

Frank Chavez, Member
Alan Packman, Chair
Kevin Sanders, Member



Luis Hernandez, Member
Ryan Cangioli, Vice Chair

Advisory Opinion 2019-001

Commissioner Hart Stebbins:

You requested an advisory opinion from the Code of Conduct Review Board (the "Board") concerning a former county commissioner going to work for the University of New Mexico (a county contractor) after leaving office under the Bernalillo County Code of Conduct (the "Code").

QUESTIONS:

The specific questions you posed are as follows:

1. Would the Code of Conduct prevent a county commissioner from working for the University of New Mexico in a paid capacity after the commissioner has left the commission?
2. Would the Code of Conduct in any way impair the University's ability to enter into contracts or agreements with the county if a former county commissioner is employed by the university?

CODE OF CONDUCT PROVISIONS:

In order to address your question, there are several sections of the Code of Conduct that should be considered. Section 2-130 (b) provides:

"Improper influence. No public servant shall make, participate in making or in any way attempt to use his or her position to influence any county governmental decision or action in which he knows, he or she has reason to know, or should know that he or she or any person within the third degree of relations has any substantial interest. . ."

Section 2-130 (a)(4) of the Code provides:

"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."

Section 2-130 (g)(1)(c) states:

"No elected official during the term for which elected, and employee or volunteer during the period of their service shall acquire a substantial financial interest when they believe

or should have reason to believe that the new substantial financial interest will be directly affected by the officer or employee's official act.”

The term “substantial financial interest” is defined as:

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.

Section 2-130 (g)(2) provides:

“No public servant shall make, or participate in making, any county governmental decisions with respect to any matter in which the public servant or their family member has any substantial financial interest.”

Finally, Section 2-130 (n) states:

(n) *Contracts involving former elected officials and employees.*

- (1) The county shall not enter into a contract with, or take any action favorably affecting, any person or business that is:
 - a. Represented personally in the matter by a person who has been an elected official or employee of the county within the preceding year if the value of the contract or action is in excess of \$1,000.00 and the contract is a direct result of an official act by the elected official or employee; or
 - b. Assisted in the transaction by a former elected official or employee of the county whose official act, while in county employment, directly resulted in the county's making that contract or taking that action; or
 - c. A former public officer or employee shall not represent a person in the person's dealings with the county on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.
- (2) For a period of one year after leaving county service or employment, a former elected official or employee shall not represent for pay a person before the county.

SHORT ANSWER:

Based on the language of the above sections the Board does not think that a former county commissioner being employed at UNM after leaving office would constitute a violation of the Code nor would it impair the University's ability to enter into future contracts so long as certain safeguards are put into place as discussed below.

ANALYSIS:

Initially, Section 2-130 (a)(4) would not apply in the situation that you describe because while a county commissioner might vote on the final product of the procurement process, that vote is a part of a collective decision made by the commission as a whole. Thus, it would seem a strained

reading of this section to suggest that one member of the governing body should be barred from working for a county contractor after leaving office simply because they voted on a contract that came before the entire governing body as a result of the procurement process. It seems more likely that this section was intended to prevent those situations where a public servant is somehow intimately involved with or significantly influences the procurement process from then turning around and working for that contractor thereby creating an appearance of impropriety that the award of a contract was somehow tied to the subsequent employment.

As well, Sections 2-130 (g)(1)(c) and 2-130 (b) would not seem to be implicated in the situation you suggest so long as at the time of the acquisition of the "substantial financial interest" (i.e. employment or negotiation for employment) there is no current (or future) official act that would be taken by that commissioner related to the contractor/future employer. For example, if during the application or negotiation for employment process there were an overlap in time during which the commissioner was still holding office and prior to assuming employment at the University, then prudence would seem to dictate that the commissioner would take no action on any matter requiring an official vote that might come before the commission. The Board believes it would also be prudent that at the point of engagement or negotiation for any future employment with the contractor, the commissioner refrain from any sort of interaction with the contractor regarding the status of any current contract, including performance, amendments, change of scope, etc. This cautious approach is suggested in order to ensure that there are degrees of separation between the commissioner in their elected role and their role as an applicant or potential employee of a contractor.

