



STATE ETHICS COMMISSION

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December 2, 2022

Via Proceedings Portal and Electronic Mail

Brian Egolf
Speaker of the House
c/o Tom Hnasko, Timothy Rode
Hinkle Shanor LLP
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Counsel for Respondent Egolf

Re: *Garcia v. Egolf*, No. 2022-030 (State Ethics Commission): notice under NMSA 1978, § 10-16G-10(G) (2019)

Dear Speaker Egolf,

Please note that in the above-referenced administrative proceeding, the State Ethics Commission's General Counsel has determined that probable cause supports allegations asserted by the complainant, Representative Miguel Garcia, that you violated the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1967, as amended through 2019). *See* Attach. 1, Ltr. from W. Boyd to J. Farris (Dec. 1, 2022), Findings and Recommendations in Support of Probable Cause, *Garcia v. Egolf*, No. 2022-030 (State Ethics Comm'n, Dec. 1, 2022); *see also generally* NMSA 1978, § 10-16G-10(G) (2019); 1.8.3.13(A) NMAC (2021).

In this administrative matter, the General Counsel investigated whether you violated Section 10-16-3 of the Governmental Conduct Act. *See* Attach. 1, Findings and Recommendations in Support of Probable Cause, at 3-15; *see generally* 1.8.3.13(A)(1)(a) NMAC. Specifically, as detailed in the Specification of Alleged Violations and the Findings and Recommendations in Support of Probable Cause, the General Counsel has determined that the following allegations in the complaint are supported by probable cause:

1. Respondent Brian Egolf violated Subsection C of Section 10-16-3 of the Governmental Conduct Act by knowingly appointing himself to serve on the Public Regulation Commission Nominating Committee, in violation of Article IV, Section 28 of the New Mexico Constitution.

See Specification of Alleged Violations, attached to Findings and Recommendations in Support of Probable Cause.

State Ethics Commission

To: Speaker Egolf

December 2, 2022

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Under Section 10-16G-10(G), because the General Counsel has determined probable cause, a public hearing will be set. A hearing officer will hold a hearing to determine whether a preponderance of the evidence establishes a violation of the Governmental Conduct Act on the claim enumerated above. *See* NMSA 1978, § 10-16G-12(D) (2019). The assigned hearing officer in this matter is the Honorable Alan C. Torgerson (Ret.), who is copied hereto. *See generally* 1.8.3.13(A)(1)(c), (A)(2).

Also, under Section 10-16G-10(G) and 1.8.3.16(A) NMAC, this correspondence and its attachments, the complaint, any response you filed to the complaint, and any related records shall be made public thirty days following today's date. If any of the materials in the attachments to this notification or in any of the documents filed on the Proceedings Portal in this administrative matter contain information that is protected from disclosure by any privilege or otherwise made confidential by law, please inform me of that material and the basis for the claim of confidentiality within fourteen days of receiving this correspondence. *See* NMSA 1978, § 10-16G-13(D) (2019).

If you wish to correct the alleged violation of the Governmental Conduct Act described in the Specification of Alleged Violations, you have ten days from the date of this notification to do so. *See* NMSA 1978, § 10-16-13.1(B) (1993, as amended through 2019). To correct the alleged violation, you must resign from the Public Regulation Commission Nominating Committee within ten days of the date of this letter. If there is a dispute as to whether you have corrected the alleged violation, Hearing Officer Torgerson will resolve that dispute.

Finally, Hearing Officer Torgerson will have access to the docket for this matter on the Commission's Proceedings Portal. Please file any papers related to the hearing on the docket and watch for filings from Hearing Officer Torgerson. I request that Hearing Officer Torgerson issue any notices or orders in this matter at least thirty days after the date of this notification.

Very truly yours,

/s/ Jeremy Farris

Jeremy Farris

Executive Director

State Ethics Commission

cc: Hon. Alan C. Torgerson (Ret.), Hearing Officer (via electronic mail:
alanctorgerson@yahoo.com)

Hon. Miguel Garcia, *Complainant in No. 2022-030* (via Proceedings Portal and
electronic mail: spongebob.garcia@gmail.com)



STATE ETHICS COMMISSION

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Jeremy D. Farris, Executive Director

December 2, 2022

To: Jeremy Farris, Executive Director

Re: *Garcia v. Egolf*, Case No. 2022-030: investigation findings and probable cause determination

Director Farris:

I am writing concerning *Garcia v. Egolf*, a complaint alleging Respondent Brian Egolf violated the Governmental Conduct Act, NMSA 1978, §§ 10-16-1 to -18 (1993, as amended through 2021).

As explained in the attached findings, I conclude that the complaint's allegation that the respondent violated the Governmental Conduct Act is supported by probable cause.

Pursuant to 1.8.3.13(A) NMAC, I submit the attached findings and recommendations, which detail the specific allegations to be decided at a hearing. I request that you appoint a hearing officer to conduct a hearing to determine whether the respondent violated the Governmental Conduct Act, and, if so, impose fines or other appropriate relief. See 1.8.3.13(B) NMAC.

Please provide the parties with a copy of these findings pursuant to Subsection 10-16G-10(G) of the State Ethics Commission Act; inform the respondent that the complaint, the attached findings, and related filings will be made public in thirty days; and ask the respondent to state whether any of the attached materials contain information that is confidential by law, and the basis for the claim of confidentiality. See NMSA 1978, § 10-16G-13(D) (2019).

Very truly yours,

A handwritten signature in black ink that reads "Walker Boyd".

Walker Boyd

Enclosure: as stated

IN THE STATE ETHICS COMMISSION

MIGUEL GARCIA,

Complainant,

v.

BRIAN EGOLF,

Respondent.

