



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2020-06

August 7, 2020¹

QUESTION PRESENTED

Under the Governmental Conduct Act, may a cabinet secretary or another state employee work remotely from outside of the state on a permanent or near-permanent basis, when their job duties are ordinarily based in New Mexico?

FACTS²

The Secretary of Education has worked from Philadelphia, Pennsylvania for most of the past four months. *See* Dillon Mullan, *New Mexico's education secretary working from out of state*, Santa Fe New Mexican, Jul. 20, 2020, <https://tinyurl.com/y2yqsdtd> (last accessed July 29, 2020). During that period, the Secretary worked out of Santa Fe for a few weeks in March and, then, during the five-day special legislative session in June. *See id.* In view of the State's response to the Covid-19 pandemic, like many state employees, the Secretary has carried out his many duties remotely, using web-based video conferencing products and services. *See id.* He can telework equally from Philadelphia as from his apartment

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)). On July 8, 2020, the Commission received a request for an advisory opinion that referenced news reports detailing facts as presented herein. The request was submitted by a public employee who has the authority to submit a request. *See generally* NMSA 1978, § 10-16G-8(A)(1).

or office in Santa Fe. *See id.* As a consequence, a public school district superintendent had not noticed—and would have no way of knowing absent the Secretary’s candor—that the Secretary was working from out of state. *See id.*

Years before the current pandemic, a Public Information Officer (PIO) with the Department of Finance and Administration (DFA) worked remotely from Chicago, Illinois for several of the waning months of Governor Richardson’s administration. Like a cabinet secretary, the PIO position was also exempt from the Personnel Act. And, like the current Secretary of Education, the New Mexico news media also covered the story, but with more editorial skepticism about the propriety of the accommodation. *See* KRQE Larry Barker Investigative Report (July 2, 2010), <https://tinyurl.com/yxeyor3b> (last accessed July 29, 2020).

According to the request, these two cases are not isolated incidents; they are simply two incidents that the news media covered. It is the Commission’s understanding that a not insignificant number of state employees have requested out-of-state telework accommodations, both during and before the current health crisis.

ANSWER

Subsection 10-16-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits a state employee’s duties or otherwise obstructs the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

ANALYSIS

After the Governor declared a public health emergency on March 11, 2020, the Secretary of Health ordered all public and private employers, including all State agencies, to “limit operations to the greatest extent possible and minimize employee contact.” Public Health Emergency Order Limiting Mass Gatherings and Implementing Other Restrictions Due to COVID-19, ¶ 4, at p. 3 (Dept. of Health, Mar. 19, 2020); *see also* Governor’s Executive Order 2020-004 (Mar. 11, 2020). State agencies have implemented that order, making use of amended telework policies, portable technologies, and web-based video conferencing, and accounting for teleworked hours through the State’s enterprise resource planning system.

The Commission’s opinion does not turn on whether the State’s response to the current public health emergency is appropriate. The Commission’s own staff has transitioned to a default telework arrangement, and the Commission has conducted three “virtual” public meetings. At present, working from home is not only allowed but also necessary for public health. Telework arrangements may well persist after the public health crisis abates. *See, e.g., The Economist*, “What will be the new normal for offices?” (May 9, 2020).

The question, then, is whether a state employee, whose job is ordinarily based in New Mexico, may telework from outside the state on a permanent or near-permanent basis. Working from home is allowed, but is it allowed when the employee’s home is in, say, Chicago or Los Angeles? The request poses this question as an ethics matter and, to the extent it implicates the Governmental Conduct Act, it is.³ To interpret that Act, we survey other ways that the law regulates the residency of public employees.

There is no generally applicable residency requirement for all public officials and employees. Once, there was. In 1933, the Legislature enacted a statute requiring all employees of the State of New Mexico, including all political subdivisions thereof, to reside in the State and, moreover, to have resided in the State for at least one year prior to the commencement of their employment. 1933 N.M. Laws, ch. 68, § 1. This statute stood unamended for forty-six years, until the Legislature repealed it in 1979. *See* 1979 N.M. Laws, ch. 54, § 1 (repealing NMSA 1978, § 10-1-5).⁴ Clear reasons favored repeal: the statute preventing residents of border-state metropolitan areas (e.g., El Paso, Texas) from working as state or local government employees in New Mexico. The statute’s requirement of one year of residency prior to government employment also restricted the ability of state and local governments to recruit beyond state borders. By 1979, the Legislature concluded that the 1933 residency restrictions, on balance, no longer worked to New Mexico’s advantage.

