

June 01, 2011 Advisory Letter-Does a member of the Parole Board have a conflict of interest if the member also is a candidate for magistrate judge?

May 20, 2011

Ella Frank, Executive Director
New Mexico Adult Parole Board
45 Penitentiary Road
Santa Fe, NM 87508

Re: Opinion Request -- Conflict of Interest

Dear Ms. Frank:

During his tenure on the New Mexico Adult Parole Board, Mr. Johnny Chavez requested our opinion regarding whether a member of the Parole Board has a conflict of interest if the member also is a candidate for magistrate judge.[1] Based on our examination of the relevant New Mexico constitutional, statutory, case law and administrative authorities, and on the information available to us, we conclude that a conflict would arise if the Parole Board member was elected and sworn in as magistrate judge.

We did not find any legal limitation on a person's ability to run for the position of magistrate judge while continuing to serve as a member of the Parole Board. Once elected, however, a magistrate's extra-judicial activities, including other employment, are limited by statute and court rules.

The New Mexico constitution creates the position of magistrate judge as an elected state office within the judicial department, and provides that the legislature may prescribe a magistrate's qualifications beyond the constitutional requirements that a magistrate shall be a qualified elector and resident of his respective district. N.M. Const. art. VI, § 26; see also NMSA 1978, § 35-2-1 (1979) (magistrate qualifications). A magistrate is statutorily defined as "full-time," which is further defined to mean a magistrate "who holds office hours a minimum of forty hours per week and who holds no other employment that may conflict with his full-time judicial duties." NMSA 1978, § 35-1-36.1(A) and (B) (1994). Thus, a magistrate's options for extra-judicial activities or service are restricted to that time outside his regular office hours.

The Code of Judicial Conduct, Rules 21-001 to 21-901 NMRA, also limits a full-time magistrate's ability to hold a governmental position in addition to his elected judicial office. For example, the Code reaffirms the statutory requirement that all magistrates are full-time by its prohibition on "other paid employment or compensable activity hours" being performed "simultaneously" with a magistrate's judicial hours and duties. Rule 21-500(H) NMRA. Furthermore, a full-time magistrate judge (1) is prohibited from holding any other judicial position, Rule 21-500(I) NMRA; (2) shall not hold any other paid position, judicial or otherwise, that conflicts with the magistrate's hours and duties, Rule 21-500(H) NMRA; and (3) cannot accept appointment to a governmental position that is

concerned with matters other than the improvement of the law, the legal system or the administration of justice, Rule 21-500(C)(2) NMRA.

Beyond the legal restrictions on dual-office holding by judges generally, a specific statute bars an Adult Parole Board member from serving as a magistrate judge at the same time. The New Mexico Adult Parole Board is created by the legislature through the Parole Board Act and the Board members' qualifications and duties are specifically prescribed by statute. See NMSA 1978, § 31-21-24 (2005) (general provisions regarding the Board and its members) and § 31-21-25 (2001) (Board duties). The Act expressly prohibits an Adult Parole Board member from being "*an official* or employee of any other federal, *state* or local government entity." Section 31-21-24(D) (emphasis added). Because a magistrate is an elected judicial official of the state, the Parole Board Act specifically prohibits a member of the Adult Parole Board from simultaneously serving as a magistrate judge.

To summarize, although we find no legal prohibition on, or conflict of interest with, a member of the Parole Board continuing to serve while running for elective office,[2] if the member is elected to and sworn in as a magistrate judge, he or she is must resign from the Adult Parole Board.

We trust that this letter addresses the questions raised in your request. If we may be of further assistance, please let us know. Your request was for an 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 this letter instead of a formal 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.

Very truly yours,

MARY H. SMITH
Assistant Attorney General

[1] Although we understand that Mr. Chavez is no longer a member of the Parole Board, we are providing you with our response for the Board's guidance in the event this or a similar issue is raised in the future.

[2] A person's candidacy for election to the judicial office of magistrate is governed by statute, NMSA 1978, § 35-1-3 (1968) and § 35-2-1 (1979), and by the Code of Judicial Conduct, Rule 21-700 NMRA.