

SHOULD I STAY OR SHOULD I GO? NAVIGATING THE DELICATE SUBJECT OF RECUSAL

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Recusal in U.S. History

“No member may be present when a bill or any business concerning himself is debating; nor is any member to speak to the merits of it till he withdraws...Where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed, even after a division. In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case, it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.”

*-- A Manual of Parliamentary Practice
for the Use of the Senate of the United States (1801)*



Recusal in New Mexico

“Consequently, we believe that the kinship-based disqualification requirements of Article VI, Section 18 [of the New Mexico Constitution] apply to the members of any state or local public body when it acts in a quasi-judicial or administrative adjudicatory capacity. Absent the consent of all parties, a member of a quasi-judicial body must be disqualified from participating in a matter if the member is related to one of the parties by marriage or blood, within the degree of first cousin. Of course, due process principles generally require members of a quasi-judicial body to consider any interest or bias that would prevent them from acting impartially in a particular matter and to recuse themselves if necessary.”

-- New Mexico Governmental Conduct Act Compliance Guide

New Mexico Law & Recusal



Recusal in New Mexico Law

- ❑ The word recusal is mentioned in New Mexico statutes in connection to legal and financial actions.
- ❑ For example, NMSA 1978, § 8-8-18, relates to a “commissioner or hearing examiner” who is in “any adjudicatory proceeding in which he is unable to make a fair and impartial decision or in which there is reasonable doubt about whether he can make a fair and impartial decision...”
- ❑ Though not explicitly applicable, there is instructive language there stating that recusal should occur when:
 - ❑ The individual has “a personal bias or prejudice concerning a party or its representative or has prejudged a disputed evidentiary fact involved in a proceeding prior to hearing.”
 - ❑ “Personal bias or prejudice” is defined as a predisposition toward a person based on a previous or ongoing relationship, including a professional, personal, familial or other intimate relationship, that renders the commissioner or hearing examiner unable to exercise his functions impartially.
 - ❑ The official has a pecuniary interest in the outcome of the proceeding.
 - ❑ When the individual previously served as an attorney, adviser, consultant or witness in the matter in controversy
 - ❑ When, as a candidate for office, he announced how he would rule on the proceeding or a factual issue in the proceeding.



The Governmental Conduct Act

The Governmental Conduct Act, Chapter 10, Article 16 NMSA 1978, states that:

- ❑ Board members are to treat their “position as a public trust” and “use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.”
- ❑ Therefore, “[f]ull disclosure of real or potential conflicts of interest shall be a guiding principle” for a board member to determine his or her “appropriate conduct,” and it is mandatory to use “reasonable efforts...to avoid undue influence and abuse of office in public service.”

Limits On “Official Acts” Under The Governmental Conduct Act

- ❑ An “official act” is an *official decision, recommendation, approval, disapproval or other action that involves the use of discretionary authority.*
- ❑ A board member cannot “take an *official act* for the primary purpose of directly enhancing” his or her “financial interest or financial position.”
 - ❑ It is a fourth degree felony to do so.
- ❑ Because of this prohibition, a board member is “disqualified from engaging in any *official act* directly affecting the public officer’s...financial interest.”
 - ❑ Exception: if the financial benefit of the financial interest of the board member is proportionately less than the benefit to the general public.
- ❑ *The NM Attorney General says: The GCA does not require that the public officer who receives a prohibited “thing of value” does not have to have personally performed the official act. A violation of the GCA can also occur if the officer “has sufficient influence or authority to direct another officer or employee to perform an official act.” [Governmental Conduct Act Compliance Guide page 14]*

What Does That Mean in Practice?

- ❑ When in doubt as to whether a board member should be disqualified from engaging in an official act that has an effect on the individual's (or his or her family's) financial interest, the GCA mandates that the best course is full disclosure.
- ❑ The GCA generally speaks to financial interests, but the Attorney General has observed that, where any bias or interest would adversely affect an official's ability to perform that individual's duties exclusively in the public interest, or where a personal interest "could reasonably be perceived as unduly influencing" an official's conduct in a particular matter "contrary to the public interest," the minimum requirement would be disclosure of the interest and, "if necessary," to "refrain from acting or participating in the matter."
- ❑ Recusal = to refrain from acting or participating in a matter.