³Under NMSA 1978, Section 10-16G-8(A), the Commission may issue advisory opinions “on matters related to ethics.” Such “matters related to ethics” are both informed and circumscribed by the nine laws that the Commission currently may enforce. *See, e.g.,* NMSA 1978, § 10-16G-9(A) & (F) (providing the nine laws that the Commission may enforce). Those nine laws include the Governmental Conduct Act, NMSA 1978, §§10-16-1 to -18.

⁴We observe that NMSA 1978, sections 10-1-6 to 10-1-9 are vestigial. These provisions served the residency requirement and, now inert, should also be considered for repeal.

While no law generally requires public employees and officials to reside within New Mexico, several laws impose specific requirements. To begin, the state Constitution reflects a clear preference for the residence of public officials, requiring hundreds of state and local government officials to reside in New Mexico.⁵ In addition, the Legislature specifically requires residence for many state officials and employees.⁶ Neither the Constitution nor any statute expressly requires all cabinet secretaries to reside in New Mexico; however, the Senate must approve these officers' appointments, and the hearing procedures involved in Senate approval might work to ensure that the various cabinet secretaries reside in New Mexico.⁷ So, while no law generally requires residency for all public officials and employees, many laws specifically impose that requirement for certain offices and, for others, Senate confirmation makes residency likely.

The request asks us to advise whether the Governmental Conduct Act contributes anything to this subject. The Act does not specifically address residency; rather, it requires public officers and employees to treat their "government

⁵*See, e.g.*, N.M. Const. art. IV, § 3 (Senators and Representatives); N.M. Const. art. V, § 1 (Governor, Secretary of State, State Auditor, State Treasurer, Attorney General, and Commissioner of Public Lands); N.M. Const. art. V, § 13 (all municipal officers, county commissioners, school board members, and municipal governing body members); N.M. Const. art. V, § 14 (members of the State Transportation Commission); N.M. Const. art. VI, § 24 (District Attorneys); N.M. Const. art. VI, § 8 (Supreme Court Justices); N.M. Const. art. VI, § 14 (District Court Judges); N.M. Const. art. VI, § 26 (Magistrate Court Judges); N.M. Const. art. VI, § 28 (Court of Appeals Judges); N.M. Const. art. VI, § 36 (members of the district court judges nominating committees); N.M. Const. art. VI, § 36 (members of the metropolitan court judges nominating committees); N.M. Const. art. X, § 6(B) (municipal representatives); N.M. Const. art. X, § 7 (county commissioners); N.M. Const. art. X, § 10(D) (urban county representatives); N.M. Const. art. XII, § 6 (members of the Public Education Commission); N.M. Const. art. XII, § 15 (local school board members).

⁶An incomplete survey is illustrative. *See, e.g.*, NMSA 1978, § 6-21-4(B) (certain members of the New Mexico Finance Authority); § 6-24-5(B) (directors of the New Mexico Lottery Authority); § 10-16G-4(A)(1) (members of the State Ethics Commission); § 15-3B-5 (staff architect in Facilities Management Division of the General Services Department); § 18-2-1 (members of the State Library Commission); § 18-3A-5(A) (trustees of the New Mexico Museum of Natural History and Science); § 18-13-4(A)(4)-(5) (trustees of the Historic Landscape Trust).

⁷N.M. Const., art. IV, § 42 (hearings on confirmation of gubernatorial appointees); N.M. Const., art. V, § 5 (providing for the Senate's advice and consent power); *see also, e.g.*, NMSA 1978, § 9-24-5 (requiring Senate confirmation for the secretary of public education).

position[s] as a public trust,” meaning that they may use “the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.” NMSA 1978, § 10-16-3(A). Furthermore, public officers and employees must conduct themselves “in a manner that justifies the confidence placed in them by the people” § 10-16-3(B). Does working remotely from out of state subvert an employee’s treatment of a government position as a public trust? Does it strain the public’s confidence?

The public might reasonably expect state employees to live here, in New Mexico; to contribute to a local tax base here; to send their children to school here; and to have knowledge of public affairs in ways that depend on the thick relation of living in a community, as opposed to the increasingly thin relation of having an employment contract with it. Even so, subsection 10-16-3(B) does not require state officials and employees to reside in New Mexico. The Legislature expressly requires residency when it sees fit, *see* n.5, *supra*, and we hesitate to read subsection 10-16-3(B)’s public-confidence provision to imply a duty that the Legislature ordinarily imposes expressly, *see, e.g., State v. Lindsey*, 2017-NMCA-048, ¶ 19, 396 P.3d 199 (“[W]e assume that ‘[t]he Legislature knows how to include language in a statute if it so desires[.]’”) (second alteration original) (citation omitted).

