

STATE OF NEW MEXICO  
OFFICE OF THE ATTORNEY GENERAL



HECTOR H. BALDERAS  
ATTORNEY GENERAL

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August 28, 2018

Leonard Lee Rawson, Member  
State Investment Council  
P. O. Box 996  
Las Cruces, NM 88004

Re: Opinion Request – State Investment Council Code of Conduct

Dear Mr. Rawson:

You have requested our advice regarding the authority of the New Mexico State Investment Council (“SIC”) to require its members to acknowledge a code of conduct. Specifically, you ask:

1. Does the New Mexico Governmental Conduct Act, NMSA 1978, ch. 10, art. 16 (as amended through 2011) (“GC Act”), authorize SIC to adopt and enforce a code of conduct applicable to SIC members?
2. May SIC require its members to sign an acknowledgement of a code of conduct?
3. May SIC exclude SIC members who have not signed an acknowledgement of a code of conduct from deliberations (including executive sessions) and voting on SIC actions (including voting on matters discussed in executive session)?
4. If SIC members have been improperly excluded from deliberations and voting on a particular SIC action, is the action invalid regardless of whether a majority of SIC members have voted in favor of the action?
5. Does restricting members from attending or voting on matters discussed in closed sessions constitute an effective removal of legislature- or governor-appointed members of SIC? If yes, does this violate NMSA 1978, Section 6-8-3(C) or Article 12, Section 13 of the New Mexico constitution?

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6. Does SIC have authority to impose sanctions—including dismissal, demotion, or suspension—on public officers and employees who are removable only by impeachment, such as the governor, state treasurer, and commissioner of public lands?

7. Do the terms “demotion” and “suspension,” as used in Section 10-16-11 of the GC Act, include restricting members from attending or voting on matters discussed in closed session?

As discussed below in response to your specific questions, based on our review of the applicable law and information available to us at this time, we conclude that the GC Act authorizes SIC to adopt a code of conduct applicable to its members, but does not authorize SIC to enforce the code against its members. SIC may request its members to sign an acknowledgement of a code of conduct, but SIC has no authority to impose sanctions on a member who refuses to sign the acknowledgement, such as excluding the member from deliberations and voting on SIC matters.

1. SIC’s Authority to Adopt and Enforce its Code of Conduct

The GC Act requires “each elected statewide executive branch public officer” to adopt “a general code of conduct ... based on the principles set forth in the [GC Act]” for officers and employees subject to the elected public officer’s control. NMSA 1978, § 10-16-11(A). All public officers and employees are required to review the general code of conduct prior to or at the time they are hired. *Id.* § 10-16-11(B).

In addition to the general code of conduct, the GC Act authorizes “the head of every executive and legislative agency and institution of the state” to:

draft a separate code of conduct for all public officers and employees in that agency or institution. The separate agency code of conduct shall prescribe standards, in addition to those set forth in the [GC Act] and the general codes of conduct for all executive and legislative branch public officers and employees, that are peculiar and appropriate to the function and purpose for which the agency or institution was created or exists.

NMSA 1978, § 10-16-11(C).

Under Section 10-16-11(C), SIC, as the head of an executive agency, may adopt a separate code of conduct prescribing specific standards in addition to the GC Act and applicable general code of conduct that “govern the conduct of” SIC’s public officers and employees, including members of SIC. *See* NMSA 1978, § 10-16-2(I) (defining “public officer or employee” for purposes of the GC Act to include “any elected or appointed official or employee of a state agency ... who receives ... [a] salary or is eligible for per diem or mileage”).

The GC Act provides state agencies with limited authority to enforce their codes of conduct.<sup>1</sup> Specifically, a violation of an agency’s separate code of conduct shall, “except for those public

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<sup>1</sup> Our discussion of SIC’s authority to enforce a code of conduct focuses on enforcement measures that require legislative authorization, such as formal action in response to a code of conduct violation that

officers and employees removable only by impeachment, ... constitute cause for dismissal, demotion or suspension.” NMSA 1978, § 10-16-11(C). The GC Act provides state agencies no other authority to enforce their codes of conduct.

