



STATE ETHICS COMMISSION

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From: Jeremy Farris, Executive Director, State Ethics Commission
Re: A bill to amend the Governmental Conduct Act in the 2024 legislative session

This memorandum supports and explains a bill to amend New Mexico's Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2023).

In the First Session of the 56th Legislature, the House of Representatives unanimously passed House Bill 5, as amended, which was sponsored by Representative Cates, Representative Jaramillo, Representative Little, Representative Chávez, and Representative Szczepanski. Given that achievement, it is my understanding that the Governor plans to put a nearly identical bill on the call for the Second Session of the 56th Legislature.

As outlined in its 2023 Annual Report, the State Ethics Commission appreciates the Governor's giving her message to a bill to amend the GCA and supports this legislative effort. In what follows, I explain the what the bill does and why it is necessary for New Mexico.

I. BACKGROUND

The GCA is New Mexico's main governmental ethics, conflict-of-interest, and anti-corruption statute, and it applies variously to *all* government officials and employees around New Mexico. Since the Commission's beginning, the Commission has been daily engaged with the GCA. The Commission has adjudicated approximately 100 complaints alleging GCA violations, issued more than a dozen advisory opinions interpreting GCA provisions, filed amicus briefs in *State v. Padilla*, No. A-1-CA-38283, and *State v. Gutierrez, et al.*, No. S-1-SC-38367, *consolidated with* No. S-1-SC-38368, appellate litigation which concerned the enforceability of subsections 10-16-3(A) through (C) of the GCA, and has filed and litigated civil lawsuits around New Mexico to enforce the GCA's provisions. The GCA's importance reaches far beyond the Commission's work: it contains criminal provisions enforced by the Attorney General; every state agency should promulgate a code of conduct for its employees that is based on its requirements; and violations of the GCA can serve as a basis for discipline or termination of government employees.

The New Mexico Supreme Court recently issued an opinion in *State v. Gutierrez, et al.*, 2023-NMSC-002, that stops criminal enforcement of subsections 10-16-3(A) through (C), the GCA's core anti-corruption provisions. While it has yet to be tested, the *Gutierrez* opinion might also curtail the ability of the Office of the Attorney General, the District Attorneys, and the State Ethics Commission to civilly or administratively enforce the GCA's most foundational provisions.

As a consequence of the *Gutierrez* opinion and other legal developments over the past three years, the Commission has learned a great deal about the GCA, including the statute's several gaps and shortcomings. The GCA needs amendment to make the statute clearer, fairer, and better able to achieve its largest purpose—namely, that individuals working in government in New Mexico use the powers and property of their government office only to benefit the public, and not to benefit themselves. This bill does exactly that.

II. A NEW PURPOSE SECTION

In view of the Supreme Court's *Gutierrez* opinion, section 3 should be repealed and replaced. Currently, this section tries to do too much. Currently section 3 contains both aspirational language that announces the GCA's purposes (*e.g.*, 10-16-3(B)), and language that straightforwardly regulates conduct (*e.g.*, 10-16-3(D)). These dual functions are confusing and ultimately led the *Gutierrez* Court to hold that subsections 10-16-3(A) through 10-16-3(C) do *not* create crimes, even if some language in those statutes instructs government officials employees what they should and should not do.

Several statutes have clear purpose sections, which declare the public policy of New Mexico but which do not purport to regulate conduct. The Open Meetings Act, the Procurement Code, and the Inspection of Public Records Act contain good examples. *See* NMSA 1978, §§ 10-15-1 (2013); 13-1-29 (1984); 14-2-5 (1993). Like those statutes, the GCA should have a purpose section that declares the public policy of New Mexico and which might be used as an interpretative guide for the remainder of the statute. That section, however, should not attempt to regulate conduct. Accordingly, the bill repeals section 3, redrafting it as a purpose and declaration-of-policy section.

10-16-3. Purpose of the act; declaration of public policy.

Recognizing that a government position is a public trust, the intent of the Legislature in enacting the Governmental Conduct Act is to ensure, and it is declared to be the public policy of this state, that the powers and resources of public office should only be used to advance the public interest and not to obtain personal benefits or to pursue private interests.

