also prohibits a public officer from holding another public office that is functionally incompatible with the first office. In *Haymaker v. State*,[7]

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[5] N.M. Att'y Gen. Op. 07-06 (Dec. 17, 2007). The State Ethics Commission considers the Advisory Opinions and Advisory Letters issued by the New Mexico Attorney General as persuasive authority. The Attorney General's opinions and letters, however, do not necessarily dictate the advisory opinions that the Commission may issue. *See* NMSA 1978, §§ 8-5-2(D) (requiring the Attorney General to issue opinions in writing upon questions of law submitted by state officials); 10-16G-8 (authorizing the Commission to issue advisory opinions on matters related to ethics upon request); *First Thrift & Loan Ass'n v. State ex rel. Robinson*, 1956-NMSC-099, ¶ 28, 62 N.M. 61, 304 P.2d 582 ("We are not bound by [opinions of the Attorney General's office] in any event, giving them such weight only as we deem they merit and no more. If we think them right, we follow and approve, and if convinced they are wrong . . . we reject and decline to feel ourselves bound."). Although opinions of the Attorney General are not binding on the Commission, these opinions are persuasive authority grounded in applicable law.

[6] N.M. Att'y Gen. Op. 06-01 (Jan. 26, 2006).

[7] 1917-NMSC-005, 22 N.M. 400.

the court determined that the relevant inquiry is whether there "is an inconsistency in the functions of the two offices, 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."[8] In *Amador v. N.M. State Bd. of Educ.*,[9] the court concluded that the positions of school teacher and a member of the State Board of Education are not incompatible, because if the teacher appealed from a local board of education to the State Board, the "teacher would simply refrain from acting as a member of the Board in his case[.]"[10]

Under this framework, the prohibition against holding two incompatible offices does not outright prevent a DLA from holding another position with a state agency, it only precludes the DLA from holding another position that is *incompatible* with the position of DLA. As noted above, the courts have identified functional incompatibility where one office 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."[11] There are limited circumstances where this would prohibit a DLA from holding employment with another state agency, but could apply if, for example, a DLA also sought to be director of the Legislative Council Service or if a legislator also sought to be the legislator's own DLA. As a general matter, however, a DLA would be permitted to hold another position in state government so long as neither position is subordinate to the other and "contrariety and antagonism" would not result from attempting to hold both positions.

[8] *Id*. ¶ 9 (quotation marks omitted) (quoting *People v. Green*, 58 N.Y. 295).

[9] 1969-NMSC-076, 80 N.M. 336.

[10] *Id*. ¶ 7.

[11] *Haymaker*, 1917-NMSC-005, ¶ 9.

II. The Governmental Conduct Act outlines certain disclosure and conflict-of-interest requirements for a DLA holding employment with another state agency.

The Governmental Conduct Act provides guidance on the disclosure and recusal requirements applicable to a DLA where the DLA holds secondary employment.[12]

First, the Governmental Conduct Act requires that "[a] public officer or employee shall disclose in writing to the officer's or employee's respective office or employer all employment engaged in by the officer or employee other than the employment with or service to a state agency or local government agency."[13]

Additionally, the Governmental Conduct Act provides that the "[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service."[14]

The Governmental Conduct Act also delineates what official acts a public employee may engage in that affect the employee's financial interest, defined by the Governmental Conduct Act to include "any employment or prospective employment for which negotiations have already begun[.]"[15] Specifically, Section 10-16-4 of the Governmental Conduct Act prohibits a public employee from taking an official act "for the primary purpose of directly enhancing the public . . . employee's financial interest[,]" generally disqualifies a public employee from "engaging in any official act directly affecting the public . . . employee's financial interest[,]" and provides that "no public employee during the period of

[12] *See also* State Ethics Comm'n Adv. Op. 2025-02 (June 6, 2025) (concluding that as a general matter the Governmental Conduct Act does not prohibit a public employee from having secondary employment).

[13] NMSA 1978, § 10-16-4.2 (2011). While there is conceivably an argument that this provision does not require disclosure of "service to a state agency or local government agency" such an argument runs counter to the common sense reading of the statute.

[14] NMSA 1978, § 10-16-3(C) (2011).

[15] NMSA 1978, § 10-16-2(F)(2) (2011).

employment shall acquire a financial interest when the public . . . employee believes or should have reason to believe that the new financial interest will be directly affected by the . . . employee's official act."[16]

Taken together, these provisions outline the disclosure requirements and conflict-of-interest provisions governing a public employee's holding, or seeking, additional employment. Importantly, none of these provisions is limited to when a public employee seeks additional employment with a *private* employer. These considerations would apply equally to a public employee holding employment with another state agency.

A DLA is a public employee subject to the Governmental Conduct Act.[17] Reviewing these provisions in the context of a DLA holding a secondary employment with a state agency, a DLA must disclose each position, in writing, to each of the DLA's supervisors. A DLA is prohibited from negotiating with another state agency for employment if the DLA knows or should have reason to know that those negotiations will be directly affected by the DLA's official act.[18] For example, if the DLA is tasked with making official recommendations to the DLA's supervising legislator about appropriations and recommends an appropriation to a certain state agency, the DLA could be prohibited from holding or accepting employment with that agency. Finally, a DLA must also at all times hold each position of public employment as a public trust.[19] To the extent the DLA encounters a situation where the obligations as a DLA conflict with the DLA's obligations to another state agency, the DLA should disclose the conflict and decline to take action which would breach the public trust for either position.

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[16] NMSA 1978, § 10-16-4 (2011).

[17] *See* NMSA 1978, § 10-16-2(I) (2011) (defining "public employee" to mean any "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 also* State Ethics Comm'n Adv. Op. 2024-05, at 7 (Oct. 5, 2024), available at https://nmonesource.com/nmos/secap/en/18985/1/document.do (concluding a DLA is a public employee for purposes of the Governmental Conduct Act).

[18] § 10-16-4(C).

[19] § 10-16-3(A).

CONCLUSION

A DLA may simultaneously be employed by another state agency so long as the dual employment does not cause the DLA, for more than thirty successive days, to fail to devote time to the usual and normal extent during ordinary working hours for either employment, and so long as the two positions are not otherwise incompatible. Further, the DLA must disclose each employment to the DLA's other supervisor in writing. Finally, the DLA should disclose any potential conflicts that arise between the two positions, and recuse from any official acts that would affect the other position.

SO ISSUED.

HON. WILLIAM F. LANG, Chair
JEFFREY L. BAKER, Commissioner
STUART M. BLUESTONE, Commissioner
HON. CELIA CASTILLO, Commissioner
HON. GARY L. CLINGMAN, Commissioner
HON. DR. TERRY MCMILLAN, Commissioner
DR. JUDY VILLANUEVA, Commissioner

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