

STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS
ATTORNEY GENERAL

May 31, 2017

The Honorable Nate Gentry
New Mexico State Representative
3176 Andrew Drive NE
Albuquerque, NM 87110

Re: Opinion Request – Provision of Paid Leave to Teacher Serving as Legislator

Dear Representative Gentry,

You requested an opinion regarding a school district's provision of paid leave to a public school administrator or teacher serving in the state legislature. Specifically, you asked:

(1) Does a school district policy that provides paid leave to a school teacher or school administrator serving as a member of the legislature violate Article IV, Section 10 of the New Mexico Constitution, which limits permissible compensation for legislators?

(2) Would the provision of paid leave by a school district to a school teacher or administrator constitute payment to an individual without consideration, in violation of the Anti-Donation Clause of Article IX, Section 14 of the New Mexico Constitution?

(3) Would the receipt of paid leave from a school district render the legislator a lobbyist on behalf of the school district or otherwise create a conflict of interest by improperly influencing the official acts and decisions of the legislator in violation of law?

Based on our review of the applicable law and information available to us at this time, we conclude that (1) paid leave provided to a public school teacher, administrator or other public school employee serving as a member of the legislature would not violate Article IV, Section 10 if the leave was provided as compensation to the employee for the employee's services to the school district; (2) the provision of paid leave to a school employee as compensation for the employee's services to the school district would not violate the Anti-Donation Clause; and (3) the school district's payment of paid leave to a school employee as compensation for the employee's services to the school district, by itself, would not create an unlawful conflict of interest.

Article IV, Section 10

Article IV, Section 10 of the New Mexico Constitution states:

Each member of the legislature shall receive:

A. per diem at the internal revenue service per diem rate for the city of Santa Fe for each day's attendance during each session of the legislature and the internal revenue service standard mileage rate for each mile traveled in going to and returning from the seat of government by the usual traveled route, once each session as defined by Article 4, Section 5 of this constitution;

B. per diem expense and mileage at the same rates as provided in Subsection A of this section for service at meetings required by legislative committees established by the legislature to meet in the interim between sessions; and

C. no other compensation, perquisite or allowance.

N.M. Const. Art. IV, § 10. This constitutional provision permits members of the legislature to receive specified per diem and mileage during legislative sessions and for service on interim legislative committees, and “no other compensation, perquisite or allowance.” It was adopted to “limit[] the compensation legislators may receive, as a means of ensuring that legislators do not act under improper motivations...” *State ex rel. Udall v. Public Employees Retirement Board*, 1995-NMSC-078, ¶ 33, 907 P.2d 190, 197. *See also* N.M. Att’y Gen. Op. No. 93-06 (1993) (provisions like Article IV, Section 10 “reserve directly to the people of the state (through the constitutional amendment process) the power to set legislator compensation and avoid conflict-of-interest problems inherent when legislators are able to decide upon their own compensation and expenses...”). While the per diem and mileage rates have been adjusted from time to time, the prohibition against receiving other compensation has remained unchanged since its initial adoption by the framers of our Constitution in 1911. *State ex rel. Udall v. Public Employees Retirement Board*, 1995-NMSC-078, ¶ 3, 907 P.2d at 191.

The restrictions in Article IV, Section 10 apply to compensation for a legislator’s services as a member of the legislature. They do not restrict a legislator’s compensation for otherwise permissible, non-legislative employment. *See* N.M. Att’y Gen. Op. No. 77-3 (1977) (intent of Article IV, Section 10 “was to limit the compensation to legislators for services performed as legislators” and does not prohibit compensation to which “a person who happens to be a legislator is entitled ... for services performed in a capacity other than as a legislator...”). As such, Article IV, Section 10 would preclude a school district from providing paid leave to a teacher or other school employee serving as a legislator only if the paid leave amounted to compensation for the person’s services as a legislator. And, although it did not address Article IV, Section 10 specifically, the New Mexico Court of Appeals has held that statutory provisions prohibiting a legislator from receiving “compensation for services as an officer or employee of the state except such compensation and expense money as [the legislator] is entitled to receive as a member of the legislature” do not bar school teachers and administrators from serving as legislators. *See State ex rel. Stratton v. Roswell Indep. Schools*, 1991-NMCA-013, 806 P.2d 1085 (interpreting NMSA 1978, §§ 2-1-3, 2-1-4). Similarly, the prohibition in Article IV, Section 10 does not apply to compensation, including paid leave, a legislator receives from a local school district for services