As compared to subsection 10-16-3(B), subsection (A) is more focused in its application. *See State v. Gutierrez*, 2020-NMCA-___, --- P.3d. ---, 2020 WL 2830581, at *9-*10 (N.M. Ct. App. May 29, 2020) That statute directs attention to whether the powers and resources that accompany public offices are being used to advance the public interest, or whether they are being used for other ends. The statute’s application requires an analysis of the power or resource at issue and its use.

Remote work implicates the “resources of public office,” §10-16-3(A), in at least two respects: (i) the public pays for the technologies that enable telework accommodations; and (ii) the public pays for the office space and other resources that are not used as a result of remote work. A public officer or employee can run afoul of subsection (A) by abusing a telework accommodation to further a personal interest at the expense of the public interest. For example, an employee might claim to be working from home (and collect pay) when in fact the employee is attending to personal matters.

At present, teleworking accommodations indubitably advance the public interest; such arrangements allow state employees to continue to discharge their responsibilities while reducing the spread of SARS-CoV-2. The request does not

ask for an opinion about teleworking *tout court*, but teleworking from out of state. It conceivable that an out-of-state telework accommodation could advance the public interest because, in rare cases, the accommodation might enable the State to employ singular talents that it might not otherwise; accordingly, subsection 10-16-3(A) cannot be read to flat prohibit out-of-state telework. But, if teleworking from out of state specifically impedes a state official's or employee's ability to complete their job duties, then the accommodation does not advance the public interest. Whether an accommodation for a state official or employee to telework from out of state subverts the public interest depends on a fact-based assessment whether their job duties can be completely discharged remotely and from afar.

While the request adverts to the Secretary of Education and a former PIO as examples of this specific accommodation, the request does not present enough facts to conclude whether or not the Secretary of Education can discharge his job duties and exercise the powers of his office while predominantly teleworking from Philadelphia. We observe, however, that the Secretary's statutorily established duties and powers are legion. *See* NMSA 1978, § 9-24-8 (enumerating the Secretary of Education's duties and powers); § 22-2-1(A) ("The secretary is the governing authority and shall have control, management and direction of all public schools, except as otherwise provided by law."); *see generally* NMSA 1978, §§ 22-1-1 to 22-35-5 (relating to the operation of public schools). The Secretary oversees a commensurately large percentage of the State's total expenditure. *See, e.g.*, State of New Mexico Comprehensive Annual Financial Report for FY18, at 16 & 18 <https://tinyurl.com/y52dt4o3> (last accessed July 29, 2020) (showing that education, excluding higher education institution expenditures, approximated \$3.17 billion, or nearly 17% of the State's total expenditures in fiscal year 2018). The Secretary's statutorily defined duties and the expenditure of public funds appropriated for education comprise, at least in part, "the public interest" as it relates to public education. § 10-16-3(A).

We also observe that, given the pandemic and the public health order requiring a two-week quarantine for individuals entering New Mexico from out of state, *see* Governor's Executive Order 2020-054 (issued July 1, 2020), <https://tinyurl.com/yynbqofc> (last accessed July 29, 2020), the Secretary cannot readily attend any events where his physical attendance might be required (such as an emergency that could not be addressed virtually or telephonically) or beneficial to the public (such as a press briefing). For example, the secretaries of the Department of Health and the Human Services Department routinely accompany the Governor in her press briefings concerning the State's response to the pandemic. While a similar showing from the Secretary of Education might assist press briefings

regarding public school openings and school health measures, the Secretary's out-of-state telework accommodation and the two-week quarantine order prevent his in-person attendance.

The requests' factual presentation and our few additional observations, however, are not enough to form an opinion that the Secretary's out-of-state telework accommodation either accords with or obstructs the public interest. The same applies to an analysis of the PIO position the request also mentioned. Subsection 10-16-3(A) imposes a duty on public officials and employees to use public resources to advance the public interest only and not to obtain personal benefits. That duty has implications for telework accommodations: if the telework accommodation obstructs, rather than advances, the public interest, then subsection 10-16-3(A) prohibits it. Without a richer factual description regarding how an out-of-state telework accommodation informs that analysis, we cannot provide further advice on how subsection 10-16G-3(A) applies.

CONCLUSION

Subsection 10-16-3(A) of the Governmental Conduct Act prohibits an out-of-state telework accommodation that either inhibits the performance of statutorily defined duties or otherwise obstructs the advancement of the public interest. Beyond this general statement, the Commission does not have enough information about the specific telework accommodations of the Secretary of Education or the former DFA PIO to provide an opinion as to whether those arrangements violate the Governmental Conduct Act.

SO ISSUED.

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