



## NEW MEXICO STATE ETHICS COMMISSION

### **ADVISORY OPINION NO. 2020-01**

February 7, 2020<sup>1</sup>

### **QUESTION PRESENTED**

A state employee who, “while employed and performing their regular public duties, is also receiving a monthly salary from a political campaign committee or organization.” Ltr. Request for Adv. Op (Dec. 11, 2019). Does the state employee’s receipt of such salary violate the Gift Act, NMSA 1978, §§ 10-16B-1 to -4, the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18, the Financial Disclosure Act, NMSA 1978, §§ 10-16A-1 to -8, the Campaign Reporting Act, NMSA 1978, §§ 1-19-25 to -36, the State Ethics Commission Act, NMSA 1978, §§ 10-16G-1 to -16, or any code of ethics adopted pursuant to these laws?

### **ANSWER**

The request before the Commission presents a limited set of facts that, by themselves, do not establish a violation of the Gift Act, the Governmental Conduct Act, the Financial Disclosure Act, the Campaign Reporting Act, or the State Ethics Commission Act. The State Ethics Commission Act requires persons requesting advisory opinions to “identify a specific set of circumstances involving an ethics issue.” NMSA 1978, § 10-16G-8(A)(2). When the Commission issues an advisory opinion, the opinion is tailored to the “specific set” of factual circumstances that the

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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).

request identifies. The request now before the Commission presents a limited set of factual circumstances. The facts presented do not establish a statutory violation.

The Commission declines to opine on whether the factual circumstances that the request identifies violates “any code of ethics” adopted pursuant to the Governmental Conduct Act, among other statutes.<sup>2</sup> This request fails to “identify a specific set of circumstances involving an ethics issue,” as the State Ethics Commission Act requires. Accordingly, the Commission declines to issue an advisory opinion on the matter.

## ANALYSIS

Generally, a state employee may accept private employment in addition to their state employment. *See* NMSA 1978, § 10-6-3 (recognizing that, subject to limitation, state public officials and employees may “accept private employment for compensation”). A state employee’s ability to accept additional private employment, however, is limited by law. For example, under NMSA 1978, Sections 10-6-3 and 10-6-5, the statutes governing abandonment of public employment, a public official or state employee may not accept private employment if the private position “physically interfere[s]” with the duties of the . . . public position during ordinary working hours” or if the private position is “otherwise incompatible” with the public position. N.M. Att’y Gen. Advisory Ltr. (Nov. 21, 2014) (internal quotation marks omitted) (quoting N.M. Att’y Gen. Op. 90-14 (1990)); *see generally* N.M. Att’y Gen. Advisory Ltr. (Dec. 1, 2014) (discussing the two ways that a public and private position can be incompatible under New Mexico law).<sup>3</sup> Other laws

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<sup>2</sup>In responding to requests for advisory opinions, the State Ethics Commission has discretion to provide a definitive answer or to decline to do so, with respect to any issue the request poses. *See* NMSA 1978, § 10-16G-8(A) (“The commission *may* issue advisory opinions on matters related to ethics.”) (emphasis added).

<sup>3</sup>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,

impose additional constraints on a state employee's acceptance of private employment.<sup>4</sup>

The request asks whether a state employee receiving a monthly salary from a campaign committee or political organization violates other laws that might limit a state employee's acceptance of private compensation, including the Gift Act, the Governmental Conduct Act, the Financial Disclosure Act, the Campaign Reporting

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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.”).

<sup>4</sup>The law contains several examples of constraints on a state employee's acceptance of private compensation that are not implicated by the request for an advisory opinion. For illustrative purposes, we provide the following two examples:

First, under Article XX, Section 9 of the New Mexico Constitution, a state employee may not receive compensation from a private employer in exchange for actions that the state employee undertakes as part of their public duties. *See* N.M. Const. Art. XX, § 9 (“No officer of the state who receives a salary, shall accept or receive to his own use any compensation, fees, allowance or emoluments for or on account of his office, in any form whatever, except the salary provided by law.”); *see also* N.M. Att’y Gen. Op. 91-09 (concluding that a state judge cannot accept a gratuity in connection with the performance of a marriage ceremony).

Second, the Rules of Professional Conduct for attorneys impose additional constraints on attorneys serving as public officers or public employees regarding their acceptance of additional, non-state employment. *See, e.g.*, Rule 16-111(C) NMRA (“Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person.”); Rule 16-113(G) NMRA (requiring an attorney representing an organization to obtain consent from “an appropriate official” when also representing a director, officer, employee, member, shareholder or other constituent when the representation involves a potential conflict of interest).

