STATE WATERS, PORTS AND HARBORS: VIRGINIA RESOURCES AUTHORITY.

ADMINISTRATION OF GOVERNMENT: GOVERNOR’S SECRETARIES: SECRETARY OF COMMERCE AND TRADE.

Inclusion of Virginia Resources Authority in Commerce and Trace Secretariat is for state government organizational purposes; does not alter independent nature of Authority to govern its affairs according to enabling statutes. Board of Directors has exclusive power over personnel policies of Authority, with exception of appointment of Executive Director.

Mr. William G. O’Brien
Chairman, Board of Directors, Virginia Resources Authority
September 19, 2002

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the Code of Virginia.

Issues Presented

You pose two questions concerning the status of the Virginia Resources Authority. Specifically, you ask whether the Authority, as a political subdivision of the Commonwealth, is organizationally separate and distinct from state executive branch agencies organized within the Commerce and Trade Secretariat. You also ask whether the Board of Directors of the Authority has the exclusive power over personnel issues, with the exception of the Governor’s ability to appoint the Executive Director pursuant to § 62.1-202.

Response

It is my opinion that the Virginia Resources Authority, as a political subdivision of the Commonwealth, is a state-created governmental entity within the Commerce and Trade Secretariat for state government organizational purposes; however, such inclusion does not alter the independent nature of the Authority to govern its own affairs in accordance with its enabling statutes. It is also my opinion that the Board of Directors of the Authority has the exclusive power over personnel issues, with the exception of the Governor’s ability to appoint the Executive Director pursuant to § 62.1-202.

Facts
In 1984, the General Assembly created the Virginia Resources Authority "as a public body corporate and as a political subdivision of the Commonwealth." Additionally, "the exercise by the Authority of the duties and powers conferred by [Chapter 21 of Title 62.1] shall be deemed to be the performance of an essential governmental function of the Commonwealth." The purpose of the Authority is to encourage the investment of both public and private funds and to make loans, grants, and credit enhancements available to local governments to finance water and sewer projects, drainage projects, solid waste treatment, disposal and management projects, recycling projects, professional sports facilities, resource recovery projects, public safety facilities, and the remediation of brownfields and contaminated properties.

A board of directors governs the Authority. The Board of Directors of the Authority consists of four state officials and seven members appointed by the Governor, "subject to confirmation by the General Assembly," each of whom serves a four-year term. The Governor designates one member of the Board to serve as chairman, and the Board may choose its own vice-chairman.

The Governor appoints the Executive Director of the Authority, who is responsible for directing the day-to-day activities of the Authority. The Executive Director reports to the Board and serves as ex officio secretary to the Board. The Executive Director also "perform[s] other duties as instructed by the Board of Directors in carrying out the purposes of [the Authority]." Section 62.1-203 grants to the Authority certain powers to effect its purposes, including the power "to employ officers, employees, agents, advisers and consultants, including without limitations, attorneys, financial advisers, engineers and other technical advisers and public accountants and, the provisions of any other law to the contrary notwithstanding, to determine their duties and compensation without the approval of any other agency or instrumentality."

It is my understanding that the Authority does not directly receive any state appropriations. The Authority has "the power to borrow money and issue its bonds in amounts the Authority determines to be necessary or convenient to provide funds to carry out its purposes and powers and to pay all costs and expenses incurred in connection with the issuance of bonds." It has "the power to pledge any revenue or funds of or under the control of the Authority
to the payment of its bonds and credit enhancements, subject only to any prior agreements with the holders of particular bonds or the beneficiaries of particular credit enhancements pledging money or revenue." The issuance of bonds by the Authority "shall [not] constitute a debt or a pledge of the faith and credit of the Commonwealth, or any political subdivision thereof other than the Authority, but shall be payable solely from the revenue, money or property of the Authority as provided for in [Chapter 21 of Title 62.1]."

Applicable Law and Discussion

Previously, this Office has distinguished state agencies from independent political subdivisions by reviewing factors that assess the entity’s reliance on the state for control and funding. Specifically, a state agency is an entity that serves as a subordinate or auxiliary body to fulfill a state purpose, is dependent upon state appropriations, and is subject to state control to a great degree. For example, the exercise of powers of an agency is subject to prior approval or postexercise veto by a higher authority of state government.

A political subdivision is created by the legislature to exercise some portion of the state’s sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.

