

January 21, 2010 Advisory Letter---DA Mary Lynne Newell: Potential conflict of interest within Grant County government.

Honorable Mary Lynne Newell
Office of the District Attorney
Grant County Courthouse
PO Box 1025
Silver City, NM 88062-1025

Re: Conflict of Interest with County Commissioner and County Treasurer

Dear District Attorney Newell:

You have requested our opinion regarding a potential conflict of interest within Grant County government. Specifically, you have asked: (1) whether a conflict of interest exists if a County Commissioner votes on the budget and personnel matters regarding the County Treasurer's office when the Commissioner's spouse is the County Treasurer and (2) "[i]f it is a conflict, what action if any should be taken to resolve this?"

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude that there is no statute, local ordinance or local policy prohibiting this conduct.

A county commissioner is an elected position. A commissioner's role is to "represent the county and have the care of the county property and the management of the interests of the county in all cases where no other provision is made by law." NMSA 1978, § 4-38-18 (1953). A county treasurer is also an elected position.¹ A county treasurer's role is to keep "account of all money received and disbursed; regular accounts of all checks...drawn on the treasury...." NMSA 1978, § 4-43-2 (2001). The treasurer shall also keep "the books, papers and money pertaining to his office ready for inspection by the board of county commissioners at all times." *Id.*

The State Governmental Conduct Act, NMSA 1978, Sections 10-16-1 to -18 provides general instruction on conflict of interest issues. It, however, does not apply to county officials. See N.M. Att'y Gen. Op. No. 69-135 (1969). Therefore, the applicable statutes are those governing county commissioners, NMSA 1978, Sections 4-38-1 to -42 and 4-44-22 to -27, and any relevant Grant County ordinance/policy documents.

The legislature has explained when county officials must disqualify themselves from voting on a matter: "Any elected county official...shall disqualify himself from any official act directly affecting a business in which he has a financial interest." NMSA 1978, § 4-44-22(A) (1969). The law further reads: "Every employee of the county who has a financial interest which he believes ... may be affected by the actions of the county ... shall disclose the precise nature ... of such interest." NMSA 1978, § 4-44-25(A) (1969) (emphasis added).

The marriage between a county commissioner and county treasurer does not, by itself, create a “financial interest” in this statutory context. This is because marriage does not necessarily mean a county commissioner’s financial interest will be affected. First, while New Mexico is a community property state, the legislature, not the county commission, has the sole authority to set, and raise, a county treasurer’s salary and thus impact his household’s earning power. See NMSA 1978, §§4-44-4 to –8 (amended through 2006). Second, a canon of statutory construction is that terms should be read according to their plain meaning. See *Wilson v Denver*, 125 N.M. 308, 314, 961 P.2d 153 (1998). The term “marriage” is defined as a “contract...by which a man and woman ...mutually engage with each other to live their whole lives...together....” *Black’s Law Dictionary*, 671 (6th ed. 1983). In contrast, a “financial interest” in the statutory context of Sections 4-44-25 and -28 relates to the monetary value in a specific business entity; one subsection even refers to certain dollar threshold (i.e. \$10,000). See NMSA 1978, § 4-44-25(B) (1969). The term “business” is further defined as a “commercial enterprise engaged in for gain or livelihood.” *Black’s Law Dictionary*, 136 (6th ed. 1983). Finally, the County Commission’s limited oversight of the County Treasurer, described above, does not affect the Commissioner’s (as the Treasurer’s spouse) financial interest.

The Grant County Commission has enacted an ordinance regarding personnel matters and potential conflicts of interest. See Grant County Ordinance 1978-06-19 (1978). The Ordinance has a specific section on conflicts of interest. See *id.* § 9. It provides that an elected county official “shall disqualify himself for any official act directly affecting a business in which he has a financial interest.” See *id.* § 9C. This language appears to track with Sections 44-4-25. There is no additional language regarding a conflict of interest in the ordinance. It is also our understanding that the county does not have any further personnel policies on this matter.

We conclude that there is no express statutory or regulatory prohibition against this conduct. Based on this conclusion, it is unnecessary to answer the second question in your letter at this time.²

Nevertheless, an elected official may still face questions regarding the appearance of a potential conflict of interest. Elected officials may voluntarily: (a) continue on despite the questions; (b) publicly disclose any potential conflict; or (c) recuse themselves from voting on a particular matter. We set these principles out simply as points of reference for evaluating potential conflicts of interest in the workplace. As stated above, county commissioners “have the care of the county property and the management of the interest of the county in all cases” even where “no other provision is made by law.” NMSA 1978 § 4-38-18 (1953). “The county officials are trustees for the people within the county. As such, they are required to act with reasonable skill and diligence, and to discharge their duties with that prudence, caution and attention which careful men usually exercise in the management of their own affairs.” N.M. Att’y Gen. Op. No. 67-149 (1967).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are

providing you with 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 general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

Zachary Shandler
Assistant Attorney General

Cc: Albert J. Lama, Chief Deputy Attorney General

[1] The anti-nepotism statute is not applicable here because it applies only when an elected official employs a person. See NMSA 1978, § 10-1-10 (1953) (an elected officer cannot *employ* an assistant whose in related by consanguinity within the third degree, absent certain exceptions). The County Treasurer is not an employee of the County Commission.

[2] Please note, the "District Attorney shall investigate and prosecute any complaint" involving a violation alleged under Section 4-44-22 to 4-44-27 and that a violation may be "grounds for dismissal, demotion or suspension." NMSA 1978, § 4-44-27 (1969).