Neither Article XX, Section 9 of the New Mexico Constitution nor the Rules of Professional Conduct that apply to attorneys are implicated here. The request does not say that the employee receives a salary from a campaign committee or political organization as payment for their services as a state employee. Nor does the request posit that the employee is an attorney representing a state entity.

Act, or the State Ethics Commission Act. The facts presented do not establish a violation of these statutes.

### 1. Gift Act

The facts presented do not establish a violation of the Gift Act. Under the Gift Act, a state employee may not knowingly accept from a “restricted donor” a “gift” with a market value greater than two hundred fifty dollars. § 10-16B-3(A). Whether a state employee’s receipt of a monthly salary from a political campaign committee or political organization violates the Gift Act depends on (i) whether the salary received is a “gift” and (ii) whether the campaign committee or organization is a “restricted donor.” *See id.*

The facts presented do not establish that the monthly salary is a gift. The Gift Act defines “gift” to mean “any donation or transfer without commensurate consideration of money, property, service, loan, promise or any other thing of value . . . .” § 10-16B-2(B). The statutory definition of gift excludes compensation for services rendered or capital invested that is normal and reasonable in amount, commensurate with the value of the service rendered, in no way increased or enhanced by reason of the recipient’s position as a state employee, and not otherwise prohibited by law. § 10-16B-2(B)(3). In other words, whether the state employee’s monthly salary from a political campaign committee is a gift depends on whether the salary is normal and reasonable in amount or, instead, exceeds what is normal and reasonable and relates to the state employee’s position. The request does not posit facts that establish that the monthly salary is a gift, as opposed to a payment in exchange for consideration.

Moreover, the facts presented do not establish that the campaign committee or organization is a restricted donor. The Gift Act defines a “restricted donor” to include: (i) a person who is or is seeking to be a party to a contract with the agency that employs the donee; (ii) a person who will be directly and substantially affected financially by the performance or nonperformance of the donee’s official duty in a way that is greater than the effect on the public generally; (iii) a person who is the subject of or party to a matter that is pending before a regulatory agency and over which the donee has discretionary authority as part of the donee’s official duties or employment within the regulatory agency; and (iv) a person who is a lobbyist or a client of a lobbyist with respect to matters within the donee’s jurisdiction. § 10-16B-2(D).

A conclusion that a campaign committee or political organization is a restricted donor under the Gift Act requires facts that are additional to and more specific than the facts set out in the request. For instance, a campaign committee or political organization might be a restricted donor because it is affected by the donee's performance in a way that is greater than the effect on the public generally. It depends, of course, on who the donee (*i.e.*, the state employee) is and what power the donee has over matters that affect the donor. Further, a campaign committee or political organization might be a restricted donor because it is the subject of or a party to a matter that is both pending before a regulatory agency and subject to the donee's discretionary authority. Again, it depends on the donee's position and responsibilities in state government. The request posits that the donee is a state employee only.

Accordingly, the facts that the request presents do not establish a violation of the Gift Act.

## 2. Governmental Conduct Act

For similar reasons, the facts presented do not establish a violation of the Governmental Conduct Act. The request is not specific enough to establish that a state employee who receives a monthly salary from a campaign committee or political organization thereby violates the Governmental Conduct Act.

Several provisions of the Governmental Conduct Act bear upon a state employee who receives a monthly salary from a campaign committee or political organization. For example, under the Governmental Conduct Act:

- A public employee may not use the “resources of public office” to “obtain personal benefits or pursue private interests.” § 10-16-3(A).
- A public employee may not “use property belonging to a state agency . . . or allow its use, for other than authorized purposes.” § 10-16-3.1(C).
- A public employee may not receive money or the promise thereof that is conditioned upon or given in exchange for promised performance of an official act, *see* NMSA 1978, § 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 public employee cannot take an official act for the primary purpose of directly enhancing the public employee's financial position. *See* § 10-16-4(A).
- A public employee cannot, during the period of employment, acquire a financial interest if 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. *See* § 10-16-4(C).<sup>5</sup>
- A public employee shall disclose in writing to the employee's employer all employment engaged in by the employee other than the employment with the state agency. *See* § 10-16-4.2.
- A public employee cannot receive an honorarium for a service rendered that relates to the performance of public duties, where an honorarium means the payment of money in excess of one hundred dollars, excluding reasonable reimbursements or compensation for services rendered in the normal course of a private business pursuit. *See* § 10-16-4.1.