No. 2022-030

FINDINGS AND RECOMMENDATIONS IN SUPPORT OF PROBABLE CAUSE

December 2, 2022

STATE ETHICS COMMISSION

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Background

Below I provide an overview of the parties to the complaint, a summary of the complaint, and a summary of my investigation of the complaint.

I. The parties

A. The complainant

The complainant, Miguel Garcia, is a member of the House of Representatives.

B. The respondent

The respondent, Brian Egolf, was and is the Speaker of the House of Representatives and has purported to nominate himself to the Public Regulation Commission (“PRC”) nominating committee.

II. The complaint

The PRC has immense power over utilities and common carriers in New Mexico: it regulates public utilities, including electric, natural gas and water companies; transportation companies; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies. Currently, the PRC consists of five members who are elected from five districts defined by law.¹

In the 2020 regular legislative session, the Legislature passed, and the Governor signed into law, legislation reducing the number of PRC commissioners from five to three, subjecting them to gubernatorial nomination and senate consent, and implementing the role and responsibilities of the PRC nominating committee.² This law was contingent on passage of an accompanying constitutional amendment in the November 2020 general election.³ Under the constitutional amendment, commissioners are no longer elected. Instead, “[t]he Governor nominate[s] members from a list of qualified nominees submitted to the Governor by the public regulation commission nominating committee, as provided by law.”⁴ The constitutional amendment passed.⁵ Accordingly, the PRC nominating committee came into existence, and has the following statutory features:

- The seven members of the committee must be knowledgeable about public utility regulation, may not be employed by, on behalf of, or have a contract with a public

¹ See N.M. Const. art. XI, § 1.

² See Laws 2020, ch. 9, § 17.

³ *Id.*

⁴ See Laws 2019, Const. Am. 1, §§ 1–3.

⁵ See N.M. Const. art. XI, § 1, ann. to 2020 amendment (stating that the proposed constitutional amendment was “adopted at a general election held on November 3, 2020 by a vote of 445,655 for and 355,471 against”).

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utility that is regulated by the PRC, and cannot apply to be a nominee to the PRC.⁶

- The committee members are nominated by different officials of state government: four by members of the legislative branch, two by cabinet secretaries, and one by the Governor.⁷
- Once convened, the committee is tasked with meeting “as often as necessary in order to submit a list to the Governor of no fewer than five qualified nominees for appointment to the commission for the terms beginning January 1, 2023.”⁸
- When a vacancy on the PRC occurs (either because a commissioner’s term is ending or because of a vacancy), the Commission is required to reconvene “to submit a list to the Governor . . . of no fewer than two qualified nominees[.]”⁹

As Speaker of the House, the respondent had the authority to appoint one of the legislatively appointed members of the PRC nominating committee.¹⁰

The complaint alleges the respondent “appointed himself to serve on the 7 member panel that will submit no less than two recommendations per position [on the PRC] to the Governor who in turn will make 5 appointments to the 5 member board[.]”¹¹

III. The response

In his response to the complaint,¹² the respondent argues (i) the complaint is defective because it fails to allege a personal interest or “otherwise failed to ethically discharge his responsibilities;”¹³ and (ii) the respondent’s self-appointment to the PRC nominating committee

⁶ NMSA 1978, § 62-19-4(A)(1)–(3) (2022).

⁷ See NMSA 1978, § 62-19-4(A)(4) (2022). The Governor’s nominee to the committee must be a member of an Indian nation, tribe, or pueblo. See § 62-19-4(A)(4)(c).

⁸ NMSA 1978, § 62-19-4(F) (2022).

⁹ NMSA 1978, §§ 62-19-4(G), (H) (2022).

¹⁰ See NMSA 1978, § 62-19-4(A)(4)(a) (“The [PRC nominating committee] is created and consists of seven members who are . . . appointed as follows: four members appointed one . . . by the speaker of the house of representatives . . .”).

¹¹ See Compl; the complaint appears to mistakenly assert that the governor will appoint five members to the PRC, when in fact the governor will select three. See N.M. Const. art. XI, § 1(B) (“Beginning January 1, 2023, the [PRC] shall consist of three members.”).

¹² See Mot. to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted (#8) (Sept. 29, 2022) (“Resp.”). Although styled as a motion to dismiss, the Commission’s rules do not permit the respondent to submit a motion to dismiss an administrative complaint. If the executive director finds that the Commission has jurisdiction over the complaint, the complaint may only be dismissed after an investigation and upon a finding that it is not supported by probable cause; settlement; or a written decision by a hearing officer after a hearing. See 1.8.3.10(C)(3) NMAC (“If the director determines that a complaint lies wholly or in part within the jurisdiction of the commission, unless otherwise provided below, the director shall forward the complaint to the general counsel to initiate an investigation.”); 1.8.3.13(C) (settlement agreements); 1.8.3.14(N) NMAC (hearing officer decision after or in lieu of hearing). Accordingly, the pleading will be referred to as a response to the complaint.

¹³ Resp. at 3-4.

does not violate the Emoluments Clause of the State Constitution.¹⁴ Finally, the respondent appears to advance an advice-of-counsel defense to any violation, claiming that he consulted with lawyers in the Legislative Counsel Service about the propriety of his self-appointment to the PRC nominating committee and was informed that there was no prohibition against his doing so.¹⁵

IV. Summary of my investigation

To investigate whether the complaint is supported by probable cause, I reviewed:

- The complaint;
- The respondent's response to the complaint;
- Relevant and applicable constitutional provisions, statutes, and caselaw;
- The respondent's responses to my requests for production of documents; and
- The complainant's addendum to the complaint.

