

December 1, 2014 Advisory Letter — Opinion Request – Charter School Teacher’s Service on Public Education Commission

Jeff Carr, Commissioner
Public Education Commission, District 10
P.O. Box 313
Eagle Nest, NM 87718

Re: Opinion Request – Charter School Teacher’s Service on Public Education Commission

Dear Mr. Carr:

You requested our advice regarding legal limitations on a charter school teacher’s ability to serve as a member of the Public Education Commission (“PEC”). Specifically, you ask whether (1) a charter school teacher employed by a school chartered by the state is statutorily prohibited from also serving as a commissioner on the PEC, and (2) the School Personnel Act, NMSA 1978, ch. 22, art. 10A (1975, as amended through 2014), in particular, would require the charter school employee to resign or take a leave of absence while serving on the PEC. As discussed in more detail below, we have reviewed the pertinent New Mexico statutes, including the School Personnel Act, and found nothing expressly prohibiting a person from serving as an employee of a state-chartered school while also serving as a member of the PEC.

Under the Charter Schools Act, NMSA 1978, ch. 22, art. 8B (1999, as amended through 2011), charter schools, including those chartered by the state, are authorized to operate as public schools. See NMSA 1978, § 22-8B-2(A). Employees hired by a charter school are covered by the School Personnel Act. See id. § 22-8B-10(A).

We have reviewed the School Personnel Act and found nothing requiring a charter school employee to resign or take a leave of absence in order to serve as member of the PEC.¹ We also reviewed the Charter Schools Act, which contains some restrictions related to dual employment and conflicts of interest. See, e.g., NMSA 1978, § 22-8B-4(B) (“no member of a local school board shall be a member of a governing body for a charter school”), § 22-8B-5.2(A) (precluding a person from serving as a member of a charter school governing body if the person owns or otherwise has a financial interest in a private entity). See also 6.60.9.8.B(5), 6.60.9.9.C(16) NMAC (provisions of Public Education Department’s ethics code requiring educators to “refrain from exploiting the institutional privileges of our professional positions to promote political candidates [or] partisan activities” and barring them from engaging in outside employment “the performance of which conflicts with [their] public school duties”). Nevertheless, similar to the School Personnel Act, the restrictions in Charter Schools Act do not include a prohibition against serving as a charter school employee while also serving on the PEC.

In addition to the School Personnel Act and the Charter Schools Act, we looked to two other laws that might affect a person who holds two public employment positions. First,

the provisions of the Governmental Conduct Act, NMSA 1978, ch. 10, art. 16 (1967, as amended through 2011), ensure that all state and local government employees conduct themselves ethically and primarily in the public interest. In pertinent part, the Act makes it “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...” and, in most cases, disqualifies a public officer or employee “from engaging in any official act directly affecting the public officer’s or employee’s financial interest....” Id. § 10-16-4(A), (B). “Financial interest,” for purposes of the Governmental Conduct Act includes “any employment.” Id. § 10-16-2(F)(2).

Although Governmental Conduct Act would not bar a charter school employee from serving on the PEC, it might limit the employee’s ability to act as PEC member in certain circumstances. Among other things, the PEC is responsible for approving, denying, suspending and revoking charters of state-chartered schools. See NMSA 1978, § 22-8B-16. If a charter school teacher or employee was serving on the PEC, it is conceivable that the charter of a school that employed the PEC member would come before the PEC for approval, denial, suspension or revocation. As discussed above, the Governmental Conduct Act disqualifies a public officer or employee from taking official action² that directly affects the officer’s or employee’s financial interest. Here, the PEC member’s financial interest - his or her employment with the charter school - would be directly affected by the PEC’s action on the charter. Under these circumstances, the Governmental Conduct Act would disqualify the PEC member from engaging or participating in the PEC’s action.

