



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2022-02

February 4, 2022¹

QUESTION PRESENTED²

1. A candidate sought a municipal, school district, or special district elected office, and the candidate received contributions to support the candidate's election to that office. Does the Campaign Reporting Act, NMSA 1978, Sections 1-19-1 to -37 (1979, as amended through 2021) ("CRA"), prohibit the candidate from retaining and using those contributions to support the candidate's subsequent campaign for an office covered by the CRA?
2. A municipal judge intends to run for county office in 2022 and seeks to transfer contributions

¹ This is an official advisory opinion of the State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceeding concerning a person who acted in good faith and in reasonable reliance on the opinion. NMSA 1978, § 10-16G-8(C) (2019).

² The State Ethics Commission Act requires a request for an advisory opinion to set forth a "specific set of circumstances involving an ethics issue." *See* NMSA 1978, § 10-16G-8(A)(2) (2019). "When the Commission issues an advisory opinion, the opinion is tailored to the 'specific set' of factual circumstances that the request identifies." State Ethics Comm'n, Advisory Op. No. 2020-01, at 1-2 (Feb. 7, 2020) (quoting § 10-16G-8(A)(2)). For the purposes of issuing an advisory opinion, the Commission assumes the facts as articulated in a request for an advisory opinion as true and does not investigate their veracity. On December 10, 2021, the Commission received a request for a formal advisory opinion that detailed the issues as presented herein. The request was submitted by a public official who has the authority to submit a request. *See* § 10-16G-8(A)(1).

received as a candidate for judicial office to a newly-formed campaign committee that supports his candidacy for county office. Does the CRA prohibit the transfer?

ANSWERS

1. No.
2. Yes.

ANALYSIS

1. A candidate who sought election to a municipal, school district, or special district office may transfer contributions to a campaign committee affiliated with the candidate seeking election to an office subject to the CRA.

Elections for municipal and special district offices are governed by municipal or special district laws. Because those laws generally do not restrict candidates' uses of contributions, and the CRA does not apply to contributions received by those candidates, candidates for municipal or special district offices may convert contributions received for use in an election subject to the CRA. Separately, school district elections are covered by the School District Campaign Reporting Act, NMSA 1978, Sections 1-22A-1 through -10 (2013), and that Act permits the use of contributions for a candidate's election to any public office, including a public office subject to the CRA.

A. Municipal and special district offices

As the request notes, "money raised at local levels may not [be] subject to any campaign reporting laws." Likewise, the CRA excludes municipal and special district offices from its definition of "election," thereby excepting candidates seeking municipal or special district elected office from the CRA's requirements concerning registration, disclosure, contributions, and expenditures. *See* § 1-19-26(K).

Municipalities and special districts may limit contributions or impose restrictions on the permissible use of those contributions by candidates seeking municipal or special district elected office. For example, Santa Fe and

Albuquerque both require a candidate for municipal office to return all unexpended contributions at the end of every election cycle to contributors, place the funds in the city general fund, or give the contributions to charity. *See* Santa Fe, N.M., Code of Ordinances, Ch. 9, § 2.9(H)(2) (2015); Albuquerque, N.M., Charter, Art. XIII, § 4(f) (2019). But as the request points out, a candidate seeking election to other municipal, conservation district, or special district office may not be subject to any specific contribution or expenditure limitations.

For these candidates, contributions are neither subject to the CRA nor subject to local restrictions on the use of contributions received. And under the CRA, “[t]he limitation on contributions to a candidate provided for in Subsection A of [Section 1-19-34.7] shall not apply to a candidate’s own contribution from the candidate’s personal funds to the candidate’s own campaign.” § 1-19-34.7(H). Accordingly, if a candidate is permitted to convert contributions received in furtherance of a campaign for municipal office to another use, the CRA permits the candidate to contribute those converted funds to the candidate’s own campaign for election to an office subject to the CRA.

Our conclusion is narrow: municipal law may restrict a candidate from converting contributions for use in an election to an office subject to the CRA; likewise, the legislature can amend the CRA to restrict or prohibit the use of contributions received by a candidate in municipal or special district elections in an election subject to the CRA.³ Nor may a candidate skirt the CRA’s contribution and expenditure limits by soliciting contributions for a non-CRA office; as soon as an individual “seeks or considers an office in an election covered by the [CRA],” the individual becomes subject to the CRA’s contribution and expenditure limits. *See* § 1-19-26(G). Finally, a municipal or special district candidate’s conversion of contributions to personal use could constitute fraud, if it is shown that the