Legal standard

After the Executive Director determines the Commission has jurisdiction over a complaint, the general counsel is required to investigate the complaint to determine whether it is supported by probable cause (in which case the complaint must be resolved by a hearing officer at a public hearing), or whether it is not (in which case the complaint is subject to mandatory dismissal).¹⁶ In determining whether a complaint is supported by probable cause, the Act requires the general counsel to determine whether there is evidence that could form the basis for a finding of liability by a hearing officer or the Commission; however, to make that determination, the Act does not require the general counsel to exhaustively review all possible sources of evidence.¹⁷ A complaint may be supported by probable cause when there is evidence (not necessarily conclusive) of a violation.¹⁸

A complaint also may be supported by probable cause when the undisputed facts establish a violation of the law. As the Court of Appeals put it in the context of claims for malicious abuse of process, "[t]he question of probable cause is a question of law and fact.

¹⁴ See Resp. at 7-11.

¹⁵ See Resp. at 5 n.1; see also Respondent's Responses to the General Counsel's First Requests for Production of Documents (Ex. 1)

¹⁶ See § 10-16G-10(D)–(E).

¹⁷ See § 10-16G-10(E).

¹⁸ See *State v. Cordova*, 1989-NMSC-083, ¶ 15, 109 N.M. 211, 784 P.2d 30 (interpreting the term "probable cause" in the criminal procedure context to require that "(1) only a probability of [a violation] need be shown; (2) there need be less vigorous proof than the rules of evidence require to determine guilt of an offense; [and] (3) common sense should control" (quoting *State v. Snedeker*, 1982-NMSC-085, 99 N.M. 286, 290, 657 P.2d 613, 617)); *State v. Vest*, 2011-NMCA-037, ¶ 7, 149 N.M. 548, 252 P.3d 772 ("The degree of proof necessary to establish probable cause for the issuance of a search warrant is more than a suspicion or possibility but less than a certainty of proof.").

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Whether the circumstances alleged to show probable cause are true, and exist, is a matter of fact; but supposing them to be, whether they amount to probable cause, is a question of law.”¹⁹

Discussion

The complaint alleges a violation of Section 10-16-3 of the Governmental Conduct Act. That section provides:

A. A legislator or public officer or employee shall treat the legislator’s or public officer’s or employee’s government position as a public trust. The legislator or public officer or employee shall use the powers and resources of public office only to advance the public interest and not to obtain personal benefits or pursue private interests.

B. Legislators and public officers and employees shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the integrity and discharging ethically the high responsibilities of public service.

C. Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.

D. No legislator or public officer or employee may request or receive, and no person may offer a legislator or public officer or employee, any money, thing of value or promise thereof 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.

The complaint does not allege that the respondent promised to perform an official act in exchange for something of value, so Subsection 10-16-3(D) is not at issue. Instead, I take the complaint to allege violations of the broader conflict-of-interest and abuse-of-office prohibitions set forth in Subsections 3(A)–(C).²⁰ The theory of the complaint, as confirmed by the complainant in his addendum, is that the respondent was prohibited by the Constitution’s Emoluments Clause from nominating himself to the PRC nominating committee; in nominating himself to the committee, the respondent violated the public trust obligations set out in Section 10-16-3(A)–(C).²¹

¹⁹ *Yucca Ford, Inc. v. Scarsella*, 1973-NMCA-042, ¶ 4, 85 N.M. 89 (quoting *Leyser v. Field*, 1890-NMSC-001, ¶ 3, 5 N.M. 356).

²⁰ See Complaint (#1) (Aug. 4, 2022) at 2 (“By his action to self appoint himself [sic] to the PRC Nominating Committee, Brian Egolf is in blatant defiance of the New Mexico Governmental Conduct Act Section 10-16-3A and 10-16-3B.”).

²¹ See Addendum to Complaint (#9) (Oct. 4, 2022) (citing Article IV, Section 28 of the State Constitution “as another item in my complaint in which Mr. Egolf is in blatant defiance.”).

My analysis is divided as follows. First, I address the threshold question of whether the Commission may adjudicate a claimed violation of Section 10-16-3(A)–(C) of the Governmental Conduct Act after the Supreme Court held the section cannot form the basis of criminal charges in *State v. Gutierrez et al.*²² Concluding that the Commission may adjudicate violations of Section 10-16-3(A)–(C) in civil administrative proceedings, I next address whether the Commission can adjudicate an alleged violation of Section 10-16-3 premised upon a legislator’s violation of a duty arising under the State Constitution. That question turns on two sub-questions: (i) Whether a legislator’s violation of the Emoluments Clause of the State Constitution is cognizable as a violation of Section 10-16-3(A)–(C) of the Governmental Conduct Act; and if so (ii) whether there is probable cause to support a finding that the respondent committed a prohibited abuse of office by nominating himself to the PRC nominating committee in violation of the Emoluments Clause.

I. The Commission may adjudicate a violation of Section 10-16-3(A) – (C) of the Governmental Conduct Act in civil administrative proceedings.

In *State v. Gutierrez, et al.*, the Supreme Court held that “the Legislature intended for Subsections (A)-(C) [of Section 10-16-3 of the Governmental Conduct Act] to be applied as ethical principles rather than as criminal statutes.”²³ In *Gutierrez*, the Court granted certiorari to review an opinion by the Court of Appeals upholding in part and rejecting in part various criminal defendants’ arguments that (i) the Legislature did not intend to permit criminal prosecutions for violations of Section 10-16-3(A)–(C) of the Governmental Conduct Act; and (ii) to the extent the Legislature intended to make violations prosecutable criminal offenses, Section 10-16-3(A)–(C) was unconstitutionally vague.²⁴ The Court of Appeals concluded that by enacting a provision making any knowing and willful violation of the “provisions of the [Governmental Conduct Act]” punishable as a misdemeanor, the legislature plainly intended to make violations of Section 10-16-3(A)–(C) prosecutable criminal offenses.²⁵ The Court of Appeals then invalidated Subsections (B) & (C) on constitutional vagueness grounds, but upheld Subsection (A) against constitutional challenge.²⁶

On certiorari, the Supreme Court declined to address the Court of Appeals’ constitutional vagueness analysis; instead, the Court held that as a matter of statutory interpretation, “the plain language of Subsections (A)-(C) does not allow their enforcement as criminal statutes when considered in the light of fundamental principles of criminal law.”²⁷ The Court found that a violation of a statute may only furnish a basis to impose criminal liability if the statute sets forth

²² 2022-NMSC-____, No. S-1-SC-38367 (consolidated) (Sept. 26, 2022).