The Authority, by the terms of its organic statute, is "a political subdivision." Given that the Authority possesses and exercises those statutory powers and functions embodied in the term "political subdivision," there is no need to resort to the multifactor test of previous opinions of this Office to determine whether the Authority is a "state agency" or a "political subdivision." Depending on the context, however, a political subdivision may be considered a state agency for limited purposes. Section 2.2-204 provides that the Secretary of Commerce and Trade is responsible to the Governor for the Virginia Resources Authority. It is the inclusion of the Authority in § 2.2-204 that prompts your first inquiry.

Prior to the recodification of Title 2.1, the Virginia Resources Authority was not an entity listed as a governmental unit organized
under the Commerce and Trade Secretariat. Nevertheless, in recodifying Title 2.1, the General Assembly listed the Virginia Resources Authority among state executive branch agencies and other commissions for which the Secretary is responsible to the Governor. As a political subdivision, the Authority is different from typical executive branch state agencies that are organized under the Commerce and Trade Secretariat. Such executive branch state agencies report to their respective Secretaries. A Secretary appointed by the Governor has the authority to (1) "[r]esolve administrative, jurisdictional, operational, program, or policy conflicts between agencies or officials assigned," (2) "[d]irect the formulation of a comprehensive program budget for the functional area ... encompassing the services of agencies assigned for consideration by the Governor," and (3) "[h]old agency heads accountable for their administrative, fiscal and program actions in the conduct of the respective powers and duties of the agencies." The Authority, however, is unlike many of the agencies listed in § 2.2-204 in that it operates independently of the Secretary through its Board of Directors. As such, it is a unique state-created entity that is merely listed with state executive branch agencies and other authorities in § 2.2-204.

For state government organizational purposes, the General Assembly has determined that the Virginia Resources Authority should be among those agencies for which the Secretary of Commerce and Trade is responsible to the Governor. Presumably, the inclusion within the Commerce and Trade Secretariat is due to the role the Authority plays in economic development throughout the Commonwealth. The Authority’s inclusion within the Secretariat, however, does not transform the Authority into a state executive branch agency directly under the control of the Secretary of Commerce and Trade. Section 2.2-204 merely requires the Secretary to be responsible to the Governor for the Virginia Resources Authority. This responsibility may include reporting on the activities of the Authority. Section 2.2-204 does not confer upon the Secretary any supervisory power over the Authority; that power is vested in the Authority’s Board of Directors. Consequently, the Authority should not be considered a "state executive branch agency" although it is listed among other such agencies in § 2.2-204.

You also ask whether the Virginia Resources Authority has the exclusive power to hire and establish the compensation of personnel, with the exclusion of the Executive Director. The Authority’s inclusion in § 2.2-204 does not negate or override its status as a political subdivision that is governed by a board of
directors. Pursuant to § 62.1-203(8), only the Board of Directors of the Authority is authorized to hire, terminate, compensate and determine the duties for its personnel. The Board exercises this power “without the approval of any other agency or instrumentality.” As such, with the exception of the appointment of the Executive Director, no other state entity or person may direct the personnel policies of the Board.

Conclusion

Accordingly, it is my opinion that the Virginia Resources Authority, as a political subdivision of the Commonwealth, is a state-created governmental entity within the Commerce and Trade Secretariat for state government organizational purposes; however, such inclusion does not alter the independent nature of the Authority to govern its own affairs in accordance with its enabling statutes. It is also my opinion that the Board of Directors of the Authority has the exclusive power over personnel issues, with the exception of the Governor’s ability to appoint the Executive Director pursuant to § 62.1-202.


5. See § 62.1-201.


7. Section 62.1-201(B).


9. Id.

10. Id.

11. Section 62.1-203(8).

12. Section 62.1-204.
Section 62.1-206.

Section 62.1-207.


Id.


Section 62.1-200.


2001 Va. Acts ch. 844, supra, at 1203 (enacting § 2.2-204).

Section 2.2-200(C)(1).

Section 2.2-200(C)(2).

Section 2.2-200(C)(3).

Other entities listed in § 2.2-204 are also categorized as "political subdivisions." E.g., Virginia Housing and Development Authority (see Va. Code Ann. § 36-55.27 (Michie Repl. Vol. 1996)); Virginia Economic Development Partnership Authority (see § 2.2-2234(C) (LexisNexis Repl. Vol. 2001)); Virginia Tourism Authority (see § 2.2-2315(C) (LexisNexis Repl. Vol. 2002)); and the Tobacco Indemnification and Community Revitalization Commission (see Va. Code Ann. § 3.1-1107(A) (LexisNexis Supp. 2002)).

Section 62.1-201(A).

E.g., Department of Labor and Industry; Department of Mines, Minerals and Energy; Department of Professional and Occupational Regulation; Department of Housing and Community Development.
Section 62.1-203(8).

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