III. REORGANIZING THE GCA'S MAIN CONDUCT-REGULATING PROVISIONS

If section 3 is redrafted as a pure declaration-of-public-policy section, then the GCA's most important conduct-regulating provisions must be reorganized. Currently, these sections are scattered among subsections 10-16-3(C) (abuse of office generally); 10-16-3(D) (quid pro quo corruption); subsection 10-16-3.1(C) (unauthorized use of government property); 10-16-4(A) (misuse of office to benefit a financial interest); and 10-16-4(C) (acquiring a financial interest that will be affected by an official act). The bill proposes a new section 3.2 that combines these duties and, therefore, streamlines the main conduct-regulating provisions. This new section would apply to all officials and employees in the legislative and executive branches of state

government and all officials and employees of local government. The new section 3.2 would read as follows. (The underlined language below is new material; the non-underlined language is a restructuring of other statutory provisions in the current GCA, but here moved into a new section 3.2.)

10-16-3.2. Abuse of office; prohibiting quid pro quo corruption.

A. A legislator or public officer or public employee, with the purpose of benefiting in a monetary interest or other financial interest or thing of value, shall not:

(1) use a power or resource of the legislator's or public officer's or employee's office; or

(2) omit to perform a duty imposed by virtue of the public office.

B. A legislator or public officer during the term for which elected or appointed and a public employee during the period of employment shall not acquire a financial interest when the legislator or public officer or employee believes or should have reason to believe that the new financial interest will be directly affected by the legislator's or public officer's or employee's official act.

C. A legislator or public officer or public employee shall not use:

(1) property belonging to a state agency or a local government agency, or allow its use, for an unauthorized purpose;

(2) the power of the public office to knowingly violate a law of the state; or

(3) the power of the public office to commit an act relating to the public office if the purpose of the act is to obtain a benefit for that person's self or another person, and committing such an act constitutes an unauthorized exercise of official functions.

D. A legislator or public officer or employee shall not request or receive, and no person may offer a legislator or public officer or employee, any money or thing of value or promise of money or thing of value that is conditioned upon or given in exchange for promised performance of an official act. Any person who knowingly and willfully violates the provisions of this subsection is guilty of a fourth degree felony and shall be sentenced pursuant to the provisions of Section 31-18-15 NMSA 1978.

A few notes about this new provision:

First, subsection 10-16-3.2(A)(1) articulates and prohibits the abuse of a government office. This subsection covers the same conduct as the current version of subsections 10-16-4(A), which prohibits a public officer or employee from taking an official act to benefit their financial interest. Under the GCA, “financial interest” is a defined term, meaning an ownership interest in a business or property or a position of employment.

Second, subsection 10-16-3.2(B) copies language from the current version of subsection 10-16-4(C), which prevents public officers and employees from acquiring interests that would be in conflict with the exercise of their government office.

Third, subsection 10-16-3.2(C) includes language from the current version of subsection 10-16-3.1(C), which prohibits a government official or employee from using government property for other than authorized purposes. Currently, that prohibition exists as part of section 10-16-3.1, which is a very truncated, state-law version of the federal Hatch Act, focusing on preventing elected public officials from co-opting the resources of the government to further their political campaigns. But the use of government property for a candidate’s political campaign is only one unauthorized use among many possible unauthorized personal uses of government property. Accordingly, the prohibition on the use of government property for other than authorized uses is better placed alongside other instances of the abuse of office.

Subsection 10-16-3.2(C) also makes clear that the use of the power of government office to knowingly violate a New Mexico law is a straightforward abuse of office. A government office is a public trust and the public does not entrust the powers of government office to public officials so that they might use their government power to knowingly violate the law. This understanding of the abuse of office is similar to other states’ definitions of abuse of office. *See, e.g.,* Colo. Rev. Stat. Ann. § 18-8-404, 405; Ken. § 522.020; Tex. Tit. 8, § 39.01.

Last, a final and significant way that a government official or employee might abuse their office is by engaging in *quid pro quo* corruption—that is, where the government official exchanges an official act for something of value. The current subsection 10-16-3(D) prohibits *quid pro quo* corruption. The draft of subsection 10-16-3.2(D) retains that important language.

Section 10-16-3.2 copies language from current subsections 10-16-4(A) and (C), leaving subsection 10-16-4(B) as the whole of what remains in the current section 10-16-4—but that makes sense. Currently, subsection 10-16-4(B) regulates when public officers or employees should be disqualified from engaging in official acts. Considering the current definitions of public officers and employees, this provision does not apply to legislators. Nor should it. Legislators represent the constituents of their districts when voting on bills, legally required disqualification on a vote arguably would deprive the represented constituents of representation on a particular matter. The appropriate course would be for the legislator to disclose the potential conflict of interest and have the discretion to decide whether to recuse from a vote. Accordingly, subsection 10-16-4(B) does not apply to legislators and, thus, should stand on its own as section 10-16-4. Section 10-16-4 would then read as follows:

10-16-4. Disqualification from official act.