²³ *Id.* ¶ 2, slip op. at 2.

²⁴ *See id.* ¶¶ 8–9.

²⁵ *See id.* ¶ 8 (citing *State v. Gutierrez*, 2020-NMCA-045, ¶¶ 12, 19, 24).

²⁶ *See id.* ¶ 9 (citing *State v. Gutierrez*, 2020-NMCA-045, ¶¶ 28–42).

²⁷ *Id.* ¶ 27.

an “actus reus” (or “wrongful deed” or “forbidden act”), and “Subsections (A)-(C) do[] not express conduct that would constitute a criminal actus reus.”²⁸

With respect to Subsection (A), the Supreme Court said that the absence of a definition of “which uses of the powers and resources of public office would qualify as criminal conduct, either by not advancing the public interest or by obtaining personal benefits or pursuing private interests,” rendered that subsection unenforceable in criminal proceedings.²⁹ Likewise, a violation of Subsection (B)’s mandate that a public officer “maintain[] the integrity” or “discharg[e] ethically the high responsibilities of public service” could not be prosecuted as a criminal offense because the provision does not define “conduct [that] would qualify as criminal in not maintaining the integrity or discharging ethically the high responsibilities of public service, at all times.”³⁰ So too Subsection (C)’s mandate that “[a]t all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service,” with the Court again finding that the failure to set out a “definition as to what conduct would qualify as criminal in not exercising relevant *reasonable efforts, at all times*” meant that the provision lacked a required “actus reus” necessary for the imposition of criminal liability.³¹

The GCA is subject to criminal, civil and administrative enforcement. Although the Supreme Court held that Section 10-16-3(A)–(C) could not be enforced in criminal proceedings, the Court’s opinion is silent as to the enforceability of these subsections through civil actions or civil administrative proceedings before the State Ethics Commission. And there are two reasons to conclude that the Commission may adjudicate and assess civil penalties for violations of Section 10-16-3(A)–(C), notwithstanding *Gutierrez*:

First, the Supreme Court “presume[d] . . . that the Legislature acted with full knowledge of the rule that criminal statutes must be sufficiently clear and definite to inform a person of ordinary intelligence what conduct is punishable.”³² The Court explained that this presumption, although borrowed from “unconstitutional vagueness analysis,” informed the Court’s conclusion that Subsections (A)–(C) were not “intend[ed] . . . to be enforced as criminal statutes.”³³ But as the Supreme Court has elsewhere noted, the same presumption does not apply to civil statutes: in the civil context, the diminished liberty interests at stake (a civil penalty or loss of property as opposed to imprisonment) means that the Legislature does not need to act with the same degree of specificity.³⁴ Accordingly, the Supreme Court’s holding that Subsections (A)–(C) cannot be enforced in criminal proceedings, and its refusal to reach a vagueness holding implicating a court’s or the Commission’s ability to impose civil remedies, is not dispositive of the

²⁸ *Id.* ¶¶ 31–32.

²⁹ *Id.* ¶ 33.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* ¶ 37 (internal quotation marks and citation omitted).

³³ *Id.*

³⁴ See *Tri-State Generation and Transmission Association v. D’Antonio*, 2012-NMSC-039, ¶ 57 (citing *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

Commission’s authority to adjudicate violations of those provisions in civil administrative proceedings.

Second, the constitutional provision creating the Commission vests the Commission with the power to “adjudicate complaints alleging violations of . . . standards of ethical conduct[.]”³⁵ Because the Commission’s adjudicatory power extends to include determining whether a respondent has violated a “standard of ethical conduct,” Commission adjudication of complaints alleging violations of Subsections (A)–(C) is not inconsistent with the Supreme Court’s holding that these provisions are “aspirational expressions of ethical principles[.]”³⁶

II. A legislator’s breach of a legal duty to act or not act pursuant to the Constitution is an abuse of office that violates Subsection 10-16-3(C) of the Governmental Conduct Act.

As noted above, the complaint does not allege that the respondent promised or exchanged an official act for something of value in violation of Subsection 10-16-3(D); rather, the complaint alleges that the respondent’s decision to appoint himself to the PRC nominating committee violates Subsections 10-16-3(A)–(C) of the Governmental Conduct Act.

Subsection 10-16-3(A) requires legislators 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.”³⁷ Here, the respondent contends that he appointed himself to the PRC nominating committee because he believed it was in the public’s interest for him to serve on that committee, and that his intent was not to obtain some personal benefit or pursue some private interest.³⁸ The complainant does not dispute the respondent’s asserted intent. Accordingly, there is no probable cause to conclude that the respondent’s decision to nominate himself to the PRC nominating committee was a violation of Subsection 10-16-3(A).

The remaining question is whether the respondent’s nomination of himself to the PRC nominating committee is a violation of Subsections 10-16-3(B) & (C). Subsections 10-16-3(B) & (C) impose a duty on legislators, public officers, and public employees to disclose real or potential conflicts of interests and to undertake “reasonable efforts . . . to avoid undue influence and abuse of office in public service.”³⁹ Subsection (B) details the duty’s scope of application (i.e., to whom the duty applies), and Subsection (C) provides the duty’s specific content (i.e., what the duty requires). A violation occurs when a legislator, public official, or employee either (i) fails to disclose a real or potential conflict of interest, or (ii) has abused his office.