Further support for this position is found in Section 2-130 (g)(2) which clearly contemplates that a public servant might have a substantial financial interest in a matter and in those cases they should refrain from making any governmental decisions with respect to that matter. The Board would suggest that decisions or participation in decisions would include such acts as voting, commenting on matters that are placed before the commission, attending presentations concerning the status of a contract, etc.

One final note referencing a prior Advisory Opinion (2016-002) issued by the Board that may be instructive to some degree. While perhaps not directly on point, the Board opined about whether or not a sitting commissioner could work for a bank that might seek to provide financial services to the County. The Board concluded that there was no strict prohibition against such a situation, however, the Board did caution that several safeguards should be in place to ensure that there was no appearance of impropriety or conflict of interest to ensure that the two roles (commissioner and bank employee) did not intersect. A copy of that opinion is attached for your consideration.

Finally, Section 2-130 (n) seems to address both questions in different aspects. The initial prohibition (Section 2-130 (n)(1)(a)) contained in this section is that the County shall not enter into contracts with people or businesses that are personally represented by someone who has been an elected official within the preceding year. Thus, in the situation suggested by your question, so long as the former commissioner does not represent the University in front of the County for a period of one year after leaving office, it should not jeopardize any current contracts the University may have with the County or impair the University from seeking any future contracts. The creation of a firewall around a former commissioner in these circumstances is likely intended to avoid any appearance of impropriety with regards to how any current or future contract might have been awarded. The Conduct Review Board in a previous Advisory Opinion (2014-002) has addressed the question of what constitutes "representation" as that term is used in this section. That Opinion

is also attached for your consideration. Specifically, the Board advised that representation would include “any sort of professional interaction with the County. . .” It should be noted that these restrictions discussed are the ones found in the County Code of Conduct and the University might have more restrictive policies in place which we would defer to their general counsel for any explanation.

Additionally, the second general prohibition (Section 2-130(n)(1)(b)) in this section seems to reinforce the first in that it restricts the county from entering into contracts with any business assisted by a former elected official who may have, through an official act, caused the county to enter into a contract with that business. This section seems to contemplate a situation where a former elected official was somehow directly responsible for the award or granting of a contract while in office and then assists the business in some future transaction. The situation envisioned by this section might be one where a former elected official or employee might have been responsible for awarding a contract that was not subject to the procurement process. In that instance, the former public servant would not be able to assist in future transactions between the County and the contractor. As noted above, individual commissioners act as a part of a collective governing body and so again it would seem to be a strained reading of this provision to suggest that a single commissioner would be directly responsible for the making of a contract.

The restriction contained in the third part (Section 2-130 (n)(1)(c)) would similarly not apply because of the requirement that the former elected official or employee “personally and substantially participate” in a matter. The phrase “personally and substantially” seems to imply an intimate and complex involvement in a particular matter and that would seem far removed from the situation of a single former commissioner who represents a single vote among a collective. For example, a commissioner might be a part of a larger task force where criteria for a contract might be developed. This participation as a single member of a larger group is not the kind of personal and substantial participation I think is contemplated by the Code. The phrase “personally and substantially” sets a fairly high bar and the Board suggests that the type of participation contemplated here would be one where a public servant is involved in the drafting, direct negotiation and monitoring of a contract.

The above example of task force participation contrasts with the situation where a public servant, in their individual capacity and using their discretionary authority, were to award a no-bid contract to a vendor. If soon after the contract is awarded, the public servant then leaves the employ of the County and assumes an executive position with the contracting company. In that case, there would seem to be a clearer nexus or connection between the awarding of the contract and the employment with the contractor. The spirit of this provision would seem to be intended to prevent those types of situations where there is an appearance that the only reason a contract was awarded was in exchange for future employment for the public servant who was directly responsible to the awarding of that contract.

The final piece of this section (Section 2-130 (n) (2)) is simply a variation of the one contained in (n)(1)(a) and so the same analysis would apply.

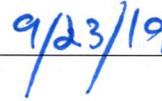
CONCLUSION:

Overall, so long as the proper safeguards are in place, the Board believes that the Code would allow a former commissioner to work for the University after leaving office and that such work would not impair the University's ability to enter into future contracts with the County.



Alan Packman, Chair
Bernalillo County Code of Conduct Review Board

Date



9/23/19