³ The CRA prohibits the conversion of contributions for a federal election campaign for use in an election subject to the CRA. *See* § 1-19-29.1(C). But this prohibition has never been enforced because two federal district court decisions have held that it violates federal election candidates’ First Amendment rights to make political communications, and is not sufficiently tailored to a compelling state interest. *See* Mem. Op. and Order, *New Mexicans for Bill Richardson v. Gonzales*, No. Civ. 93-1135 JP (D.N.M. Aug. 2, 1996) (ECF No. 73); Mem. Op. and Order, *People for Pearce v. Oliver*, No. 17-cv-752 JCH/SMV, 2017 WL 5891763 (D.N.M. Nov. 28, 2017) (ECF No. 51). But Section 1-19-29.1(C)’s prohibition on conversion of contributions applies only to contributions received by a campaign for federal office; the CRA does not speak to the conversion of contributions received by a campaign for a municipal or special district office.

candidate obtained the contributions through false representations of fact to contributors about how their contributions would be used.⁴

B. School district offices

The School District Campaign Reporting Act, §§1-22A-1 to -10, governs elections for board of education member offices of school districts with enrollments of twelve thousand students or more. Under the School District Campaign Reporting Act, a candidate seeking a school district office may make “expenditures to eliminate the campaign debt of the candidate for the office sought or expenditures incurred by the candidate when seeking election to another public office.” NMSA 1978, § 1-22A-10(D) (2013) (emphasis added). In an earlier advisory opinion, the Commission concluded that the term “public office” includes any elected office, federal, state, or local. *See* Advisory Op. 2021-11 (Aug. 13, 2021). Accordingly, a CRA candidate may make an expenditure of contributions received in support of that candidate’s election to a school district office subject to the School District Campaign Reporting Act.⁵

2. The unexpended contributions of a candidate for judicial office must be returned to contributors or donated to charity or the State of New Mexico, and therefore cannot be transferred to another campaign committee.

The CRA applies to candidates seeking judicial office. *See* § 1-19-26(K). Under the CRA, “a candidate for judicial office shall solicit or accept campaign funds and return unused funds in accordance with the provisions of the Code of Judicial Conduct.” § 1-19-29.1(B). The Code of Judicial Conduct applies to municipal judges. *See* Rule 21-004(A) NMRA. The Code of Judicial Conduct prohibits a judge seeking appointment or election to a public, nonjudicial office

⁴ For example, a candidate who solicited contributions for a special district election by representing that the contributions would be expended only on the candidate’s efforts to obtain special district office could be liable for fraud if the candidate converts the contributions to personal use or for use in a campaign for a different office. *See* UJI 13-1633 NMRA (setting out the elements of fraudulent misrepresentation).

⁵ There is no law imposing restrictions on the use of contributions for campaigns for a school district office in a school district with fewer than twelve thousand students. Accordingly, there is no general prohibition against a candidate for such an office converting contributions for personal use and later using those contributions for a campaign seeking election to an office covered by the CRA.

from soliciting or accepting funds (either personally or through a committee) to support the candidacy. *See* Rule 21-405(A) NMRA. When a judge seeks election to an elective nonjudicial office, a judge is required to resign from his or her judicial office immediately upon filing of a statement of candidacy. *See* Rule 21-405(C) NMRA. These rules ensure that a judge “cannot use the judicial office to promote his or her candidacy, and prevents post-campaign retaliation from the judge in the event the judge is defeated in the election.” Rule 21-405 cmt. 2.

Although the Code of Judicial Conduct permits candidates for elective judicial office to accept contributions to support a campaign for judicial office, it prohibits retention of contributions received after the election takes place, without regard to whether the candidate is elected:

a candidate for judicial office who has unused campaign funds shall refund the remaining funds pro rata to the campaign contributors, or donate the funds to a charitable organization, or to the State of New Mexico, as the candidate may choose, within thirty (30) days after the date the election results are certified.

Rule 21-404(B) NMRA.

The Code of Judicial Conduct prohibits a transfer of unexpended contributions from a candidate for judicial office to a campaign committee supporting a candidate for elected office. Because the CRA incorporates the Code of Judicial Conduct (as it applies to candidates for judicial office) by reference, *see* §1-19-29.1(B), the CRA also prohibits a candidate for municipal judicial office from transferring contributions received to a campaign committee.

CONCLUSION

Where municipal or special district law does not restrict a candidate’s uses of contributions received for election to a municipal or special district office, the CRA allows the candidate to use those converted funds as contributions to support a campaign for election to an office covered by the CRA. The School District Campaign Reporting Act permits a candidate seeking election to a school district office to use contributions to support a subsequent campaign for another public office, including an office covered by the CRA. By contrast, the CRA prohibits a candidate for judicial office from using contributions in a subsequent campaign for other public office, because the Code of Judicial Conduct (which the CRA incorporates by reference) precludes such a transfer.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFFREY L. BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

HON. GARREY CARRUTHERS, Commissioner

RONALD SOLIMON, Commissioner

JUDY VILLANUEVA, Commissioner