³⁵ N.M. Const. art. V, § 17(B).

³⁶ *Gutierrez*, 2022-NMSC-____, ¶ 38.

³⁷ See § 10-16-3(A).

³⁸ See *Egolf picks himself to serve on PRC nominating committee*, SANTA FE NEW MEXICAN (July 2, 2022), https://www.santafenewmexican.com/news/local_news/egolf-picks-himself-to-serve-on-prc-nominating-committee/article_f79b0906-f9a2-11ec-9d6a-c7e1f085d005.html (last accessed Nov. 15, 2022) (“Egolf said in a statement, “I was proud to play a role in the legislation that brought needed modernizations to the PRC and I want to see that process through, so I am volunteering myself for the Nominating Committee.””).

³⁹ §§ 10-16-3(B)–(C).

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To the extent the respondent's personal interests are in conflict with his power to appoint a member of the PRC nominating committee, that conflict was disclosed by the very nature of the respondent's action: no one asserts that the respondent concealed or otherwise failed to disclose that he was nominating himself to the PRC nominating committee. The question is therefore whether the respondent committed an abuse of office in so doing.

To "abuse" means "put [something] to a wrong or improper use."⁴⁰ "Abuse of public office" has been defined on similar lines, as "an act relating to [a public servant's] office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized," or a knowing failure to "perform[] a duty which is imposed upon [the public servant] by law or is clearly inherent in the nature of his office[.]"⁴¹ It is elsewhere defined as "[a] public servant's tortious or criminal use of governmental position for private gain."⁴² Considering these definitions, I interpret "abuse of office in public service" in Subsection 10-16-3(C) as requiring proof that the respondent (1) is a legislator, public official, or public employee, who (2) knowingly (3) breaches a clear and applicable legal duty.⁴³

Here, the complaint alleges the respondent committed a prohibited abuse of office by nominating himself to the PRC nominating committee in violation of the State Constitution's Emoluments Clause. That clause prohibits (as relevant here) "[any] member of the legislature . . . during the term for which he was elected, [to] be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term[.]"⁴⁴ I conclude that this provision imposes a duty on the respondent not to seek or accept appointment to any civil office during his term or to seek or accept appointment to an office created during the term for which he was elected. Accordingly, if the respondent knowingly violated this duty by appointing or accepting

⁴⁰ *Abuse*, Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/abuse> (last accessed June 14, 2022).

⁴¹ N.Y. Penal Code. § 195.00. This interpretation avoids the problems of vagueness and indeterminacy that would come from defining "abuse of office" to include any exercise of power for an improper purpose, and is also in harmony with the overall structure of Section 3 of the Governmental Conduct Act: Subsection 10-16-3(A) proscribes any use of official power or resources in service of a private interest, even if the use of power or resources would otherwise be permitted. Subsection 10-16-3(C) prohibits public officers and employees from corruptly acting or refusing to act in violation of a legal duty relating to their office or public employment, regardless of whether such acts or omissions are motivated by a personal interest.

⁴² *Abuse of Public Office*, Black's Law Dictionary (11th ed. 2019).

⁴³ These elements largely track the elements of misconduct in public office, an offense at common law. *See, e.g., State v. Weleck*, 91 A. 2d 751, 756 (N.J. 1952) (defining "official misconduct" as "any unlawful behavior in relation to official duties by an officer intrusted in any way with the administration of law and justice, or, as otherwise defined, any act or omission in breach of a duty of public concern, by one who has accepted public office.") (quoting 1 Burdick, *Law of Crime* § 272 (1946)). It does not matter that the legal duty arises from the State Constitution, as the Commission may interpret and apply a provision of the State Constitution in adjudicating a claimed violation of a statute within the Commission's jurisdiction, so long as the Commission's adjudication does not involve determining whether a statute or the Commission's enabling legislation is constitutional. *See Sandia Sav. & Loan Ass'n v. Kleinheim*, 1964-NMSC-067, ¶ 14, 74 N.M. 95 (quoting 3, Davis, *Administrative Law Treatise*, § 20.04); *Chavez v. City of Albuquerque*, 1998-NMCA-004, ¶ 36, 124 N.M. 479 (Hartz., J., concurring in part and dissenting in part)).

⁴⁴ N.M. Const. art. IV, § 28.

an appointment to the PRC nominating committee, that violation is an abuse of office under Section 10-16-3(B) & (C) of the Governmental Conduct Act.

III. The respondent's self-appointment to an office created during his term as legislator in violation of the Emoluments Clause is an abuse of office that violates Subsection 10-16-3(C) of the Governmental Conduct Act.

The question is whether, as the complainant alleges, the respondent violated the Emoluments Clause by appointing himself to the PRC nominating committee. The Emoluments Clause provides:

No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.⁴⁵

It is undisputed that the respondent appointed himself to the PRC nominating committee and that the committee was created during his term of office. Accordingly, the question is whether a position on the PRC nominating committee is a “civil office” subject to the prohibition.

The Supreme Court has set out five criteria for a position to qualify as a “civil office” subject to the Emoluments Clause:

1. It must be created by the Constitution or by the Legislature or created by a municipality or other body through authority conferred by the Legislature;
2. it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public;
3. the powers conferred, and the duties to be discharged, must be defined, directly or impliedly, by the Legislature or through legislative authority;
4. the duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior or subordinate office, created or authorized by the Legislature, and by it placed under the general control of a superior officer or body;
5. it must have some permanency and continuity, and not be only temporary or occasional. In addition, in this state, an officer must take and file an official oath, hold a commission or other written

⁴⁵ N.M. Const. art. IV, § 28.

