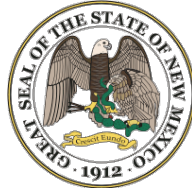


STATE OF NEW MEXICO
OFFICE OF THE ATTORNEY



GENERAL

HECTOR H. BALDERAS
ATTORNEY GENERAL

November 14, 2022

Ms. Stephanie M. Rodriguez, Cabinet Secretary
New Mexico Higher Education Department
2044 Galisteo Street, Suite 4
Santa Fe, NM 87505-2100

Re: Opinion Request – Removal of New Mexico Military Institute Regent

Dear Secretary Rodriguez:

You have requested our advice regarding the law governing the procedure for removing a member of the Board of Regents of the New Mexico Military Institute (“NMMI”). You ask:

1. Were steps taken by the NMMI Board of Regents to remove one of its members within the Board’s authority?
2. Do the Board’s actions to limit the member’s role as a regent pending his removal violate the member’s rights and duties as a regent?

As discussed in more detail below, based on our examination of the relevant constitutional, statutory and case law authorities, as well as the information available to us at this time, we conclude that the NMMI Board of Regents has no legal authority to remove one of its members or impose measures limiting the member’s role as regent pending his removal from the Board. Unless and until he is removed by the New Mexico Supreme Court, as provided in Article XII, Section 13 of the state constitution, the regent has the same rights, responsibilities and authority as other members of the Board, including voting on matters before the Board.

Your request refers to a meeting held on September 29, 2022, during which the NMMI Board of Regents voted three to two in favor of a motion providing one of its members with notice of the Board’s intention to proceed with his removal as a regent. The motion stated that unless the regent elected to resign his position, he was “not to contact NMMI employees or attend NMMI or Board functions without the [Board] president’s prior approval.” Later, according to your request, the Board president advised the regent that he would not be removed “officially” from the Board until

the removal process governed by the New Mexico Constitution was concluded. In the meantime, the Board president stated that:

In accordance with the Board's Policy Manual and Robert's Rules and these instructions, [the regent] will be removed from his committee assignments and will have no duties as Vice Chair of the Board. He may attend Board of Regents meetings and listen to the deliberations. He will not be recognized by me during any portion of the meeting agenda and Board of Regents members will not entertain comments from him. He will not be permitted to vote as a Board member on items considered by the Board. He will not be able to participate in executive sessions.

With regard to staff, [the regent] will be treated as a member of the public. Any requests for information will be handled pursuant to IPRA. He will need my prior approval before attending any other NMMI or Board of Regents events. Once the constitutional process is completed, Regents and Staff will receive further instruction.

The powers, duties and obligations of the NMMI Board of Regents are governed by the New Mexico Constitution and state statutes. Article XII, Section 13 of the constitution directs the legislature to “provide for the control and management” of NMMI and other state educational institutions listed in Section 11 “by a board of regents ... consisting of five members ...” who are qualified electors of the state “and no more than three of whom ... [are] members of the same political party.” The regents are nominated and, with the consent of the Senate, appointed by the governor for staggered, six year terms. N.M. Const. art. XII, § 13(A),(B).

Subsection E of Section 13 controls the process for removing members of the boards of regents. It states:

Members of the board shall not be removed except for incompetence, neglect of duty or malfeasance in office. Provided, however, no removal shall be made without notice of hearing and an opportunity to be heard having first been given such member. The supreme court of the state of New Mexico is hereby given exclusive original jurisdiction over proceedings to remove members of the board under such rules as it may promulgate, and its decision in connection with such matters shall be final.

N.M. Const. art. XII, § 13(E). Section 13’s language governing the removal of members of a board of regents is unequivocal. The New Mexico Supreme Court “has exclusive original jurisdiction” over removal proceedings and the decision as to whether removal is appropriate on the grounds of incompetence, neglect of duty or malfeasance specified in the constitution. This leaves a board of regents, including the NMMI Board, with no legal authority to remove one of its members.

In light of Section 13's grant of exclusive jurisdiction over removal proceedings to the Supreme Court, we believe the actions of the NMMI Board and the Board president regarding the removal of one of its members, as described in the request, were outside the scope of the Board's authority. The Board president conceded that the regent would not be "officially" removed until the after the process required by the constitution was completed. Nevertheless, the Board, evidently acting on its own view that the constitutional grounds for removal existed, summarily barred the regent from exercising his official responsibilities as a regent, including participation in meetings and executive sessions and voting on matters before the Board. Because the Board's actions precluded the regent from acting and performing his duties as regent, we believe they constituted, in effect, an attempt to remove the regent contrary to law.

Even if they fell short of actually removing the regent, the measures taken by the NMMI Board to prevent him from performing his duties were likely improper. Under Section 13 of the state constitution, as noted above, the Board is composed of five co-equal members charged with the "control and management" of NMMI. Under Section 13 and statutes implementing Section 13, each regent has the same responsibility and authority as a member of the Board. We found no constitutional or statutory provision giving the Board supervisory or similar authority allowing the Board to control, limit or otherwise interfere with the regents' ability to perform their duties as specified by law.

In some instances, it may be appropriate for the NMMI Board to preclude a member from voting or participating in a specific matter based on constitutional due process considerations or laws governing conflicts-of-interest. *See, e.g., Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005, 589 P.2d. 198 (reversing, on due process grounds, the board's decision revoking an optometrist's license because the board failed to disqualify one of its members from participating in the disciplinary proceeding on the basis of bias); 2022 Op. N.M. State Ethics Comm'n No. 2022-09 (when the spouse of a member of the governing board of a post-secondary educational institution is an employee of the institution, Section 10-16-4 of the Governmental Conduct Act prohibits the board member from participating in the review and approval of a contract that will increase the wages of the member's spouse). Otherwise, absent clear legal authority, it is our opinion that the Board may not take disciplinary or other action against its members that adversely affects their ability to perform their constitutional and statutory responsibilities. *See* N.M. Att'y Gen. Advisory Letter to Leonard Lee Rawson (Aug. 28, 2018) (concluding that the Governmental Conduct Act did not authorize the State Investment Council ("SIC") to enforce its code of conduct against one of its members, including sanctions against a member that "exclud[ed] the member from deliberations, including executive sessions, or voting on SIC matters").¹

¹ The 2018 Attorney General Advisory Letter concluding that the Governmental Conduct Act did not authorize the SIC to formally discipline its members for violating the SIC Code of Conduct distinguished "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." N.M. Att'y Gen. Advisory Letter, n.1. Similarly, we believe that our conclusion regarding the NMMI Board's authority to impose disciplinary measures against a regent would not preclude the Board

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In summary, the power to remove a member of the NMMI Board of Regents resides solely with the Supreme Court under Section 13(E) of the state constitution. State law contains no express provision for the discipline of NMMI regents short of removal, and we conclude that the NMMI Board has no constitutional, statutory or other legal authority to remove, suspend, or take similar disciplinary measures against its members that interfere with their ability to perform their duties as regents. Unless and until removed by the Supreme Court, a regent has the same rights, responsibilities and authority as other members of the Board.

Please note that this opinion is a public document. As such, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

A handwritten signature in black ink that reads "Sally Malavé". The signature is written in a cursive style with a large initial "S".

Sally Malavé

Director, Open Government Division

from expressing its disapproval of a regent's conduct, as long as the Board did not attempt to limit or interfere with the regent's ability to carry out the regent's responsibilities as a NMMI Board member.