The GC Act does not define the terms “dismissal, demotion or suspension” as used in Section 10-16-11(C). In the absence of a definition, the meaning of a word used in a statute “is determined by its context, the rules of grammar and common usage.” NMSA 1978, § 12-2A-2 (1997). To ascertain the legislative intent, “all provisions of a statute, together with other statutes in *pari materia*, must be read together.” *Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26, 309 P.3d 1047 (citations omitted). It is presumed that the legislature “is aware of existing statutory and common law and [does] not intend to enact a law inconsistent with existing law.” *Citation Bingo, Ltd. v. Otten*, 1996-NMSC-003, ¶ 21, 121 N.M. 205. *See also Baker*, 2013-NMSC-043, ¶ 28 (applying presumption that the legislature is aware of its prior enactments to conclude that the legislature’s use of a statutory term “was purposeful” based on the definition of the same term in a prior enactment).

The terms “dismissal,” “demotion,” and “suspension” commonly refer to action taken by an employer against an employee, usually for disciplinary reasons. Applying the rules of statutory construction discussed above, we believe the legislature intended the terms, as used in Section 10-16-11(C), to have their ordinary meaning. Looking first to other provisions of the GC Act, Section 10-16-14 authorizes the Attorney General and district attorneys to enforce the GC Act. NMSA 1978, § 10-16-14(A), (C). Like Section 10-16-11(C), Section 10-16-14(D) provides that violation of the GC Act “by any public officer or employee,” other than a public officer removable only by impeachment, “is grounds for discipline, including dismissal, demotion or suspension.” Section 10-16-14(D) then provides, in pertinent part: “Complaints against executive branch employees may be filed with the agency head and reviewed pursuant to the procedures provided in the Personnel Act.”

The Personnel Act, NMSA 1978, ch. 10, art. 16 (as amended through 2014), referenced in Section 10-16-14(D), applies to positions in state government, with certain exceptions. Among the exceptions are “members of boards and commissions and heads of agencies appointed by the governor.” NMSA 1978, § 10-9-4(B). The Act authorizes the State Personnel Board to promulgate rules, including rules for the “dismissal or demotion procedure for employees in the [classified] service, including presentation of written notice stating specific reasons....” *Id.* § 10-9-13(H). The Board’s rules governing disciplinary action against classified employees include “dismissal,” “demotion,” and “suspension,” as those terms are defined in the rules. *See* 1.7.1.7(J), (L), (JJ) NMAC.

As discussed above, the GC Act does not define the terms “dismissal, demotion or suspension” used in Section 10-16-11(C). Absent a specific definition, it is presumed that the legislature intended the terms to have their usual, ordinary meaning. This presumption is supported by Section

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penalizes a member, prohibits or restricts the ability of the member to perform his or her statutory responsibilities as a member of SIC, or similar formal, punitive action against a member. This advisory letter does not address informal, non-punitive measures in response to a violation, such as verbal or written expressions of displeasure regarding a member’s conduct that do not affect the member’s ability to perform the member’s SIC duties.

10-16-14(D) of the GC Act, which uses the same terms and expressly refers to the procedures of the Personnel Act. In the context of Section 10-16-14(D) and the pertinent provisions of the Personnel Act and Personnel Board rules discussed above, we believe it likely that, by providing that a violation of an agency's code of conduct constituted "cause for dismissal, demotion or suspension," the legislature meant only that a violation of the code of conduct was sufficient cause for disciplinary action against employees in the classified service. *See Selmecki v. New Mexico Dep't of Corrections*, 2006-NMCA-024, ¶ 9, 139 N.M. 122 ("[e]mployees subject to the Personnel Act who have completed a probationary period may only be disciplined for just cause").

SIC, composed of its members, is the governing body of a state agency. SIC are not employees of SIC, classified or otherwise. Because they are not SIC employees, members are not subject to the disciplinary measures described in Section 10-16-11(C) for violations of an agency's code of conduct. As noted above, Section 10-16-11(C) provides the only authority in the GC Act for an agency to enforce its code of conduct. Consequently, we conclude that the GC Act does not authorize SIC to enforce a code of conduct against its members.