Garcia v. Egolf, 2022-30: Findings and Recommendations

authority, and give an official bond, if the latter be required by proper authority.⁴⁶

The respondent advances two arguments that a position on the PRC nominating committee is not a covered civil office. First, the respondent points out that the nominating committee does not itself nominate or confirm members of the PRC; instead, its responsibilities are limited to providing the Governor with a list of five or more names, from which the Governor selects three for nomination.⁴⁷ The respondent argues that the committee's limited role in the PRC's operations means that membership on the committee does not satisfy the second and fourth criteria above.⁴⁸ Second, the respondent argues that because the nominating committee will only meet as necessary to provide the Governor with an initial list of potential nominees and thereafter only when a vacancy arises, membership on the committee does not satisfy the fifth criteria.⁴⁹ I address each argument in turn.

A. The PRC nominating committee possesses a delegation of sovereign power and is not subject to direct control by the Governor.

The respondent first argues that because the PRC nominating committee does not have the power to nominate or confirm members of the PRC, it (i) does not exercise sovereign power and (ii) does not perform its duties independently and without control of a superior power. As a result, the respondent argues, a position on the committee does not satisfy the second or fourth necessary criteria for a "civil office" subject to the Emoluments Clause.

In arguing that the PRC nominating committee does not exercise a grant of sovereign power, the respondent likens the committee to an advisory committee such as the Advisory Council to the Department of Hospitals and Institutions, which the Attorney General's office has previously opined does not exercise a grant of sovereign authority because it only "advise[s] the Governor as to [her] duties[.]"⁵⁰ But the PRC nominating committee does more than just provide advice to the Governor; it provides the Governor with a list of potential nominees to the PRC, and the Governor's power to nominate is limited to those names.⁵¹ The committee therefore has not only the power to provide the Governor with nominees to choose from, but also the greater power to constrain the Governor from appointing an individual by simply not recommending them. In this respect the committee is akin to a judicial nominating commission:

⁴⁶ *State ex rel. Gibson v. Fernandez*, 1936-NMSC-027, ¶ 10 (quoting *State ex rel. Nagle v. Page*, 98 Mont. 14, 37 P.2d 575, 576 (Mont. 1934)). Although *Gibson* suggests that these criteria are each necessary, the Supreme Court has elsewhere suggested that "all of these elements need not be present in a particular situation, but all have a bearing, to a degree, in determining whether a position of public employment is an office." *State v. Quinn*, 1930-NMSC-065, ¶ 6. See also *People v. Bruce*, 939 N.W.2d 188, 192 n.3 (Mich. 2019) (discussing whether each of the five factors is "indispensable" or is simply indicative).

⁴⁷ See Resp. at 8–9.

⁴⁸ *Id.*

⁴⁹ *Id.* at 11–12.

⁵⁰ Resp. at 9 (quoting N.M. Att'y Gen. Op. 77-3 (1977)).

⁵¹ See N.M. Const. art. XI, § 1(B) ("The governor shall nominate members [of the PRC] *from a list* of qualified nominees submitted to the governor by the public regulation commission nominating committee") (emphasis added).

although both bodies lack the nominating power held by the Governor, both have the power to restrict the Governor’s discretion, and therefore exercise a grant of sovereign power. Indeed, the Supreme Court held that it had jurisdiction to issue a writ of mandamus commanding members of the Fifth Judicial District Nominating Commission to provide more than one name to the Governor to consider in deciding who to nominate to fill a vacant district judge position, and in so holding necessarily found that the determination and submission of a list of potential nominees to the Governor is an “official act by a public officer.”⁵²

The respondent’s argument that the PRC nominating committee is subject to control of a superior power because the Governor controls who is nominated to the PRC and the senate controls who is confirmed misses the mark for similar reasons. While the Governor controls who is nominated, the Governor does not control who the committee puts on the list. Indeed, the only control the Governor exerts over the committee is indirect, by way of the committee members appointed by cabinet secretaries.⁵³ Because the nominating committee determines independently the list of names to be submitted to the Governor, it is not subject to higher supervisory control. Accordingly, a position on the committee meets the fourth criteria in the test for determining whether a position is a “civil office” subject to the Emoluments Clause.

B. A position on the PRC nominating committee is a permanent office, even if the committee only meets occasionally and its membership may change.

The respondent next argues that because the PRC nominating committee only meets as often as required to submit a list of names for consideration by the Governor in nominating the first slate of PRC members and thereafter only once every two years to fill vacancies, and because individual PRC nominating committee members may only serve a single four-year term, membership on the nominating committee is “temporary and occasional” and therefore does not constitute a “civil office” for Emoluments Clause purposes.⁵⁴ But this argument conflates the office at issue with the respondent’s occupancy thereof: while an individual nominating committee member may only exercise the powers and responsibilities of that office occasionally throughout his four-year term, that does not mean that the office itself is temporary or impermanent. Rather, the measure of an office’s permanence is the law or other instrument that creates it.⁵⁵ Because the office of a PRC nominating committee member is created and

⁵² *State ex rel. Richardson v. Fifth Judicial District Nominating Comm’n*, 2007-NMSC-023, ¶ 9 (quoting *Laumbach v. Bd. of County Comm’rs of San Miguel County*, 60 N.M. 226, 233, 290 P.2d 1067, 1070 (1955)); see also NMSA 1978, § 44-2-4 (1884) (a writ of mandamus “may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust or station”) (emphasis added).

