



*Avoiding Conflicts of Interest under the Governmental Conduct Act.*

*What can the School Board Do? What Board Members must do.*

**Leadership Retreat**

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# The Statute

- Governmental Conduct Act
  - Ethical Consideration
  - ***Criminal Penalties***
  - Section 10-16-17 provides:
    - Unless specified otherwise in the [GCA], any person who knowingly and willfully violates any of the provisions of [the GCA] is guilty of a misdemeanor and shall be punished by a fine of not more than one thousand dollars (\$1,000) or by imprisonment for not more than one year or both. Nothing in the [GCA] shall preclude criminal prosecution for bribery or other provisions of law set forth in the constitution of New Mexico or by statute.
    - Sections 10-16-3 and -17 indicates a legislative intent to provide for a misdemeanor penalty for a knowing and willful violation of Subsections 10-16-3(A)-(C)

# The Statute

- **State Ethics Commission**

- *In instances of violations of the GCA that were unintentional or for good cause, the state ethics commission has the authority to seek voluntary compliance with the provisions of the GCA by correcting the violation within ten days of receiving notice. Section 10-16-13.1(B).*
- *The state ethics commission also has the authority to either institute a civil action or refer the matter to the attorney general or a district attorney to institute a civil action “if a violation has occurred or to prevent a violation of any provision of the [GCA].” Section 10-16-18(B); see also § 10-16-13.1(B) (providing that referrals for civil enforcement “shall be pursued only after efforts to secure voluntary compliance with [the GCA] have failed”).*

# The Statute

- **State Ethics Commission**
  - *Alternatively, “[i]f the state ethics commission reasonably believes that a person committed, or is about to commit, a violation of the [GCA],” it “may refer the matter to the attorney general or a district attorney for enforcement.” Section 10-16-18(A); see also § 10-16-14(A) (authorizing the state ethics commission to “investigate suspected violations of the [GCA] and forward its findings and evidence to the attorney general, district attorney or appropriate state agency or legislative body for enforcement”).*
  - *In instances of knowing and willful violations of the GCA, the attorney general or a district attorney is authorized to bring criminal charges. See §§ 10-16-3(D), -4(A), -17 (designating as a felony or misdemeanor the knowing and willful violation of the provisions of the GCA).*

# The Statute

**Ethical principles of public service; certain official acts prohibited; penalty.**

- **A. A legislator or public officer or employee shall treat the legislator's or public officer's or employee's government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.**
- **B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.**
- **C. Full 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.**
- **D. No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of [NMSA 1978,] Section 31-18-15 [(2019)]**

# The Court's Interpretation

- *State v. Gutierrez*, 2020-NMCA-045, 472 P.3d 1260, *cert. granted*, 504 P.3d 535 (N.M. 2020), and *cert. granted*, 504 P.3d 535 (N.M. 2020)
  - Supreme Court will hear case to review the decision
- Section 10-16-3, Subsections (B) and (C) are unconstitutionally vague.
  - No criminal prosecution
  - Civil action (State ethics Commission)?

# Ethical Application and Finances

- All school board members and their local superintendents are covered under the applicable conflict of interest provisions of the GCA.
- The GCA provides that “[a] ... public officer [shall not use his or her powers and resources of public office] ... to obtain personal benefits or pursue private interests incompatible with the public interest.” N.M. Stat. Ann § 10-16-3(A) (2011).

# Ethical Application and Finances

- The GCA also provides that “[i]t is unlawful for a public officer ... to take an official act for the primary purpose of directly enhancing his [or her] own financial interest or financial position ... [and] should disqualify himself [or herself] from engaging in any official act directly affecting his[or her] financial interest.” N.M. Stat. Ann § 10-16-4(A) and (B) (2011).
- In the end, the GCA requires that school board members “shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.” N.M. Stat. Ann § 10-16-3(B) (2011).



# The Applicable Provision

## (N.M. Stat. Ann. § 10-16-3(A))

- Whether a public officer uses the powers and resources of their office for the specific purpose “to obtain personal benefits or pursue private interests” is a question of fact. See N.M. Stat. Ann. § 10-16-3(A) (2011); see e.g., *State v. Muraida*, 2014-NMCA-060, ¶ 18, 326 P.3d 1113, 1118 (N.M. Ct. App. 2014) (concluding that intent presents a question of fact and may be inferred from both direct and circumstantial evidence).
  - Retaliation on personal vendetta
- In addition, whether a particular use of “the powers and resources” of a public officer’s office results in “personal benefits” to the public officer or advances their “private interests” is also a question of fact.