The second potential legal impediment to a person holding two public positions arises when the two positions are incompatible. There are two types of incompatibility under New Mexico law. The first is often referred to as “physical incompatibility.” Physical incompatibility occurs when a public officer or employee accepts another public or private position and, because of the other position, “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....” NMSA 1978, § 10-6-3 (1943). See also id. § 10-6-5 (1979) (declaring that a position described under Section 10-6-3 “is ... incompatible with the tenure of public office or employment”). A public officer or employee who takes another, incompatible position “shall be deemed to have resigned from and to have permanently abandoned his public office and employment.” Id. § 10-6-3.

The other type of incompatibility is a common law (judicially-created) doctrine known as “functional incompatibility.” Under that doctrine, two positions are incompatible, and cannot be held by the same person, if the functions of the positions are inconsistent, e.g., 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 same duties of both.” Haymaker v. State, 22 N.M. 400, 403-04, 163 P. 248 (1917) (holding that the same person could not be both a member of a school board and its clerk where the board had direct supervisory authority over the clerk position).

One of the few judicial opinions discussing incompatible employment involved a factual situation almost identical to that at issue here. In that case, the New Mexico Supreme Court addressed whether a person who taught at a public school could retain that position after being elected to the State Board of Education, which was the predecessor to the PEC. 3 See Amador v. New Mexico State Bd. of Educ., 1969-NMSC-076, 80 N.M. 336. The Court held that the functions of the two positions were not incompatible. According to the Court, the Board had jurisdiction over teachers only in limited circumstances. In the event that a teacher who was also a Board member appeared before the Board, the Court stated that any resulting conflict of interest could be addressed by having the teacher “simply refrain from acting as a member of the Board.” Id. ¶ 7, 80 N.M. at 338. A later Attorney General opinion similarly concluded that the positions of school employee and State Board of Education member were neither physically nor functionally incompatible. See N.M. Att’y Gen. Op. No. 92-04 (1992) (positions of assistant school superintendent and State Board member were not inherently incompatible); see also N.M. Att’y Gen. Op. No. 87-45 (1987) (following Amador and concluding that a local school district employee could draw a salary from the district and receive per diem and expenses as a member of the State Board of Education).

The reasoning used by the Supreme Court and subsequent Attorney General opinion to determine whether the positions of State Board of Education member and public school employee were incompatible applies equally to the positions of PEC member and charter school teacher and compels the same conclusion. Although the PEC performs different functions than the former State Board of Education, the PEC, like the Board, conducts its business primarily at periodic meetings and its members do not serve full time. This means there is little chance that a charter school teacher would fail to perform his or her teaching duties for 30 consecutive days as a result of his or her participation as a PEC member. See N.M. Att’y Gen. Op. No. 92-04 (position of assistant school superintendent was not physically incompatible with service on State Board where Board conducted its business at one-day meetings held six times per year). With respect to functional incompatibility, if the charter of the school employing the teacher came before the PEC for action, any conflict of interest could be addressed, as in Amador, by having the teacher refrain from acting as a member of the PEC. Accordingly, we conclude that the same person would not be barred on incompatibility grounds from holding both the position of PEC member and the position of teacher in a state-chartered school.

If we may be of further assistance, please let us know. Your request to us was for a formal Attorney General's Opinion on the matters discussed above. Such an opinion would be a public document available to the general public. Although we are providing you our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the public.

Sincerely,

Elizabeth A. Glenn
Chief Deputy Attorney General

[1] In contrast, the State Personnel Act, NMSA 1978, ch. 10, art. 9 (1961, as amended through 2014), expressly prohibits employees covered by that Act from "hold[ing] political office" during their employment, with limited exceptions not pertinent here, and requires employees who become candidates for public office to take a leave of absence. See NMSA 1978, § 10-9-21(B), (C). By its terms, the State Personnel Act excepts public school employees from its coverage. *Id.* § 10-9-4(E).

[2] "Official action" under the Governmental Conduct Act means "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority." NMSA 1978, § 10-16-2(H).

[3] The PEC replaced the State Board of Education under an amendment to the state constitution approved by state voters in 2003. See annotations to N.M. Const. art. XII, § 6.