



## STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2026-04**

April 17, 2026<sup>1</sup>

### **Holding Dual Roles as a School Board Member and State Employee Under the Governmental Conduct Act**

#### **QUESTION PRESENTED<sup>2</sup>**

Under the Governmental Conduct Act,<sup>3</sup> may an individual who serves on a local school board and who is also responsible for approving certain financial decisions for the same school board in their role as a state employee hold these dual roles despite a potential conflict of interest?

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<sup>1</sup> 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).

<sup>2</sup> 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 October 29, 2025, the Commission received a request for an advisory opinion that detailed the issues as presented herein and Commission staff issued an informal advisory opinion letter in response. *See* 1.8.1.9(B) NMAC. Commissioner Bluestone requested that this advisory letter be converted into a formal advisory opinion. *See* 1.8.1.9(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC. “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.

<sup>3</sup> NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023).

## ANSWER

Yes, the individual would be allowed to hold the dual roles under the Governmental Conduct Act so long as the individual: (1) recuses from matters in their role as a state employee that would affect the school board to avoid any functional incompatibility between the two positions under state law; (2) discloses to the state agency employer any potential conflicts with the local school board, as well as disclose to the local school board to the extent there is a potential conflict in the individual's dual roles; and (3) fairly and impartially effectuates their duties as both a school board member and as a state employee.

## ANALYSIS

### **I. The Governmental Conduct Act would not prohibit the dual roles.**

The Governmental Conduct Act provides guidance on the disclosure and recusal requirements applicable to a public officer or employee where the individual's official acts enhance or directly affect a financial interest.<sup>4</sup> Section 10-16-4(A) provides that “[i]t 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.”<sup>5</sup> Section 10-16-4(B) separately 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, 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.”<sup>6</sup> A financial interest is defined as “an interest held by an individual or the individual's family that is: (1) an ownership interest in business or property; or (2)

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<sup>4</sup> See 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).

<sup>5</sup> NMSA 1978, § 10-16-4(A) (2011).

<sup>6</sup> NMSA 1978, § 10-16-4(B).

any employment or prospective employment for which negotiations have already begun[.]”<sup>7</sup>

Here, while the individual’s employment with the state agency would constitute a financial interest, the position as a local school board member would not. This poses a unique situation in that the local school board likely could not take any acts that would affect the individual’s state employment; and while the individual’s state employment would allow the individual to take official acts affecting the school board, because the individual does not have a financial interest in the position as a school board member, the disqualification and recusal requirements of Section 10-16-4(A) and (B) would not apply.

The Governmental Conduct Act, however, further provides that “[a] public officer or employee shall treat the . . . public officer’s or employee’s government position as a public trust.”<sup>8</sup> Additionally, “[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.”<sup>9</sup> While the Governmental Conduct Act does not define “abuse of office,” the common law informs the meaning of the statutory term.<sup>10</sup> The abuse of office was (and remains) a civil action at common law. It is also known as “malfeasance in office,” “official misconduct,” and the “abuse of the public trust.”<sup>11</sup> Notwithstanding the several names that courts have given it, the claim for abuse of office is straightforward: it is a claim for the breach of a fiduciary duty, as applied to public officers who have a fiduciary relationship with the public.<sup>12</sup>

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<sup>7</sup> NMSA 1978, § 10-16-2(F) (2011).

<sup>8</sup> NMSA 1978, § 10-16-3(A) (2011).

<sup>9</sup> NMSA 1978, § 10-16-3(C).

<sup>10</sup> See *Sims v. Sims*, 1996-NMSC-078, ¶ 23, 122 N.M. 618 (“[W]hen determining the meaning of a statute, courts will often construe the language in light of the preexisting common law.” (citing 2A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 45.02 (1992))).

<sup>11</sup> See Abuse of Public Office, *Black’s Law Dictionary* (11th ed. 2019).

<sup>12</sup> It is “beyond dispute” that public officials owe fiduciary duties to the public. See *Skilling v. United States*, 561 U.S. 358, 407 n.41 (2010); see also, e.g., *United States v. Carter*, 217 U.S.