# Direct Contracting

- A school board member bidding to provide services or materials under contract through a personally or substantially owned business with the school board to which he or she is a member is a clear and defined conflict of interest and can be viewed as an official action in furtherance of the school board member's personal benefit or in his or her personal interests.
- Section 10-16-4(B) 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 . . . [that is not] proportionately less than the benefit to the general public.” N.M. Stat. Ann. § 10-16-4(B) (2011).

# Direct Contracting

- This would appear to require a factual determination by the school board that the benefit to the school district must outweigh any personal benefit to the school board member in being awarded the contract.
  - Snow Plows
- Otherwise, it appears that a school board member cannot bid for contract directly under the GCA and doing so may result in criminal or civil penalties. See N.M. Stat. Ann. § 10-16-4(A) (2011) (“ Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony.”).

# Indirect Contracting

- School board member working for a contractor
  - The Attorney General's Office has opined that in interpreting conflicts of interest statutes the "courts generally have concluded that an official who acts as a subcontractor on a public project or supplies materials to the prime contractor has a sufficient interest in the contract to give rise to a conflict of interest when the subcontractor knows a contractor will bid on a project and either knows that the contractor will or likely will use the subcontractor's supplies or services." N.M. Att'y Gen. Op. No. 89-34 (1989), *citing United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (the Court held that a government official had an impermissible indirect interest in a contractor's agreement).

# Indirect Contracting

- School board member working for a contractor
  - The Attorney General's Office opined that a private entity with a public officer in its organization as an employee can contract with a governmental entity under the GCA provided the public officer publicly discloses his or her private employment status pursuant to the GCA; the contract is awarded in accordance with the competitive process under the Procurement Code and the public officer has no part in the appropriation of the source of the monies for the contract. See N.M. Att'y Gen. Op. No. 03-01 (2003).
  - The Opinion has been removed by the Attorney General's Office after *Gutierrez Case*. (criminal or civil)

# Before Gutierrez Case

- The GCA provides that “[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.” N.M. Stat. Ann § 10-16-3(C) (2011) (unconstitutionally vague).
- It would follow that effective public disclosure of real or potential conflicts of interest should be made at open and duly-called meetings of the school board and should be repeated when the conflict of interest is implicated by the school board’s actions.

# Before Gutierrez Case

- Clearly, while the GCA does specifically call for a school board member to recuse or abstaining from voting when there is a conflict of interest, the expectation is clear from the opinion of the Attorney General's Office. See N.M. Att'y Gen. Op. No. 03-01 (2003) (withdrawn by AG's Office).
- In addition, the Attorney General's Office appeared to recognize that a local school board can also place limitations on voting practices of its members in a local code of ethics. See *id.*

# Local Ethics Code

- School Board can make own rules on the exercise of its powers and duties:
- N.M. Stat. Ann. § 22-5-4(K) (2005) – local school board shall have the following powers and duties:
  - adopt rules pertaining to the administration of all powers or duties of the local school board
  - Ethical Code of Conduct
    - Define Conflict of Interest
    - Recusal and how and when
    - Public Disclosure of Conflicts or Financial Interests
    - Disqualification on
  - Penalties
    - Elected Official (recall or quo warranto)



# Employment of School Members

- N.M. Stat. Ann. § 22-5-5 (1967)
  - A. The members of a local school board shall serve without compensation.
  - B. No member of a local school board shall be employed in any capacity by a school district governed by that local school board during the term of office for which the member was elected or appointed.
- N.M. Att’y Gen. Op. (November 21, 2011)

# Nepotism

- N.M. Stat. Ann. § 22-5-6 (2009)
  - A. A local superintendent shall not initially employ or approve the initial employment in any capacity of a person who is the spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law of a member of the local school board or the local superintendent. The local school board may waive the nepotism rule for family members of a local superintendent.
- Initial Employment Only
  - *N.M. State Bd. of Educ. v. Board of Educ.*, 1981-NMSC-031, 95 N.M. 588, 624 P.2d 530 (N.M. 1981)

# Discussion

- School Board Member volunteers as coach
- School Board Member referees high school games
- School Board Member volunteers in schools
- Your examples

# Questions



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***Please note that Himes, Petrarca and Fester represents the Board of Education for its school clients***