GCA Consequences of Failure to Recuse (or Disclose)

- Civil action by the Attorney General or local DA
- Court action (e.g., injunction or restraining order)
- Fines
- Misdemeanor or fourth degree felony charges
- Invalidate a Board action



Nepotism and Recusal

- ❑ State nepotism statutes prohibit the “initial” employment of a board member or Superintendent’s spouse, father, father-in-law, mother, mother-in-law, son, son-in-law, daughter, daughter-in-law, brother, brother-in-law, sister or sister-in-law.
- ❑ There is the exception permitting the continued employment of an employee-relative.
- ❑ So what if a matter pertaining to the continuously employed employee-relative comes before the Board?
 - ❑ Disclosure of the interest is mandated under the GCA, and recusal is advisable.

The State Constitution and Recusal

- ❑ Article VI, Section 18 of the Constitution, prohibits a judge from hearing a case in which a party is “related to [the judge] by affinity or consanguinity, within the degree of first cousin,” unless all the parties consent.
- ❑ The courts have applied this restriction to all governing bodies acting in a quasi judicial capacity.
- ❑ Any member of a governing body who has a bias for or against a party in an adjudicatory proceeding will be disqualified from participating in the proceeding.

Prohibited Employment – Term of Office

NMSA 1978, § 22-5-5. Compensation; prohibited employment.

- A. The members of a local school board shall serve without compensation.
- B. No member of a local school board shall be employed in any capacity by a school district governed by that local school board during the term of office for which the member was elected or appointed.

NMSA 1978, § 22-5-8. Term of office.

- A. The full term of office of a member of a local school board shall be four years succeeding the member's election to office at a regular local election held pursuant to the Local Election Act [Chapter 1, Article 22 NMSA 1978].
- B. Any member of a local school board whose term of office has expired shall continue in that office until a successor is elected and qualified.

The Courts Speak on Recusal



Due Process and Recusal

- ❑ Due process is guaranteed under the Fourteenth Amendment of the U.S. Constitution which states that “no State [shall] deprive any person of life, liberty, or property, without due process of law...”
- ❑ According to New Mexico courts, constitutional “due process requires that the proceedings looking toward the deprivation of life, liberty, or property must be essentially fair,” and the government “cannot deprive any individual of personal or property rights except after a hearing before a fair and impartial tribunal.” *Reid v. N.M. Bd. of Optometry*, 92 N.M. 414 (N.M. 1979)
- ❑ “At a minimum, a fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case” *Id.*

The U.S. Supreme Court

- ❑ The Supreme Court has said that, “A biased decision maker is constitutionally unacceptable and ‘our system of law has always endeavored to prevent even the probability of unfairness.’”

Withrow v. Larkin, 421 U.S. 35 (1975).

BUT...

- ❑ “Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not . . . disqualify a decision maker.”

Hortonville Dist. v. Hortonville Educ. Ass’n, 426 U.S. 482 (1976).

The U.S. Supreme Court & Bias

- ❑ The Supreme Court, in trying to answer exactly what is necessary to ensure a “fair hearing” established the following requirements:
 - 1) timely and adequate notice detailing reasons for the proposed decision,
 - 2) an opportunity to confront and cross-examine adverse witnesses,
 - 3) the right to be represented by counsel,
 - 4) a decision, based solely on evidence adduced at the hearing, in which the reasons for the decision are set forth, and
 - 5) an impartial decision maker.
- ❑ Court decisions reflect that if a school board member does not voluntarily recuse himself/herself because of bias, the complaining party seeking relief may challenge the impartiality of the board member during the hearing, or in a judicial or administrative appeal.

Recusal and Board Members' Free Speech Rights?

- ❑ The Supreme Court looked at a case involving a Nevada city council member's refusal to recuse himself from a matter, in accordance with the state ethics laws.
 - ❑ The law prohibited an office who has a conflict from voting on a proposal and from advocating its passage or failure.
- ❑ The city councilor argued that the ethics law violated his First Amendment rights.
- ❑ The Court disagreed and said: a "legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."

Federal Courts in the Tenth Circuit

- ❑ A terminated teacher challenged the decision, in part based on her claim that two school Board members were personally biased against her.
- ❑ The Court said the teacher had failed to present any evidence of personal bias or ill-will by any member of the Board against her.
- ❑ The teacher's speculation that two of the Board members felt ill-will towards her because of incidents that occurred when she taught the Board members' children was insufficient to establish bias.