Central among the duties that a fiduciary owes are the duty of care and the duty of loyalty. As a fiduciary, a public officer or employee owes the public a duty of care—i.e., the duty to exercise reasonable diligence in the performance of their office.<sup>13</sup> Moreover, as a fiduciary, a public officer or employee owes their public employer (and, derivatively, the public) a duty of loyalty—i.e., the duty to use the powers and resources of the public’s office and employment for the public’s benefit only and, thus, to refrain from putting the officer’s or employee’s interests before the public’s interest.<sup>14</sup>

When Section 10-16-3(C) requires public officers and employees to avoid “undue influence and abuse of office in public service,”<sup>15</sup> that statutory language is informed by the common law fiduciary duties that public officers owe to their

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286, 306 (1909) (observing that a fiduciary duty is applicable to public officials); *United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 2013) (“Public officials inherently owe a fiduciary duty to the public to make governmental decisions in the public’s best interest.” (citation omitted)); *United States v. Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (“Elected officials generally owe a fiduciary duty to the electorate.” (citing *Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941)); *United States v. Kearns*, 595 F.2d 729, 734 (D.C. Cir. 1978) (reversing dismissal of federal common law breach of fiduciary duty claim the government asserted against federal officials, concluding “[t]he action pursued here is a proper tool, based on common law notions of principal-agent relations, for controlling the possible loss of impartial public administration”); *Marjac, LLC v. Trenk*, No. CIV A 06-1440 JAG, 2006 WL 3751395, at \*15 (D.N.J. Dec. 19, 2006) (denying a motion to dismiss a breach of fiduciary duty claim against elected officials that stand in a fiduciary relationship with their constituents); *see also generally Driscoll v. Burlington-Bristol Bridge Co.*, 86 A.2d 201, 221–22 (N.J. 1952) (describing the fiduciary duties that public officers owe to the public and observing that the duties may be enforced in the civil courts (citations omitted)).

<sup>13</sup> *Cf.*, e.g., *Air Line Pilots Ass’n, Inter. v. O’Neill*, 499 U.S. 65, 75 (1991) (discussing the fiduciary duty of care that a labor union, as a fiduciary, owes its represented employees).

<sup>14</sup> *See*, e.g., *Moody v. Stribling*, 1999-NMCA-094, ¶ 27, 127 N.M. 630 (“A fiduciary duty is a duty of loyalty.” (citations omitted)); *Kueffer v. Kueffer*, 1990-NMSC-045, ¶ 12, 110 N.M. 10 (“A fiduciary is obliged to act primarily for another’s benefit in matters connected with such undertaking. A fiduciary breaches this duty by placing his interests above those of the beneficiary.” (citations and quotation marks omitted)); *cf.* UJI 13-2406, Duty of loyalty; definition (“A lawyer has a duty of loyalty to a client. A lawyer breaches the duty of loyalty by putting the lawyer’s own interests, or the interests of another, before those of the client.”).

<sup>15</sup> § 10-16-3(C).

public employers.<sup>16</sup> Indeed, the Legislature has confirmed that a public officer's and employee's government position is "a public trust," reinforcing that, by virtue of their government positions, public officers have fiduciary duties to the public.<sup>17</sup> Accordingly, a public officer or employee engages in the "abuse of office in public service" in violation of Section 10-16-3(C) when that officer or employee uses their government office in a way that breaches a fiduciary duty owed to the public.<sup>18</sup>

Turning to the question at issue, Section 10-16-3(C) requires the individual to disclose to the state agency employer the potential conflict with the local school board, as well as disclose to the local school board to the extent there is a potential conflict in the individual's dual roles. Second, the individual owes both entities a duty to fairly and impartially effectuate their job functions. If, as a state agency employee, the individual gives unfair treatment to approving the budget and the mill levy rates for the school board on which they serve that the employee does not give to other school boards, they have arguably abused their office or succumbed to undue influence because they have not exercised reasonable diligence in the performance of their state office. This is particularly so if there is limited budget across all local school boards and the state agency employee is required to make decisions concerning which school board will get what. The individual must be able to perform both positions faithfully and impartially, but this is not to say Section 10-16-3(C) prohibits the holding of both roles. To the extent the individual encounters a situation where the obligations as a board member conflict with the member's obligations to the state agency, the individual should disclose the conflict and decline to take action which would breach the public trust for either position.

On one other note, 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

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<sup>16</sup> See *Sims*, 1996-NMSC-078.

<sup>17</sup> See § 10-16-3(A).

<sup>18</sup> See *Abuse*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/abuse> (defining "abuse" to mean "to put [something] to a wrong or improper use").

employee other than the employment with or service to a state agency or local government agency.”<sup>19</sup> The individual is required to report to the local school board the state agency employment. But “employment” is defined as “rendering of services for compensation in the form of salary as an employee[.]”<sup>20</sup> This provision itself would therefore not require reporting of the school board position to the state agency, but, as noted above, disclosure is likely required under Section 10-16-3(C).

## **II. Beyond the Governmental Conduct Act, the dual roles may be incompatible under New Mexico law.**

Under New Mexico law, a public officer is prohibited from holding two public offices where the offices are functionally incompatible. Depending on the specific duties of the individual here, the state agency position may be incompatible with the position of board member unless the individual can recuse from taking actions affecting the school board of which they are a member.

