

March 8, 2005: Nomination of Mr. Benny Shendo as Secretary of Indian Affairs

Hand-delivered

The Honorable Linda M. Lopez
State Senator
9132 Suncrest Rd. SW
Albuquerque, NM 87121

RE: Opinion Request on Nomination of Mr. Benny Shendo as Secretary of Indian Affairs

Dear Senator Lopez:

You requested our advice on several legal issues related to the nomination and appointment of Mr. Benny Shendo as Secretary of Indian Affairs. In particular, you asked (i) whether NMSA 1978, § 10-7-1 or NMSA 1978, § 21-1-23 applies to the transfer of Mr. Shendo from the University of New Mexico to the Indian Affairs Department; (ii) whether, if the former section applies, Mr. Shendo's transfer is temporary as contemplated by Att'y Gen. Op. No. 57-94; and (iii) whether, if the latter section applies, Mr. Shendo's transfer complies with that section.

Your question requires us to consider the reach of these two statutory sections in light of any dual office considerations they implicate. As discussed below, we believe that (i) §10-7-1 does not apply and that § 21-1-23 does, (ii) the second question is, thus, moot, and (iii) based on certain assumptions, § 21-1-23 apparently has been satisfied.

According to your letter and its attached Memorandum of Understanding (MOU), Mr. Shendo is employed by the University of New Mexico (UNM) and is currently under consideration by the Senate Rules Committee ("Committee") for appointment as Secretary of Indian Affairs. The MOU – executed by the Governor, Mr. Shendo, and a representative of UNM in June of 2004 – (i) "allows" the Governor to appoint Mr. Shendo as Secretary, (ii) grants Mr. Shendo a leave of absence from UNM while maintaining his employment there, and (iii) commits the Indian Affairs Department (IAD) to reimburse UNM for Mr. Shendo's salary. Your letter further indicates that, in 2004, Governor Richardson appointed Mr. Shendo to the position of Secretary of Indian Affairs, and that he has served as Secretary-designee since then. We have no information on the administrative procedure followed by UNM in arranging Mr. Shendo's leave of absence; nor have we researched in detail the procedure required under UNM's rules or policies. We do not have a job description for Mr. Shendo's position at UNM or any other information on his duties or responsibilities there. We do, however, make several assumptions in this regard in order to respond to your question, as explained below.

Your inquiry characterized Mr. Shendo's situation as a "transfer" from UNM to the Indian Affairs Department, and asked which of the following two statutes would control such a transfer:

The governor is further authorized, subject to the approval of the state board of finance, to transfer, temporarily from one office, department or institution to another office, department or institution, such employees as in his judgment may be necessary or convenient at any time to further the economical and efficient conduct of the state government. . . .

NMSA 1978, § 10-7-1.

Public funds shall not be expended for the purpose of paying compensation to any faculty member or employee of a state higher educational institution for any period of absence from his assigned duties . . . unless the period of absence . . . is approved by a designated administrative authority according to procedures established for this purpose by the regents.

NMSA 1978, § 21-1-23.

Section 10-7-1, by its terms, concerns transfers by the executive as approved by the state board of finance, an executive institution. Thus, on its face, it contemplates transfers only within the executive branch. While there is no case on point, we believe that this section does not apply to transfers outside the executive branch. As UNM and other institutions of higher education are not within the executive branch, § 10-7-1 is inapplicable.

Section 21-1-23 permits leaves of absence from higher education institutions only if "approved by a designated administrative authority according to procedures established for this purpose by the regents." Our brief review of UNM's Board of Regents' Policy Manual indicates that the regents have established administrative procedures in regard to leaves of absence. In the absence of any contrary evidence, we presume that the proper procedures were followed here, and that § 21-1-23 has, thus, been satisfied.

Your letter suggests, without specifically inquiring, that the dual office aspect of the situation – as between the UNM employment and the cabinet office – may be a concern. It is correct that, absent a clear demarcation of duties and loyalties, problems of incompatibility of dual offices can arise. See Att'y Gen. Op. Nos. 89-10 (1989); 90-14 (1990); 91-02 (1991); 92-01 (1992); *Haymaker v. State*, 22 N.M. 400, 403-04, 163 P. 248 (1917) (positions are functionally incompatible when one is subordinate to another, or when a "contrariety and antagonism would result in the attempt by one person to faithfully and impartially discharge the duties of both."). Again, we assume that Mr. Shendo enjoys a valid leave of absence from UNM arranged in accordance with applicable administrative procedures. We further assume that a clear demarcation exists between his former UNM duties and his current duties as Secretary of Indian Affairs, the latter of which include assisting "in setting the policy, and act as the

clearinghouse, for all state programs affecting the Indian people of New Mexico.” NMSA 1978, § 9-21-7 (2004). In that regard, we assume that he serves the statewide interests of all Native Americans without any improper bias or allegiance to UNM Native American students.

We hope this response is helpful. If we may be of further assistance, please let us know. You requested a formal Attorney General’s Opinion on the matter discussed above. Such an opinion would be a public document available to the general public. Although we are providing our legal advice in the form of a letter instead of an Attorney General 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,

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cc: Stuart M. Bluestone, Chief Deputy Attorney General