as a teacher or administrator, because it is not compensation for the legislator's services as a member of the legislature.

Anti-Donation Clause of Article IX, Section 14

In pertinent part, Article IX, Section 14 prohibits a school district from "directly or indirectly ... mak[ing] any donation to or in aid of any person, association or public or private corporation" unless otherwise authorized by the state constitution. A "donation" for purposes of the Anti-Donation Clause is "a 'gift,' an allocation or appropriation of something of value, without consideration...." *Village of Deming v. Hosdreg Co.*, 1956-NMSC-111, ¶ 36, 303 P.2d 920, 926.

New Mexico courts have consistently held that compensation provided to public employees in exchange for their services is not a donation proscribed by the Anti-Donation Clause. *See, e.g., Treloar v. County of Chaves*, 2001-NMCA-074, ¶ 32, 32 P.3d 803, 812 (severance pay provided under employment contract was "deemed to be in the nature of wages that have been earned" and did not constitute a gift in violation of the Anti-Donation Clause). *See also National Union of Hosp. Employees v. Board of Regents*, 2010-NMCA-102, ¶ 39, 245 P.2d 51, 63 (bonus provision in arbitrator's award did not represent compensation for past or expected work and constituted a retroactive wage contrary to the Anti-Donation Clause). Consequently, we conclude that paid leave provided to a teacher or other school employee serving as a member of the legislature is not an unconstitutional donation if, as discussed above, it is compensation for the employee's services as a teacher or other school employee.

Conflicts of Interest Arising When School Employees Serve as Legislators

In *State ex rel. Stratton*, the Court of Appeals acknowledged that "the possible abuse of teachers directly profiting from their term as legislators may be a strong basis for a determination of a prohibitive conflict of interest." 1991-NMCA-013, ¶ 27. 806 P.2d at 1093. Nevertheless, the court concluded:

this determination runs counter to the constituency concept of our legislature in this state, which can accurately be described as a citizen's legislature. In a sparsely populated state like New Mexico, it would prove difficult, if not impossible, to have a conflict-free legislature.

Id. See also id. ¶ 52, 806 P.2d at 1098-99 (same concerns regarding conflicting interests that apply to teachers also apply to members of the legislature who are "insurance agents, lawyers, farmers, ranchers and members of other trades and professions").

The Court of Appeals' decision in *State ex rel. Stratton* necessarily leads to the conclusion that a school district's provision of compensation, including paid leave, to a school teacher or administrator serving as a legislator does not, by itself, create an impermissible conflict of interest. A disqualifying conflict would exist only if additional facts established that, rather than compensation, a school district provided paid leave to a school employee to influence the employee's decisions and official actions as a legislator. *See, e.g., NMSA 1978, § 10-16-3(D)* (Governmental Conduct Act provision prohibiting a legislator from receiving money or other thing

of value “that is conditioned upon or given in exchange for the promised performance of an official act”). *See also id.* § 10-16-3(A) (requiring a legislator to “use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests”).

Your request to us was for a formal Attorney General’s opinion on the matters discussed above. Such an opinion would be a public document, available to the general public. Although we are providing our legal advice in the form of a letter rather than 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 this letter to the public.

Sincerely,

A handwritten signature in blue ink that reads "Sally Malave". The signature is written in a cursive style with a horizontal line at the end.

Sally Malave
Assistant Attorney General
Director, Open Government Division