In *Haymaker v. State*,<sup>21</sup> the court reviewed a case where one individual was elected to a local board of education and was also appointed as clerk of the same board. The court relied in part on a New Hampshire case, where “the plaintiff was elected to the school board, and was thereafter chosen as auditor, the court holding that by the acceptance of an incompatible office he had vacated his membership on the board” and quoted “[t]he duties of an auditor are to examine the accounts of the prudential committee, and their vouchers, and report whether they are properly cast and supported, and whether the money has been legally expended. If the same person could hold both offices, he would in fact sit in judgment on his own acts.”<sup>22</sup> The *Haymaker* court determined the positions of local board of education member and clerk were incompatible, noting 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

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<sup>19</sup> 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.

<sup>20</sup> NMSA 1978, § 10-16-2(D) (2011).

<sup>21</sup> 1917-NMSC-005, 22 N.M. 400.

<sup>22</sup> *Id.* ¶ 12 (quoting *Cotton v. Phillips*, 56 N.H. 220).

antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both.”<sup>23</sup>

In *Amador v. N.M. State Bd. of Educ.*,<sup>24</sup> the court reviewed whether the positions of schoolteacher and a member of the State Board of Education are incompatible. The court explained that “[t]he State Board only has jurisdiction over a school teacher in the instance where the teacher appeals to that Board from an adverse ruling by the local board of education[.]”<sup>25</sup> Therefore, the court concluded that “[t]he fact that a teacher who is also a member of the State Board might appeal from the action of the local board presents no serious problem. The teacher would simply refrain from acting as a member of the Board in his case just as would a member of any other trade or profession who appealed to the board of which he was a member.”<sup>26</sup>

Applying this framework to the posited situation, the prohibition against holding two incompatible offices would not outright prevent a local school board member from holding another position with a state agency. The prohibition only precludes the school board member from holding another position that is functionally *incompatible* with the position of school board member.<sup>27</sup> As noted above, the courts have identified functional incompatibility where one office is subordinate to the other.<sup>28</sup> Here, the position of state agency employee is not subordinate to local school board member, or vice versa.

The courts have also identified functional incompatibility “where a contrariety and antagonism would result in the attempt by one person to faithfully

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<sup>23</sup> *Id.* ¶ 9 (quotation marks omitted) (quoting *People v. Green*, 58 N.Y. 295).

<sup>24</sup> 1969-NMSC-076, 80 N.M. 336.

<sup>25</sup> *Id.* ¶ 7.

<sup>26</sup> *Id.*

<sup>27</sup> See also State Ethics Comm’n Adv. Op. 2025-03 (discussing whether a district legislative aide may simultaneously hold employment with another state agency).

<sup>28</sup> *Haymaker*, 1917-NMSC-005, ¶ 9.

and impartially discharge the duties of both.”<sup>29</sup> Given that the state position makes approval decisions on the budget and mill levy of the local school board, there is a question here as to whether “a contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties” of both positions. Particularly in light of the case referenced in *Haymaker* cautioning against a situation where “[i]f the same person could hold both offices, he would in fact sit in judgment on his own acts.”<sup>30</sup> But critically, as noted in *Amador*, the positions are not incompatible where the individual can refrain from acting on matters implicating the secondary position.

Therefore, if the state employee’s state position permits the employee to faithfully fulfill the responsibilities of state employment without taking action where the employee’s impartiality might be objectively questioned, for example, by recusing from matters involving the local school board, the employee is not necessarily precluded from holding both positions. If, however, the state position necessarily requires work on matters affecting the local board of which the individual is a member, the positions are arguably functionally incompatible.

## CONCLUSION

The Governmental Conduct Act would not prohibit the dual roles because the employee does not have a financial interest as a member of the local school board, but because there appears to be an incompatibility between the two positions under state law, the individual would need to recuse on matters in their role as a state employee that affect the school board. Additionally, the individual would need to disclose any potential conflicts arising out of the individual’s dual roles to both their employer and to the school board on which they serve.

**SO ISSUED.**

**HON. WILLIAM F. LANG, Chair**  
**JEFFREY L. BAKER, Commissioner**  
**STUART M. BLUESTONE, Commissioner**  
**HON. CELIA CASTILLO, Commissioner**  
**HON. GARY L. CLINGMAN, Commissioner**

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ¶ 12 (quoting *Cotton v. Phillips*, 56 N.H. 220).

**HON. DR. TERRY MCMILLAN, Commissioner**  
**DR. JUDY VILLANUEVA, Commissioner**