## 2. SIC's Authority to Require a Signed Acknowledgement

The GC Act requires public officers and employees to review the applicable general code of conduct when they are hired and requires agency heads to "adopt ongoing education programs to advise public officers and employees about the codes of conduct." NMSA 1978, §§ 10-16-11(B), (C). An agency's code of conduct applies to the agency's officers and employees regardless of whether they have reviewed the code. *See* NMSA 1978, § 10-16-11(C) (upon review by the appropriate executive branch public officer, an agency's code of conduct "govern[s] the conduct of the public officers and employees of that agency"). The GC Act does not require officers and employees to sign an acknowledgment of an agency's code of conduct.

Although not required by the GC Act, we believe SIC might reasonably require its officers, including SIC members, and employees to sign an acknowledgment of the agency's code of conduct. Requiring a signed acknowledgement shows that SIC has provided an officer or employee with the opportunity to review the code. *See, e.g., Abbott v. BNSF Railway Co.*, 383 Fed.Appx. 703, 709, 2010 WL 2428658 (10<sup>th</sup> Cir. 2010) (employee signed code of conduct stating that the code was not a contract for services, which supported a finding that the employee was aware of the disclaimer). Requiring a signed acknowledgement also is consistent with SIC's responsibility under Section 10-16-11(C) to advise its officers and employees about the code of conduct on an ongoing basis.

## 3. Excluding Members Who Refuse to Sign an Acknowledgement from Deliberating and Voting on SIC Business

As discussed above, the GC Act does not authorize SIC to enforce its code of conduct against members of SIC through disciplinary action or otherwise. As a result, even if SIC imposed a requirement for a signed acknowledgement in its code of conduct, it could not sanction a member who refused to sign by excluding the member from deliberations, including executive sessions, or voting on SIC matters, including those discussed in executive session.

4. Validity of Action When a Member has been Improperly Excluded from Participating in Deliberations and Voting

Based on the information available at this time, we are unable to address this issue. The legal consequences of improperly excluding a member from participating in SIC matters would depend on the particular facts and circumstances, including the extent to which the exclusion of the member unfairly prejudiced or affected the outcome of SIC's action.

5. Excluding SIC Members from Deliberations and Voting as an Effective Removal

The members of SIC are required by law to "meet at least ten times per year, and as often as exigencies may demand, to consult with the state investment officer concerning the work of the investment office." NMSA 1978, § 6-8-7(C). This obligation gives SIC members the right to attend and participate in SIC meetings, including executive sessions, unless precluded by law, conflict of interest or court order. *See, e.g.,* NMSA 1978, § 10-16-4(B) (generally disqualifying a public officer or employee "from engaging in any official act directly affecting the public officer's or employee's financial interest"). *See also Myers v. Elgin Cmty. College Bd. of Trustees*, 361 N.E.2d 314, 315-16 (Ill. App. Ct. 1977) (college board had no authority to deny an elected nonvoting student member the right to attend executive sessions); *Scotch Plains-Fanwood Bd. of Educ. v. Syvertsen*, 598 A.2d 1232, 1233 (N.J. Super. Ct. 1991) (allowing a public body to exclude a member from participating in a closed session to discuss the member's lawsuit against the public body); Okl. Att'y Gen. Op. No. 09-26, 2009 WL 3265216 (public body could not exclude nonvoting, ex officio members from executive session, absent a statute limiting their participation).

Without statutory authority, it appears that SIC has no authority to exclude a member from participating in SIC meetings, unless the member's participation is limited by law, a conflict of interest, or a court order. Because SIC is not authorized to exclude a member from participating in SIC meetings, it is not necessary to address whether excluding a member from deliberating and voting at a meeting would constitute an effective removal of the member.

6. Sanctions Against Public Officers and Employees Removable Only by Impeachment

As discussed above, SIC has no apparent authority to sanction its members formally, including those who are public officers or employees removable only by impeachment.

7. Excluding Members from Deliberations and Voting as "Demotion" or "Suspension" under the GC Act

As discussed above, the terms "demotion" and "suspension," as used in Section 10-16-11(C), refer only to permissible disciplinary measures an agency may take against its employees for violations of a code of conduct. Section 10-16-11 does not permit SIC to exclude its members from attending meetings, including executive sessions, or voting on matters, including those discussed in closed session.

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

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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 for". The signature is written in a cursive style.

Marylou Poli,  
Assistant Attorney General