The Honorable Howie C. Morales  
N.M. State Senate  
4285 North Swan  
Silver City, NM 88061  

Re: Opinion Request—Gila Regional Medical Center Board & Conflict of Interest  

Dear Senator Morales:  

You have requested our advice regarding conflict of interest issues involving the membership of Board of Trustees of the Gila Regional Medical Center (“GRMC” or “Center”). Grant County owns the GRMC, which is a sixty-eight bed non-profit medical facility located in Silver City. Your letter asks whether the county manager for Grant County, the treasurer for Grant County and a doctor who practices at GRMC may serve as Board members. Your letter then asks how the process for Board members who may have a conflict of interest might resolve that matter.  

According to your letter, the county commission has the statutory authority to appoint Board members. See NMSA 1978, 4-48B-10(A) (1982). There is no set number of members or qualifications provided in the statute. The Grant County Commission “recently appointed the Grant County Manager to serve as a member on the...Board...[but some]...Trustees raised the issue of whether the county manager’s position is functionally incompatible with [Board] membership.” Your letter continued: “The compatibility of other Board of Trustees members was also questioned, including a member who is the chief treasurer of Grant County, and members who are doctors that have privileges at Gila Regional Medical Center.”  

Based on our examination of the relevant New Mexico law and on the information available to us at this time, we conclude that the county manager has a conflict of interest. He should probably resign his seat or he could be subject to removal for “cause” pursuant to NMSA 1978, Section 4-48B-10(C). We conclude that the County Treasurer and a doctor who practices at GRMC may permissibly serve on the Board. They have the authority to vote on Board items, absent those matters where there might be a conflict of interest on a particular item. An official has a conflict of interest in holding two positions when: (a) there is physical incompatibility between the two positions or (b) functional incompatibility. See Haymaker v. State, 22 N.M. 400, 163 P. 248 (1917); N.M. Att’y Gen. Op. No. 06-01 (2006). By statute,
physical incompatibility relates to the physical requirements of holding two positions. See NMSA 1978, § 10-6-3 (1953). There is no physical incompatibility “so long as the same person can hold both positions without failing for thirty or more successive days to devote his time to the usual and normal extent to the performance of the duties of both positions.” N.M. Att’y Gen. Op. No. 06-01 (2006). As a practical example, our office has opined: “The State Board [of Education] generally convenes approximately six times per year generally for one day” and thus physical incompatibility is not an issue and is likely only an issue if “the State Board met for thirty consecutive days…”. N.M. Att’y Gen. Op. No. 94-02 (1994). It is our understanding that the GRMC Board meets monthly throughout the calendar year. See GRMC By-Laws of the Board of Trustees, § V(E) (July 30, 2008). Absent additional information regarding a more frequent or unusual number of meeting dates and times, physical incompatibility does not appear to be a relevant consideration in this matter.

Functional incompatibility is a non-statutory, common law doctrine relating to the functional requirements of serving in two positions at the same time. Functional incompatibility exists where the: “functions of the two positions are … inconsistent, as where one is subordinate to the other, or where a ‘contrariety and antagonism would result in the attempt of one person to faithfully and impartially discharge the duties of both.’” N.M. Att’y Gen. Op. No. 06-01 (2006) (quoting Haymaker v. State, 22 N.M. 400, 403-4, 163 P. 248 (1917)). The question is whether one position has “authority to oversee the activities” of the other position, such as the power to “supervise, hire, or discharge” personnel. Id.; See also N.M. Atty. Gen. Op. No. 91-02 (1991) (positions of school board member and legislator are not functionally incompatible because the legislature has no inherent authority to oversee local school boards or to supervise, hire, or discharge school board members.).

The county manager’s job is to be the fiscal director and budget officer for the county. See NMSA 1978, § 4-38-19(B) (1973). A GRMC Board member’s statutory responsibility is to “account annually for the receipt and expenditures of funds received for the operation of the hospital.” NMSA 1978, § 4-48B-10(D) (1982). These financial functions overlap in two areas. First, Grant County has the sole authority to enter into and terminate “leases, management or operation contracts, health care facilities contracts and other agreements...” regarding the hospital. NMSA 1978, § 4-48B-5(J) (2001). It does not need to seek Board input or approval and thus could reject or ignore the Board’s requested wishes. Second, Grant County has the sole authority to provide indigent fund monies to GRMC after review of GRMC’s request for funding. The County, again, could deny the Board’s request.

