

Opinion No. 03-01

January 15, 2003

OPINION OF: PATRICIA A. MADRID, Attorney General

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TO: Honorable Ray Begaye, State Representative, P.O. Box 609, Shiprock, NM 87420

QUESTION

1. Can a nonprofit entity that has a state legislator as an employee enter into a contract with the state?
2. Can a state legislator simultaneously receive legislative per diem and a salary from his private employer?
3. Can a state legislator vote on a bill that may benefit his private employer?

CONCLUSIONS

1. A private entity, either for-profit or nonprofit, that has a state legislator within its organization may enter into a contract with the State provided the contracting process is conducted in accordance with constitutional and statutory requirements.
2. A legislator who complies with legislative rules is entitled to receive his legislative per diem. His private sector employer is free to determine whether it should also compensate him for that day's work.
3. A legislator should follow the Governmental Conduct Act, NMSA 1978, Sections 10-6-1 to -- 18, and his legislative body's code of ethics in deciding when it is proper to vote or abstain on a matter in front of the body.

FACTS

State Representative Ray Begaye became the full time Chief Professional Officer for the Boys & Girls Club of the Navajo Nation in 2002. The entity is a nonprofit organization that has the opportunity to contract with federal and state governments.

ANALYSIS

There are two rules of statutory construction that apply to this matter. First, a "statute, together with other statutes in pari materia, must be read together to ascertain the legislative intent." **Roth v. Thompson**, 113 N.M. 331, 334, 825 P.2d 1241 (1992).

Second, "the plain meaning rule does not require a wooden interpretation of all statutory language." **Sims v. Sims**, 122 N.M. 618, 622, 930 P.2d 153 (1996).

There are three relevant constitutional and statutory provisions.

Nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.

N.M. Const. art. IV, § 28.

A state agency shall not enter into any procurement contract for services ... with a legislator or with a business which the legislator has a substantial interest unless the legislator has disclosed his substantial interest and unless the contract is awarded in accordance with the provisions of the Procurement Code.

NMSA 1978, § 10-16-9(A) (1993).

The third relevant statute is the Governmental Conduct Act. **See** NMSA 1978, § 10-16-1 to -- 18 (as amended through 1995). This Act provides instructions on how legislators should balance governmental and personal financial matters.

These provisions, when read together, provide a general rule governing when a private entity, with a legislator in its organization, may contract with the State:

- a. the legislator must disclose his private employment pursuant to the Governmental Conduct Act;
- b. the contract must be awarded in accordance with the Procurement Code; and
- c. the appropriation for the contract monies must have been part of the General Appropriations Act OR from independent federal funding OR made prior to, or one year after, his legislative tenure.

See State ex rel. Baca v. Otero, 33 N.M. 310, 314, 267 P. 68 (1928); N.M. Att'y Gen. Op. No. 90-17 (1990); N.M. Att'y Gen. Op. No. 89-34 (1989).

We understand that some parties have read the pertinent constitutional and statutory provisions to mean that a legislator's work in the private sector creates an inherent conflict of interest with his legislative position and therefore his entity should be disqualified from contracting with the State. This viewpoint appears to rely on an unnecessarily narrow and wooden interpretation of the relevant laws. New Mexico, like many states, has a citizen legislature and most of its members earn a living through private sector employment. "For the most part the lawmakers have real lives as farmers, teachers, bankers, business owners and lawyers ... The fact that lawmakers have real

lives as citizens in their communities is a tremendous asset to the legislative process." Michael Mello, **The Unfinished Battle for Same-Sex Marriage in Vermont**, 25 Vermont Law Rev. 149, 160 (2000). A wooden interpretation runs counter to this reality and prohibits a wide number of entities from bidding on state contracts and in turn prohibits a large number of legislators from working in the private sector. This could not possibly be the drafters' intent of these laws when New Mexico is so dependent on private sector entities to provide required and valuable services for the citizenry.

You have also asked whether a legislator can simultaneously receive legislative per diem and a private sector salary. It is our understanding that the Legislative Council Service has a booklet explaining when a legislator qualifies for legislative per diem. The legislator's private sector employer is free to determine whether to also compensate him or her for that day's work. However, it is important that the legislator and the private sector employer are clear on this issue in order to avoid problems. **See** "N.M. Lawmaker Accepts Plea Bargain Over Tribal Job Accusations", **Associated Press**, Oct. 24, 2002 (former state Representative Leo Watchman, Jr. had to repay his private sector employer for private sector salary received when performing legislative business).

Finally, you have asked whether a legislator can vote on a bill that may benefit his or her employer. The Governmental Conduct Act states: "A legislator [shall not use his or her power] ... to obtain personal benefits or pursue private interests incompatible with the public interest." NMSA 1978, § 10-16-3(A) (1993). It adds: "It is unlawful for a [legislator] ... to take an official act for the primary purpose of directly enhancing his own financial interest or financial position ... [and] should disqualify himself from engaging in any official act directly affecting his financial interest." NMSA 1978, § 10-16-4(A), (B) (1993). It is our understanding that each legislative body has its own code of ethics regarding voting practices. Therefore, a legislator should rely on these items to determine whether to vote or abstain on a particular matter.

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02-01