⁵³ See NMSA 1978, § 62-19-4(A)(4)(b). While the Governor can exercise some control by firing a cabinet secretary and replacing him or her with a cabinet secretary willing to select nominees preferred by the Governor, in the end this type of control is still indirect. Moreover, it does not result in the Governor controlling a majority of the voting members on the PRC nominating committee.

⁵⁴ See Resp. at 11.

⁵⁵ Cf. *People v. Bruce*, 939 N.W.2d 188, 197 & n.10 (Mich. 2019) (finding that a statutory delegation of police power to “qualifying federal agents” was permanent for purposes of the common law offense of misconduct in office, even though the statute did not create a “permanent position on any particular task force” exercising the statutory grant of police power); *People v. Strampel*, 2021 WL 137609 (Mich. Ct. App. Jan. 14, 2021) (unpublished) (office of dean of Michigan State University’s College of Osteopathic Medicine);

maintained in statute and will exist for as long as the State of New Mexico is in existence, or until the law at issue is amended or repealed, it is permanent for purposes of the Emoluments Clause.

IV. Respondent’s reliance on the advice of the Legislative Counsel Service precludes imposition of a fine, but does not establish a defense to the respondent’s ongoing violation of Section 10-16-3(C).

In his response to the complaint, the respondent appears to sketch out an affirmative defense to the alleged violation of Section 10-16-3(C): even if his self-appointment to the PRC nominating committee violated the Emoluments Clause and constitutes a prohibited abuse of office, he did not knowingly violate the Emoluments Clause because he had been advised by the Legislative Counsel Service that the Emoluments Clause did not prohibit him from appointing himself to the PRC nominating committee.⁵⁶ In response to my requests for production asking for documents substantiating this defense, the respondent produced communications between his chief of staff and Raúl Burciaga, the Legislative Counsel Service director (and an attorney), regarding the respondent’s self-appointment to the PRC nominating committee.⁵⁷ The email from Mr. Burciaga is dated before the complaint was filed, and appears to conclude that the respondent’s self-appointment would be “unusual but nothing prohibitive [sic].”⁵⁸

As noted above, a violation of Section 10-16-3(C) requires evidence that the respondent (1) is a legislator, public official, or public employee, who (2) knowingly (3) breaches a clear and applicable legal duty. To the extent the respondent reasonably relied upon the advice of the Legislative Counsel Service in deciding whether to appoint himself to the PRC nominating committee, I agree this reliance would establish that the respondent’s violation of the Emoluments Clause was unintentional.⁵⁹ However, the Emoluments Clause not only prohibits a legislator from appointing himself to a civil office created during his term, but also prohibits the legislator from accepting such an appointment.⁶⁰ Accordingly, the respondent may be found to have abused his office in violation of Section 10-16-3(C) in accepting and continuing to serve out an unlawful appointment after being informed of the violation and being given a reasonable opportunity to correct it.⁶¹

⁵⁶ See Resp. at 5 n.1.

⁵⁷ See Respondent’s Responses to the General Counsel’s First Requests for Production of Documents (Ex. 1).

⁵⁸ See Unaddressed Email by R. Burciaga (June 10, 2022) (Ex. A to Ex. 1); Email from R. Szczepanski to B. Egolf (June 10, 2022) (Ex. B to Ex. 1).

⁵⁹ See NMSA 1978, § 10-16-13.1 (2019) (requiring a respondent to be afforded an opportunity to correct an unintentional violation of the Governmental Conduct Act).

⁶⁰ See N.M. Const. art. IV, § 28.

⁶¹ See 1.8.3.14(N) NMAC (“After the termination of the hearing, or in lieu of a hearing if, upon a motion by a party or the general counsel, the hearing officer concludes there is no genuine dispute as to any material facts, the hearing officer shall issue written findings and conclusions on whether the evidence establishes that the respondent’s conduct as alleged in the complaint constitutes a violation of any law within the jurisdiction of the commission.”); see also 1.8.3.14(P) NMAC (“If the hearing officer finds by a preponderance of the evidence that the respondent’s conduct as alleged in the complaint constituted a violation of the Governmental Conduct Act and was either

Conclusion

For the reasons above, I conclude the complaint is supported by probable cause. I respectfully request that you appoint a hearing officer to conduct a hearing on the complaint and issue a final decision as to whether the respondent violated the Governmental Conduct Act.⁶²

Pursuant to the Governmental Conduct Act, the Commission is under a duty to “first seek to ensure voluntary compliance with the provisions of the Governmental Conduct Act,” and must give a respondent ten days’ notice to correct an unintentional or good cause violation.⁶³ In this case, my position is that the Commission’s voluntary-compliance obligation requires the respondent be given ten days’ time from the date of this notice to resign his position on the PRC nominating committee.⁶⁴ If the respondent does not resign his position, the hearing officer should conduct a hearing to determine whether to impose any fines that may be provided for by law and whether to recommend that appropriate authorities take disciplinary action against the respondent.⁶⁵



Walker Boyd, General Counsel

unintentional or for good cause, then the hearing officer shall give the respondent 10 days to correct the violation, pursuant to Subsection B of Section 10-16-13.1 NMSA 1978, before taking any action under Subsection N of 1.8.3.14 NMAC.”).

⁶² See NMSA 1978, § 10-16G-12 (2019); 1.8.3.14(N) NMAC.

⁶³ NMSA 1978, § 10-16-13.1(B) (2019).

⁶⁴ See NMSA 1978, § 10-16-13.1(B) (“The state ethics commission shall seek first to ensure voluntary compliance with the provisions of the Governmental Conduct Act. A person who violates that act unintentionally or for good cause shall be given ten days’ notice to correct the matter.”). See also 1.8.3.14(P) NMAC (“The state ethics commission shall seek first to ensure voluntary compliance with the provisions of the Governmental Conduct Act. A person who violates that act unintentionally or for good cause shall be given ten days’ notice to correct the matter.”).