Therefore, the authority of Grant County and the Board’s accompanying subordinate position creates the potential for regular “contrariety and antagonism” over fiscal, contractual and funding matters. This is especially true if the same person has a role in tackling the budget matters for both organizations. Therefore, there is functional incompatibility between serving as county manager and a GRMC Board member. This incompatibility goes to such core fiscal management issues that the county manager cannot just recuse on significant votes; he may need to resign from the Board to eliminate this conflict. If he does not resign, he may be subject to removal “for cause” after full public hearing on the matter. NMSA 1978, § 4-48B-10(C) (1982).
The GRMC Board’s by-laws provide that an “unresolved conflict of interest” is a sufficient “for cause” ground. See GRMC By-Laws of the Board of Trustees, § V(G) (July 30, 2008).

In regard to the County Treasurer, it is our understanding that he is a separately elected county position. His statutory responsibilities are to keep “account of all money received and disbursed” and keep “regular accounts of all checks and warrants drawn on the treasury and paid....” NMSA 1978, § 4-43-2 (2001). He also handles the deposit and investment of county funds. See Board of County Commr’s v. Padilla, 111 N.M. 278, 285, 804 P.2d 1097 (Ct. App. 1990). However, it does not appear that he has a role in how the county commission interacts with the GRMC over fiscal, contractual and funding matters. Therefore, there is no functional incompatibility between serving as County Treasurer and a Board member.

In regard to a doctor who practices at a hospital, the law used to clearly prohibit him from serving as a Board member. For example, in 1956, the District Attorney of the Seventh Judicial District inquired whether a nurse employed at a county hospital could serve on the Hospital Board of Trustees. See N.M. Att’y Gen. Op. 6456 (1956). The opinion found there was functional incompatibility between the two positions because Board members were statutorily empowered to “employ personnel...fix their compensation and to discharge” personnel. As a result, “the board member would be passing upon questions directly affecting him or her as an employee....” Id.

The legislature repealed the above-cited statutory language regarding the Board’s authority over staff personnel in the early 1980s. See 1982 N.M. Laws, ch. 11, § 4. The statute is now silent on this authority and it appears that hospitals and medical centers have addressed the issue by creating a multi-layer process of management for handling employee matters. For example, GRMC has a Chief Executive Officer who appears to have the authority to hire staff and fix their compensation. See GRMC By-Laws of the Board of Trustees, § IX (July 30, 2008). GRMC also has an administrative Medical Executive Committee that handles the credentialing and disciplinary process for doctors. See GRMC By-Laws of Medical Staff (March 2005). A doctor who would like to practice at GRMC must first apply with and receive a recommendation from the Medical Executive Committee. See Id., §§ 3.5, 6.6. The Committee’s recommendation is then reviewed by the Board. If a doctor disagrees with the Board’s actions, he can ask for an additional input from another committee called the Joint Conference Committee, prior to the Board making its final decision. See Id., § 6.8. Similarly, if a doctor is subject to disciplinary action, the Medical Executive Committee must first investigate the matter. See Id., § 7.1. The Committee’s recommendation is then reviewed by the Board. The doctor can appeal that decision to special hearing committee, prior to the Board making its final decision. See Id., § 8.1-1.

These changes appear to have eliminated issues of functional incompatibility relating to employment of personnel and compensation and wage issues. In fact, the full Board has customarily requested that doctors serve on the Board. “The BOT shall be composed of seven (7) members appointed by the Grant County Commission. Preferably, two (2) members of the
BOT should be physicians.” GRMC By-Laws of the Board of Trustees, § V(A)(1). In addition, the Board’s by-laws provide: “Physician members of the GRMC Medical Staff may serve as members of the BOT.” Id. § V(A)(4).

There, however, is still a reasonable argument that issues of functional incompatibility relating to staff discipline still exist in this matter. The doctor Board member, out of an abundance of caution, may wish to recuse himself on these matters. There is a formal recusal process. See GRMC By-Laws of the Board of Trustees, § V(I)(4). It provides that the “determination as to whether an actual conflict of interest exists will be determined by a majority of the members of the BOT.” Id. § V(I)(6). It further provides: “If the BOT determines that an actual conflict of interest exists, then the Board member … may participate in any discussion … if a majority vote of the BOT allows such participation.” Id. § V(I)(7). “If the BOT determines that an actual conflict of interest exists, then the Board member … shall not vote with respect to such matter.” Id. § V(I)(8).

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General's Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General