The facts presented do not establish that a state employee's receipt of a monthly salary from a campaign committee or political organization violates any of the foregoing provisions. The request does not posit facts that connect the state employee's position, or any official acts that the state employee might have discretion to take, to the monthly salary received from the campaign committee or political organization. The request does not posit any conditions that the campaign committee or political organization places on the payment of the state employee's salary. The request does not say whether the state employee's position includes the discretion to take official acts. The request does not posit any facts that relate to a state employee's purpose in exercising their discretion, if they have discretionary authority. And the request does not posit any facts regarding any disclosures that the state employee might have made to their employer.

Accordingly, the limited facts that the request presents do not amount to a violation of the Governmental Conduct Act.

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<sup>5</sup>Under the Governmental Conduct Act, a "financial interest" means "an interest held by an individual or the individual's family that is: (1) an ownership interest in business or property; or (2) any employment or prospective employment for which negotiations have already begun." § 10-16-2(F).

### 3. Financial Disclosure Act

For similar reasons, the facts presented do not establish a violation of the Financial Disclosure Act. Several provisions of the Financial Disclosure Act might bear upon a state employee who receives a monthly salary from a campaign committee or political organization. For example, under the Financial Disclosure Act:

- “A state agency head, an official whose appointment to a board or commission is subject to confirmation by the senate or a member of the insurance nominating committee shall file with the secretary of state a financial disclosure statement within thirty days of appointment and during the month of January every year thereafter that the person holds public office.” NMSA 1978, § 10-16A-3(C).
- “Every employee who is not otherwise required to file a financial disclosure statement under the Financial Disclosure Act and who has a financial interest that he believes or has reason to believe may be affected by his official act or actions of the state agency by which he is employed shall disclose the nature and extent of that interest. The disclosures shall be made in writing to the secretary of state before entering state employment and during the month of January every year thereafter.” § 10-16A-4(A).
- Financial disclosure statements must include for any person required to file and the person’s spouse “all sources of gross income of more than five thousand dollars (\$5000) to each person covered in the disclosure statement, identified by general category descriptions that disclose the nature of the income source . . . .” § 10-16A-4(D)(2).

The request does not specify facts that establish that a state employee receiving a monthly salary from a campaign committee or political organization has violated these provisions. The request does not state whether the state employee is an agency head or an official whose appointment is subject to Senate confirmation. Nor does the request posit that the state employee has a reason to believe the monthly salary received is affected by his official acts. Again, the request does not posit whether the state employee has discretion to take official acts. The request does not provide whether the state employee has submitted a financial disclosure statement, or, if so, whether and how the state employee has described the monthly salary received from the campaign committee.

Accordingly, the facts presented do not establish a violation of the Financial Disclosure Act.

#### 4. Campaign Reporting Act

A state employee does not violate the Campaign Reporting Act, §§ 1-19-25 to -36, by receiving a monthly salary from a political campaign committee or organization. The Campaign Reporting Act imposes several duties on political campaign committees and political organizations.<sup>6</sup> The Campaign Reporting Act, however, does not prohibit a campaign committee employee or political organization employee, who is also a state employee, from receiving a monthly salary. *See* §§ 1-19-25 to -36. Accordingly, a state employee does not violate the Act by receiving a monthly salary from a campaign committee or political organization.

#### 5. State Ethics Commission Act

By receiving a monthly salary from a campaign committee or political organization, a state employee who is not employed by the State Ethics Commission does not violate the provisions of the State Ethics Commission Act. §§ 10-16G-1 to -16. Only Section 10-16G-16 of the State Ethics Commission Act imposes duties

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<sup>6</sup>*See, e.g.*, § 1-19-26.1(B) (requiring a political committee to appoint and maintain a treasurer); § 1-19-26.1(C) (requiring a political committee to make a statement of organization under oath); § 1-19-26.3 (imposing duties of disclosure on campaign committees and political committees regarding expenditures to pay for telephone calls); § 1-19-26.3 (imposing duties of disclosure on campaign committees and political committees regarding expenditures for advertisements); §§ 1-19-27 & -31 (requiring the treasurers of campaign committees and political committees to file reports of expenditures and contributions with the Secretary of State); § 1-19-27.3 (requiring political organizations to file a report with the Secretary of State regarding certain independent expenditures); § 1-19-29.1 (prohibiting campaign committees from expending contributions for reasons other than statutorily enumerated purposes); § 1-19-34 (requiring political committees and campaign committees to impose certain financial controls and limiting the receipt of certain contributions); § 1-19-34.1 (prohibiting campaign committees that are the agents of a state legislator or the governor to solicit contributions during certain prohibited periods relating to the annual legislative session); § 1-19-34.7 (prohibiting campaign committees and political organizations from making contributions to a candidate, including the candidate's campaign committee, in excess of certain statutorily-imposed limits).