⁶⁵ See 1.8.3.14(N)(1) NMAC.

IN THE STATE ETHICS COMMISSION

MIGUEL GARCIA,

Complainant,

v.

BRIAN EGOLF,

Respondent.

No. 2022-30

SPECIFICATION OF ALLEGED VIOLATIONS

Pursuant to NMSA 1978, Section 10-16G-10 (2019) and 1.8.3.13 NMAC, the undersigned finds that the following allegations in the Complaint against Respondent Brian Egolf are supported by probable cause:

1. Respondent Brian Egolf violated Subsection C of Section 10-16-3 of the Governmental Conduct Act by knowingly appointing himself to serve on the Public Regulation Commission Nominating Committee, in violation of Article IV, Section 28 of the New Mexico State Constitution.

Dated this Second day of December, 2022.

/s/ Walker Boyd

General counsel

BEFORE THE NEW MEXICO STATE ETHICS COMMISSION

MIGUEL GARCIA,

Complainant,

v.

No. 2022-030

BRIAN EGOLF,

Respondent.

**RESPONSE TO STATE ETHICS COMMISSION'S FIRST SET OF REQUESTS FOR
PRODUCTION OF DOCUMENTS**

Respondent Brian Egolf, by and through his counsel, Hinkle Shanor, LLP, submits the following response to the New Mexico State Ethics Commission's November 7, 2022, First Requests for Production to Respondent:

Request for Production No. 1: In your response to the complaint, you state you "consulted with the Legislative Counsel Service [LCS] to make sure that the decision [to appoint yourself to the Public Regulation Commission Nominating Committee] was consistent with [your] ethical and legal obligations as Speaker of the House." Please produce for inspection (or provide copies of) all documents or communications that substantiate or relate to this statement. This includes any written request(s) for advice you submitted to LCS regarding whether you could, consistent with your legal and ethical obligations, appoint yourself to the PRC Nominating Committee, responses from LCS to your request(s), and any related communications.

For purposes of responding to this request, you need not provide responsive documents that were created on or after the date you were provided with a copy of the complaint in this matter.

Response: In response to this request, Mr. Egolf produces the following two documents:



- A June 10, 2022, e-mail memorandum from Raúl E. Burciaga, the Director of the New Mexico Legislative Council Service (“LCS”), to his own e-mail account, memorializing his research and conclusions regarding Mr. Egolf’s request for guidance on the ethical and legal implications of appointing himself to the PRC Nominating Committee. The e-mail states that after reviewing the applicable law, Mr. Burciaga found “nothing prohibitive” related to Mr. Egolf’s prospective appointment. *See Ex. A*, June 10, 2022, LCS E-Mail Memorandum RE: Egolf Appointment. Mr. Burciaga shared this memorandum with Mr. Egolf and Mr. Egolf’s staff that same day.
- A June 10, 2022, e-mail from Reena Szczepanski, Mr. Egolf’s Chief-of-Staff, to Mr. Egolf, stating that Mr. Burciaga had responded to Mr. Egolf’s and Ms. Szczepanski’s request for guidance on Mr. Egolf’s prospective appointment to the Nominating Committee. *See Ex. B*, June 10, 2022, E-Mail from Szczepanski to Egolf RE: LCS Response.

Mr. Egolf reserves the right to supplement this response should additional, written materials become available.

Respectfully submitted,

HINKLE SHANOR LLP

By: /s/ Timothy Rode (with permission)

Thomas M. Hnasko

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trode@hinklelawfirm.com

Attorneys for Respondent Brian Egolf

Burciaga, Raul

Sent: Friday, June 10, 2022 7:53 AM
To: Burciaga, Raul
Subject: Question from Reena

May the Speaker appoint himself to the PRC Nominating Committee

- The nominating committee is composed of seven members, four of whom are appointed by legislative leaders
- "members" is not defined and there is nothing specifying member of the public, legislative member or not a legislative member
- Review of cases and statutes doesn't bring up anything (self-appointment, self-appointed, appoint himself) on point. Only reference is related to the Financial Institutions Division Director's ability to appoint himself as conservator.
- Unusual but nothing prohibitive
- **Sec. 28. [Appointment of present and former legislators to office; interest of legislators in contracts.]**
- No member of the legislature shall, during the term for which he was elected, be appointed to any civil office in the state, nor shall he within one year thereafter be appointed to any civil office created, or the emoluments of which were increased during such term; nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law passed during such term.
- **"Civil office".** — Requirements for a civil office are: (1) it must be created by the constitution, by the legislature or through authority conferred by the legislature; (2) it must possess a delegation of a portion of the sovereign power of government, to be exercised for the benefit of the public; (3) its powers and duties must be directly or impliedly defined by the legislature or through legislative authority; (4) its duties must be performed independently and without control of a superior power, other than the law, unless they be those of an inferior office created or authorized by the legislature and placed by it under the control of a superior officer or body; (5) it must have some permanency or continuity and not be only temporary or occasional. *State ex rel. Gibson v. Fernandez*, 1936-NMSC-027, 40 N.M. 288, 58 P.2d 1197.

Raúl E. Burciaga, Esq. — Director — NM Legislative Council Service
(505) 986-4671 (direct) — (505) 944-6383 (cell)

Ex. A

From: **Reena Szczepanski** <reena.szczepanski@gmail.com>

Date: Fri, Jun 10, 2022 at 5:19 PM

Subject: Email from Raul re: PRC

To: Brian Egolf <brian@briangolf.com>

B,

Raul gave me some information in response to our question about the PRC Nominating Commission.

Thanks,

Reena

Reena Szczepanski

(505) 699-0798

Ex. B