



STATE ETHICS COMMISSION

ADVISORY OPINION NO. 2023-06

August 4, 2023¹

QUESTION PRESENTED²

In October 2021, the City entered into a collective bargaining agreement with the Police Officers Association (“the POA”). On March 3, 2023, the POA requested to reopen collective bargaining negotiations per its October 2021 agreement. A former mayor of the City is currently serving as a negotiator on behalf of the POA in its negotiations with the City. As mayor, he was briefed on negotiations regarding the collective bargaining agreement with the POA, “gave direction to the negotiation team, along with the City Council, about acceptable concessions and changes[,]” was “the presiding officer of the City’s governing body” when the City

¹ This is an official advisory opinion of the New Mexico State Ethics Commission. Unless amended or revoked, this opinion is binding on the Commission and its hearing officers in any subsequent Commission proceedings concerning a person who acted in good faith and in reasonable reliance on the advisory 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[.]” 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, 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 June 19, 2023, the Commission received a request for an advisory letter that detailed the issues as presented herein. *See* 1.8.1.9(B) NMAC. Commissioner Baker requested that the advisory letter be converted into a formal advisory opinion. *See* 1.8.19(B)(3) NMAC. *See generally* NMSA 1978, § 10-16G-8(A)(1); 1.8.1.9(A)(1) NMAC.

entered into the October 2021 collective bargaining agreement, and appointed the manager and interim city manager who also had a role in entering the agreement on the City's behalf. Considering these facts and Section 10-16-8(C)(2) of the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023), may the City enter into a new collective bargaining agreement with the POA?

ANSWER

Yes.

ANALYSIS

The request poses a question about the application of NMSA 1978, Section 10-16-8(C)(2) (2011). Under that statute,

A local government agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is . . . assisted in the transaction by a former public official or employee of that political subdivision of the state whose official act, while in employment with that political subdivision of the state, directly resulted in the agency's making that contract or taking that action.

§ 10-16-8(C)(2). Whether Section 10-16-8(C)(2) prohibits the City from entering into a collective bargaining agreement with the POA turns on two issues: First, did the former mayor take an "official act" as mayor with respect to the 2021 collective bargaining agreement? Second, if so, will that act directly result in the City's entering into a contract that it would not enter but for the former mayor's prior official act?

1. Official act

The former mayor's appointment of a manager and interim manager and his directions to the City's negotiating team were likely "official acts." The Governmental Conduct Act defines an "official act" as "an official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority[.]" NMSA 1978, § 10-16-2(H) (2011). The City is a mayor-

council municipality, which also employs a manager. *See* Forms of Municipal Government in New Mexico, New Mexico Municipal League, <https://nmml.org/DocumentCenter/View/252/Forms-of-Municipal-Government-in-New-Mexico-PDF?bidId=>. In mayor-council municipalities, the mayor: (i) is the presiding officer of the council and may vote only when there is a tie vote in the council, *see* NMSA 1978, § 3-11-3 (1965); (ii) appoints municipal employees (subject to approval by the council), may appoint temporary employees, supervises employees of the municipality, and may designate an employee to perform any service authorized by the council, *see* NMSA 1978, § 3-11-6(A)–(C) (1965); and, (iii) performs other duties, compatible with his or her office, which the council may require, *see* NMSA 1978, § 3-11-4(C) (1965). By appointing municipal staff and providing directions to the City’s negotiating team regarding the 2021 collective bargaining agreement, the former mayor likely exercised his discretion as mayor and presiding officer of the council, and therefore took “official acts” for purposes of the Governmental Conduct Act.

2. Direct result

It is unlikely that the former mayor’s official acts of providing direction to the negotiating team for the 2021 collective bargaining agreement and appointing a manager will “directly result” in the collective bargaining agreement that the City is currently negotiating and into which it might enter with the POA. Although the request does not detail the specific directions that the former mayor gave to the City’s negotiating team leading up to the 2021 collective bargaining agreement, it is unlikely that the former mayor’s directions, given years ago, will “directly result” in the next agreement between the City and the POA. Rather, the contract currently under negotiation likely will be the direct result of the POA’s request to reopen negotiations, the negotiations among the parties (involving the current City manager appointed by the current mayor and approved by the council), the directions of the current council, and the application of any impasse procedures under the City’s collective bargaining ordinance, *inter alia*. If there is any causal relationship between the former mayor’s directions and the agreement, then that relationship likely would be attenuated and its effect diluted by the supervening actions of the current City administration. Accordingly, it is unlikely that Section 10-16-8(C)(2) prohibits the City from entering into a new contract with the POA simply because it is assisted currently by the former mayor.

3. The purpose of Section 10-16-8(C)

This analysis is consistent with Section 10-16-8(C)(2)'s purpose, which mainly is to prevent government officials from using the powers and resources of their public office with a purpose to secure a benefit for themselves after they separate from government service. Section 10-16-8(C)(2) works alongside the other revolving-door provisions in Section 10-16-8 to guard against conflicts of interest. *See generally Ortiz v. Taxation and Revenue Dep't*, 1998-NMCA-027, ¶ 9 (“The purpose of ‘revolving door’ legislation is to enhance public trust and confidence in our governmental agencies by prohibiting conduct which may permit or appear to permit undue influence or a conflict of interest.”); *Principles of the Law: Government Ethics*, Tentative Draft No. 2, American Law Institute § 511 (Mar. 12, 2018). The facts presented in the request do not implicate these concerns. The contract at issue is a future collective bargaining agreement between the City and the POA, presumably negotiated under the aegis of the City’s collective bargaining ordinance, under which both the City and its employees’ benefit. As such, the agreement is not the kind of contract between a government entity and a private entity providing goods, services or construction to the government that ordinarily implicates Section 10-16-8(C)(2). The request does not suggest that the former mayor took official acts with respect to the 2021 collective bargaining agreement with a purpose to secure a benefit for himself or the POA after he separated from the City. In sum, Section 10-16-8(C)(2) prevents government employees from using their government prerogatives and resources to feather their nest after separating from the government, and the request does not suggest any facts implicating that concern.

CONCLUSION

While the mayor engaged in “official acts” related to the 2021 collective bargaining agreement, those acts did not directly result in the City’s entering into a contract that it would not enter but for those acts. The City may therefore enter into a new collective bargaining agreement with the POA.

SO ISSUED.

HON. WILLIAM F. LANG, Chair

JEFF BAKER, Commissioner

STUART M. BLUESTONE, Commissioner

HON. CELIA FOY CASTILLO, Commissioner

RONALD SOLIMON, Commissioner

DR. JUDY VILLANUEVA, Commissioner