Seabourn v. Independent School District No. 1-300 of Woodward County,
775 F. Supp.2d 1306 (U.S. W.D. Oklahoma 2010)

New Mexico Courts

- ❑ Have acknowledged that “[m]embers of tribunals are entitled to hold views on policy, even strong views, and even views that are pertinent to the case before [them],” so they are not required to recuse themselves just because they previously expressed support for a particular policy.

Nichols v. Bd. of Cty. Comm. of Taos Cty., 2018 WL 7040212 (Ct. App. N.M. 2018)

- ❑ But, “a statement or position is generally disqualifying only if it concerns the specific proposal or action that is before the tribunal.”

See Carangelo v. Albuquerque-Bernalillo Cty. Water Util. Auth., 320 P.3d 492

- ❑ “Regardless of whether an official is actually biased, he appears biased when he expresses prejudgment of an issue in a pending case and will, therefore, need to recuse himself in most instances.”

The Attorney General

- ❑ Where an official had “personal or professional” interactions with a party, outside of a hearing, there is a conflict and “the easiest solution would be to have that Board member recuse himself” from the decision-making body.



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Scenarios: What Would You Do?

Scenario 1

- ❑ Over a family gathering at Thanksgiving, the Board member's nephew approaches the Board member to express his dissatisfaction with the Athletic Director. He feels that the A.D. treated him unfairly this season and allowed other students to bully and haze him and others. Various friends and community members have also complained to the Board member this year about the coach's language at football games, his alleged treatment of the students, and his apparent anger control issues. Each time, the Board member took those issues to the Superintendent for investigation and follow up. Now, that the issue has hit close to home, the Board member asks his nephew to provide more information. After hearing the details, the Board member calls the Superintendent for follow up and also request that she provide the Board with status reports of the investigation. While the Superintendent investigates the matter, Board member receives emails from other community members raising new allegations, which the Board member immediately forwards to the Superintendent. Ultimately, the Superintendent terminates the A.D. at the end of the year.
- ❑ **Questions:** Now that the A.D. has appealed the termination to the Board, must the Board member recuse himself? Should he?

Scenario 2

- ❑ Having reservations about the Superintendent when he was first hired by the Board, a Board member chose to abstain himself from that vote. Since his hiring, the Superintendent's performance has been sub-par in the Board member's view and the Board member has taken issue with recent administrative decisions made concerning curriculum and District spending. The Board member was recently approached by the local paper and invited to submit an "op-ed" piece about the state's accountability ratings for the district. The "op-ed" piece provides the Board member with the opportunity to express the frustrations he has been experiencing, both as a Board member and with the Superintendent. From the Board member's perspective, the timing could not be more perfect in light of the fact that the Superintendent's evaluation and contract are up for consideration. So, the Board member jumps at the chance of doing the piece.
- ❑ **Questions:** What should the Board member consider before agreeing to do the article? What impact could such a piece have on the Board member's participation in future Board meetings concerning the Superintendent's performance and contract?

Scenario 3

- ❑ A Board member's wife owns a local landscaping business and is submitting a competitive bid to perform several large landscaping projects for the high school campuses.
- ❑ **Questions:** Is it appropriate for the Board member to deliberate on the selection of the landscape business to perform the work? Should the Board member vote on which landscaping bid is awarded?

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Final Tips

What if You Think a Board Member Should Recuse Him/Herself?

- ❑ Generally, school board members lack the authority to remove other board members or bar them from participation in meetings and proceedings of the school Board.
- ❑ **So what can a Board do?**
 - ❑ Determine if recusal is legally required.
 - ❑ The Board President might have a private conversation with the board member about any concerns, before the Board meets.
 - ❑ If allegations of impartiality or bias occur at a meeting, the discussions should center on the specific allegations, allow the Board member to respond to the allegations, and permit the members of the Board to express their opinions concerning the need for recusal.

Consequences for Failure to Recuse?

- Potentially successful legal challenges to a Board decision.
- Potential charges against an individual board member.
- Censure by the Board.
- Disruption in the community.



When in Doubt...

- ❑ Under circumstances that are not specifically recognized by statute as creating an impermissible conflict of interest, a determination of whether to recuse or abstain will be to the board members, based on the traditional guiding principles of the board, or its own internal rules.
- ❑ For example, interest, NMSBA has adopted ethical standards for board members, and many boards have adopted those standards by policy or board operating procedures.
- ❑ At the end of the day, if a board member does not believe that he or she can be fair and impartial in considering a matter properly before the board, or feels that they cannot avoid the appearance of partiality, then it is appropriate to avoid participation in the deliberations and/or abstain from voting on the matter.

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