A public officer or employee shall be disqualified from engaging in any official act directly affecting the public officer's or employee's financial interest, except a public officer or employee shall not be disqualified from engaging in an official act if the financial benefit of the financial interest to the public officer or employee is proportionately less than the benefit to the general public.

IV. REGULATING POLITICAL ACTIVITIES BY PUBLIC OFFICIALS AND EMPLOYEES

Section 10-16-3.1 currently prohibits public officials and employees from using the powers of their government offices for a political purpose, including to benefit a candidate or political party or to influence certain political activity. Like its federal analogue, the Hatch Act, 5 U.S.C. §§ 7321–7326, the purposes of section 10-16-3.1 are: (i) to ensure that government programs are administered in a nonpartisan fashion and that government resources are not used for partisan, political ends; (ii) to protect government employees from political coercion in the workplace; and (iii) to ensure that government employees are advanced based on merit and not political affiliation. See U.S. Office of Special Counsel, “Hatch Act Overview,” <https://osc.gov/Services/Pages/HatchAct.aspx>. Unlike the Hatch Act, however, section 10-16-3.1 does not provide sufficiently clear guidance to government officials, employees, and oversight agencies as to what conduct is permitted or prohibited. This lack of clarity results in the filing of administrative complaints with both the Office of the Attorney General and the State Ethics Commission to remedy conduct that, while clearly disallowed in the federal context by the Hatch Act, is arguable in the state context under current section 10-16-3.1. For example, in the short period of the Commission's existence, the Commission has seen administrative complaints alleging that candidates for office are campaigning while (i) in their government uniform, (ii) on duty as government employees, or (iii) using a government building in their campaign advertisements. These administrative complaints have not led to the clarification of section 10-16-3.1's scope, either because the administrative complaint was beyond the jurisdiction of the Commission as a quasi-judicial body, or because the Commission reached a settlement based in part on arguable differences about the law's scope.

This area of law therefore needs clarification. Accordingly, the bill adopts some clear and specific provisions from the federal Hatch Act that address what a federal employee may not do with respect to engaging in political activity in connection with their federal employment. 5 U.S.C. § 7324(a)(1)–(4). The bill amends section 10-16-3.2 to add the prohibitions contained in section 7324(a)(1)–(4) of the Hatch Act, but provides, with respect to paragraph (C)(4), that the paragraph does not apply to the governor, the attorney general or any other elected state official for whom state law enforcement officers provide security. The bill also amends the GCA's definitions sections to provide a clear definition of “political activity.” With these proposals, and after the transfer of subsection 10-16-3.1(C) to a new section 10-16-3.2, section 10-16-3.1 would read as follows:

10-16-3.1. Prohibited political activities.

A public officer or employee is prohibited from:

A. directly or indirectly coercing or attempting to coerce another public officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for a political purpose;

B. threatening to deny a promotion or pay increase to an employee who does or does not vote for certain candidates, requiring an employee to contribute a percentage of the employee's pay to a political fund, influencing a subordinate employee to purchase a ticket to a political fundraising dinner or similar event, advising an employee to take part in political activity or other similar activities; or

~~C. violating the officer's or employee's duty not to use property belonging to a state agency or local government agency, or allow its use, for other than authorized purposes.~~

C. engaging in political activity:

(1) while the public officer or employee is on duty;

(2) in any room or building reserved for the exclusive use of the State of New Mexico or any agency or instrumentality thereof;

(3) while wearing a uniform or official insignia identifying the office or position of the employee; or

(4) using any vehicle owned or leased by the State of New Mexico or any agency or instrumentality thereof; provided however, that this subsection does not apply to the governor, the attorney general or any other elected state official for whom state law enforcement officers provide security.

V. CLARIFYING THAT EMPLOYERS CAN BE LIABLE FOR THEIR EMPLOYEES' REVOLVING-DOOR VIOLATIONS

Section 10-16-8 regulates the revolving-door between government employment and private companies that represent clients before government offices. Subsection 10-16-8(D) prohibits a former government officer or employee from representing a person for pay before their former government agency within one year of separating from that government agency. Subsection 10-16-8(B) also prohibits in perpetuity a former government officer or employee from representing a person before any government agency on a matter on which they worked "personally and substantially" while in government service.

These are important laws. It is important to note, however, that often it is the business employer of the former government employee that causes the former government employee to

violate the GCA's revolving-door provisions, and it is also the business employer of the former government employee that stands to profit from the former government employee's unlawful representations. Accordingly, the GCA should allow for the imposition of liability against the corporate employer for its employee's revolving-door violations.