upon state employees who are not also Commission employees. Under Section 10-16G-16, a state employee “shall not take or threaten to take any retaliatory, disciplinary or other adverse action against another person who in good faith: (1) files a verified complaint with the commission that alleges a violation; or (2) provides testimony, records, documents or other information to the commission during an investigation or at a hearing.” § 10-16G-16(A). A state employee who receives a monthly salary from a political campaign committee does not thereby threaten or take retaliatory or disciplinary action against another person. Consequently, a state employee who is not also a Commission employee does not violate the State Ethics Commission Act by receiving a monthly salary from a campaign committee or political organization.

The State Ethics Commission Act imposes additional duties on state employees who the Commission employs, particularly the Executive Director. For example, under Section 10-16G-6(D),

For a period of one calendar year immediately following termination of the director’s employment with the commission, the director shall not: (1) represent the respondent, unless appearing on the director’s own behalf; or (2) accept employment or otherwise provide services to a respondent, unless the director accepted employment or provided services prior to the filing of a complaint against the respondent.

Within one year after the termination of the Executive Director’s employment, he or she shall not accept a monthly salary from a campaign committee or political organization if that committee or organization was a respondent in a proceeding before the Commission. The request for an advisory opinion, however, does not specify facts regarding whether the state employee is the Executive Director of the State Ethics Commission or whether the campaign committee or political organization is a respondent in Commission proceedings. The facts that the requests presents do not establish a violation of the State Ethics Commission Act.

6. Codes of Ethics Adopted Pursuant to the Gift Act, the Governmental Conduct Act, the Financial Disclosure Act, the Campaign Reporting Act, and the State Ethics Commission Act.

The request asks the Commission to provide an opinion on whether a state employee who receives a monthly salary from a campaign committee or political organization violates any code of ethics adopted pursuant to the Gift Act, the Governmental Conduct Act, the Financial Disclosure Act, the Campaign Reporting

Act, and the State Ethics Commission Act. The Commission declines to do so. *See* 10-16G-8(A); *see also* Note 2, *supra*.

The request correctly indicates that, in addition to statute, agency-adopted codes of conduct regulate state employees' conduct. The Governmental Conduct Act not only authorizes state agencies to issue codes that govern their respective employees' conduct but also provides that a violation of these separately adopted agency codes shall constitute "cause for dismissal, demotion or suspension." § 10-16-11(C). The several state agency codes of conduct may respectively impose duties on the state employees that are more stringent than the duties that the Governmental Conduct Act imposes. § 10-16-11.1.

The State Ethics Commission Act contemplates a role for the Commission with respect to these agency-adopted codes. After January 1, 2020, the state agencies must file these codes with the State Ethics Commission. § 10-16-11(C). The Act requires the Commission to "draft a proposed code of ethics for public officials and public employees and submit the proposed code to each elected public official and public agency for adoption." § 10-16G-5(B)(4). The Commission has yet to draft and submit this proposed code to each elected public official and each public agency. In the future, the Commission might opine on how the proposed code of ethics, which Section 10-16G-5(B)(4) contemplates, applies to specific facts.

The Commission, however, declines to issue an advisory opinion regarding the applicability of another agency's code of conduct where the requester does not point the Commission to a specific code of conduct but rather broadly alludes to all codes of conduct adopted pursuant to the Governmental Conduct Act, among other statutes. Section 10-16G-8 of the State Ethics Commission Act requires a request to "identify a specific set of circumstances involving an ethics issue." A request that asks for an opinion ranging over any code of ethics adopted pursuant to the Governmental Conduct Act fails to identify "a specific set of circumstances." § 10-16G-8(A)(2). Accordingly, the Commission will not issue an advisory opinion in response to the request.

**Issued this 7th day of February, 2020.**

**HON. WILLIAM F. LANG, Chair**

**JEFF BAKER, Commissioner**

**STUART M. BLUESTONE, Commissioner**

**HON. GARREY CARRUTHERS, Commissioner**

**DR. JUDY VILLANUEVA, Commissioner**

**FRANCES F. WILLIAMS, Commissioner**