

BERNALILLO COUNTY CODE OF CONDUCT REVIEW BOARD

David Duhigg, Member
Sarita Nair, Member
Peter Vredenburg, Vice-Chair



Michael Flynn, Member
Alan Packman, Chair

Advisory Opinion 2016-002

Dear Commissioner Talbert:

You requested an Advisory Opinion from the Code of Conduct Review Board (the “Board”) concerning a public servant’s obligations under the Bernalillo County Code of Conduct (the “Code”) related to conflicts of interest and interest in County business contained in Sections 2-130 (c) and (g). Specifically, the question is captured in the following:

“A member of the Board of County Commissioners is also employed as the COO for a local bank. The bank maintains the same position in the market as any other bank within the state for purposes of conducting financial transactions with counties within the state. The question is whether or not the bank that employs the Commissioner may seek to provide financial or banking services for any county within the state including the county for which he is a Commissioner?”

For purposes of this question, the Conduct Review Board assumes that the County Commissioner in question will not provide input or exercise decision making authority as to how the County decides which banks or financial institutions the County chooses to engage as this is the responsibility of the County Treasurer. However, if the Commissioner were ever placed in an advisory or decision-making role for the County in this regard, he would recuse himself participating in either substantive discussions or a final vote as required under the Code of Conduct. The Conduct Review Board also assumes that the County goes through some form of competitive selection process for deciding which banks to utilize. Finally, the Conduct Review Board assumes that the Commissioner is not the lead or contact person for his employer bank in terms of soliciting or contacting counties for the provision of financial services. Additionally, it should be noted that you have indicated that you are not a shareholder with the bank nor do you hold any share options or other equity with the bank.

In considering your question, the Board took into account the following definitions and provisions contained within the Code:

- *Financial interest or substantial financial interest* means an interest held by an individual or the individual's family that is:

- (1) An ownership interest in business or property greater than 20 percent; or
- (2) Any employment or prospective employment for which negotiations have already begun.

Sec. 2-130. - Standards of conduct.

(c) Prohibited bidding and contracting.

- (2) No public servant shall attempt to influence the process or outcome of a competitive bid, proposal or request for a proposal, unless formally or specifically appointed to participate in the bid or proposal process; or by virtue of their job duties has the authority to advise or take action on a specific bid or proposal.
- (3) No elected official or employee shall enter into contracts or obtain financial interests with a person or business that are, or are attempting to have business with the county.
- (4) No public servant who participated, directly or indirectly in a county procurement process shall seek employment, be an employee, or receive any financial consideration from a person or business contracting or seeking to contract with the county. . .
- (6) No person or business who is doing business with the county or seeking to do business with the county shall attempt to influence the outcome of a bid process by contacting any candidate or public servant about a bid or proposal process unless the public servant contacted is formally or specifically appointed to participate in the bid or proposal process; or by virtue of their job duties has the authority to advise or take action on a specific bid or proposal. Persons or businesses doing business or seeking to do business with the county shall be required to comply with the provisions of this code of conduct as they apply to their interactions with the county and any violation of the code of conduct requirements are hereby found to be a breach of a county contract they hold and shall be grounds for rejection of any bid or proposal.

(g) Conflicts of interest.

(5) Interest in county business.

c. The county shall not enter into a contract with a public servant or with their family or with a business in which they or their family has a substantial interest unless the public servant has disclosed through public notice to the county clerk their substantial interest and unless the contract is awarded pursuant to a competitive process; provided that this section does not apply to salary for the elected office or employee compensation by the county. A person negotiating or executing a contract on behalf of the county shall exercise due diligence to ensure compliance with the provisions of this section.

(k) Prohibited employment. It is unlawful for an employee who is participating directly or indirectly in the contracting process to become or to be, an employee or contractor for any person or business contracting with the county.

(l) Prohibited sales.

- (1) An elected official or employee shall not sell, offer to sell, coerce the sale of or be a party to a transaction to sell goods, services, construction or items of tangible personal property directly or indirectly through their family or a business in which the elected official or employee has a substantial interest, to an employee supervised by the elected official or employee. An elected official or employee shall not receive a commission or shall not profit from the sale or a transaction to sell goods, services, construction or items of tangible personal property to an employee supervised by the elected official or employee. The provisions of this subsection shall not apply if the supervised employee initiates the sale. It is not a violation of this subsection if a elected official or employee, in good faith, is not aware that the employee to whom the goods, services, construction or items of tangible personal property are being sold is under their supervision.

As to the part of the question that related to financial transactions with other New Mexico counties, the Code does not address such transactions with regards to elected officials, so the Board does not feel that this would be within its jurisdiction to decide. However, the Board would direct you to the New Mexico Governmental Conduct Act for any possible guidance that might provide.

With regards to the question of whether or not your employer bank could conduct financial transactions with Bernalillo County, there is no absolute prohibition concerning such conduct, however, the above cited provisions of the Code do provide several caveats. Initially, there does seem to be a general prohibition concerning having either an ownership interest, receiving compensation or a bonus for such a transaction, or using your position to influence the decision making process. (See Section 2-130 (l) (1) above). If, as stated in your recitation of the question, you keep an arm's length distance from any of the transactional aspects of such a contract or agreement (both from the County side and from your employer bank side) then such a transaction and your status as an employee of the bank would not create a violation under the Code. The core recommendation from the Board is that there should be a firewall created between yourself and such a transaction with regards to both your role as bank employee and as a commissioner.

This is general guidance provided by the Board that addresses only your specific question. There are other possible permutations that are not addressed here, but you may want to consider them in other possible business dealings with the County and your employer bank. The spirit of the Code is one where there should be no appearance or actual compromise of the integrity of the selection process by any elected official (See Section 2-130 (c) cited above), nor should there be any situation in which an elected official appears to improve or improves their own financial situation by virtue of a business dealing with the County.

Your request was for an Advisory Opinion from the Board and as such you should be reminded of the conditions contained within the Board's Rules and Regulations that attach to this Opinion. Section 2 (D) of the Board's Rules and Regulations provide that you may rely on this Opinion as a basis for your future actions and as a defense to any future complaint that may be filed against you only to the extent that the material facts provided were complete and accurate and that you have followed the advice contained within this Opinion. While this Opinion may be used as precedent in future cases, it is not binding on the Board unless it was issued to and followed by

the respondent to a complaint. A copy of these rules is provided along with this Opinion for your review.



Alan Packman, Chair
Bernalillo County Code of Conduct Review Board



Date