While the Act arguably already allows for the imposition of vicarious liability against a corporate employer for its employees' GCA violations, nevertheless, section 10-16-8 could be improved by making explicit what is now only implicit: that an employer may be liable for its employees' revolving-door violations. To clarify the statute's meaning, the bill amends section 10-16-8 to include a new subsection (E) that expressly allows for the imposition of liability on the employer for an employee's revolving-door violations:

10-16-8. Contracts involving former public officers or employees; representation of clients after government service.

A. A state agency shall not enter into a contract with, or take any action favorably affecting, [~~any~~] a person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of the state within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of the state whose official act, while in state employment, directly resulted in the state agency's making that contract or taking that action.

B. A former public officer or employee shall not represent a person in the person's dealings with [~~the government~~] a state agency or local government agency on a matter in which the former public officer or employee participated personally and substantially while a public officer or employee.

C. A local government agency shall not enter into a contract with, or take any action favorably affecting, any person or business that is:

(1) represented personally in the matter by a person who has been a public officer or employee of that local government agency within the preceding year if the value of the contract or action is in excess of one thousand dollars (\$1,000) and the contract is a direct result of an official act by the public officer or employee; or

(2) assisted in the transaction by a former public officer or employee of that ~~[political subdivision of the state]~~ local government agency whose official act, while in employment with that ~~[political subdivision of the state]~~ local government agency, directly resulted in the local government agency's making that contract or taking that action.

D. For a period of one year after leaving government service or employment, a former public officer or employee shall not represent for pay a person before the state agency or local government agency at which the former public officer or employee served or worked.

E. Upon a showing that a former public officer or employee violated any provision of this section while in the employment of any person who knowingly caused the violation to occur, that person is additionally and separately liable for any civil penalty that is assessed against the former public officer or employee and is subject to other remedies provided in the Governmental Conduct Act.

VI. MAKING THE CIVIL PENALTIES FAIRER AND MORE OF A DETERRENT

The GCA's final provision, contained in Section 10-16-18, is the statute's civil remedial provision. This provision is in need of amendment, for two reasons.

First, the civil penalties—\$250 per violation for a maximum of \$5,000—are too low to meaningfully deter violations of the GCA. For example, for a business that causes an employee to violate the GCA's revolving-door provisions, a \$250 fine is merely a transaction cost that is easily absorbed. When compared to other jurisdictions, New Mexico imposes very low fines (both per transaction and maximum) for basic, governmental ethics violations. Moreover, the fines have remained the same since 1995 and are in need of updating.

Second, not all violations of the GCA are equally corrupt. For example, it is a violation of section 10-16-9(B) for a non-attorney legislator to represent a constituent before a state agency and refer to themselves as a Member during that representation—e.g., when representing a client before a state agency, signing an email to a cabinet secretary as “Sen. [NAME].” It is also a violation of section 10-16-4(A) for an employee in a municipal public works department to offer to sell municipal property in exchange for a bribe. These are both violations of the GCA and, therefore, subject to a \$250 civil penalty. But they are not equal abuses of the public trust.

To address these two issues, the bill would amend section 10-16-18 to increase the maximum available civil penalty to \$10,000. For context, this maximum penalty is only one-half of the maximum penalty currently available under the Campaign Reporting Act, also within the

Commission's remit. The bill deletes the per-violation penalty, enabling a district court judge and the Commission (and its hearing officers) to impose civil penalties that are proportionate to the violation, as opposed to fixed at \$250. With these proposals, section 10-16-18 would read as follows:

10-16-18. Enforcement; civil penalties.

A. If the state ethics commission reasonably believes that a person committed, or is about to commit, a violation of the Governmental Conduct Act, the state ethics commission may refer the matter to the attorney general or a district attorney for enforcement.

B. The state ethics commission may institute a civil action in district court or refer a matter to the attorney general or a district attorney to institute a civil action in district court if a violation has occurred or to prevent a violation of any provision of the Governmental Conduct Act. Relief may include a permanent or temporary injunction, a restraining order or any other appropriate order, including an order for a civil penalty [~~of two hundred fifty dollars (\$250) for each violation~~] not to exceed [~~five thousand dollars (\$5,000)~~] ten thousand dollars (\$10,000).

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This is a needed and important bill for the State of New Mexico. On behalf of the State Ethics Commission, I am thankful for every legislator and New Mexican that lends their support.

Very truly yours,

/s/ Jeremy Farris
Jeremy Farris
Executive Director
State Ethics Commission