

**OP. NO. 04-081**

**EDUCATIONAL INSTITUTIONS: INSTITUTE FOR ADVANCED  
LEARNING AND RESEARCH.**

**ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND  
EMPLOYEES — GENERAL PROVISIONS.**

**Local elected officials are not 'nonelected citizens' for purposes of Board of Trustees of Institute for Advanced Learning and Research. Exemption for current Board members appointed prior to July 1, 2004; upon expiration of terms of current Board members, future appointments limited to 'nonelected citizens.' After July 1, 2004, common law doctrine of incompatibility of offices applies resulting in vacation of Board membership when 'nonelected citizen' is elected to public office.**

The Honorable Danny W. Marshall, III  
Member, House of Delegates  
November 12, 2004

### **Issues Presented**

You inquire concerning application of the amendments to § 23-231.20(A), which establishes requirements for appointment to the Board of Trustees of the Institute for Advanced Learning and Research ("Board"), enacted by the 2004 Session of the General Assembly<sup>1</sup> ("2004 amendments").

First, you ask whether local elected officials, i.e. school board members, city council members, and mayors, would be "nonelected citizens" pursuant to § 23-231.20(A). Next, if local elected officials are not "nonelected citizens," you seek guidance regarding the procedure to remove Board members that were appointed prior to the 2004 amendments, but who hold elected positions that now disqualify them from serving on the Board.

Additionally, you ask whether the 2004 amendments require that the city council member and the mayor currently serving as Board members resign their positions; and, if so, what effect would the resignation have on any actions taken by the Board during the period of their membership. Finally, you ask what procedure must

be followed when a "nonelected citizen" is appointed to the Board and subsequently becomes an "elected citizen."

### **Response**

It is my opinion that local elected officials, i.e. school board members, city council members, and mayors, are not "nonelected citizens" as that term is used in § 23-231.20(A). The 2004 amendments provide an exemption from the restricted appointment provision for members appointed prior to July 1, 2004, whose terms have not expired.<sup>2</sup> It is further my opinion that upon the expiration of the terms of the members of the current Board, all future appointments must be made in accordance with § 23-231.20(A). Finally, it is my opinion that after July 1, 2004, application of the common law doctrine of incompatibility of offices results in the vacation of membership on the Board when a "nonelected citizen" is elected to public office.

### **Background**

You advise that questions have arisen regarding the eligibility requirements for continued service on the Board. Prior to the 2004 amendments, you relate that § 23-231.20 did not provide specific qualifications or conditions for service on the Board. Further, you advise that a city council member and the mayor of a local town currently serve as members of the Board. Both of these members served on the Board and held their local elected positions prior to the 2004 amendments, which added the requirement that members of the Board be "nonelected citizens."

### **Applicable Law and Discussion**

Effective July 1, 2004,<sup>3</sup> the 2004 amendments to § 23-231.20(A) provide:

The Institute shall be governed by a ~~nine~~ 15-member Board of Trustees consisting of the presidents or their designees of Averett University, Danville Community College, and Virginia Polytechnic Institute and State University; the chairman or his designee of the Board of the Future of the Piedmont Foundation; a ~~one~~ resident of the City of Danville to be appointed by the Danville City Council; a ~~one~~ resident of Pittsylvania County to be appointed by the Pittsylvania County Board of Supervisors; and ~~three~~ *nine* citizens representing business and industry and residing in

Southside Virginia, ~~one~~ *three* to be appointed by the Governor, ~~one~~ *three* to be appointed by the Senate Committee on Privileges and Elections Rules, and ~~one~~ *three* to be appointed by the Speaker of the House of Delegates. *All members appointed shall be nonelected citizens of the Commonwealth.*<sup>[4]</sup>

When new provisions are added to existing legislation by amendment, a presumption arises that, in making such amendment, the General Assembly "acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts."<sup>5</sup> It is further presumed that the General Assembly acted purposefully with the intent to change existing law.<sup>6</sup> The 2004 amendments clearly change the eligibility requirements for appointment to the Board by adding the last sentence to § 23-231.20(A) restricting membership to the Board to "nonelected citizens of the Commonwealth."

The General Assembly has not, however, defined the term "nonelected" as used in § 23-231.20(A). Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning.<sup>7</sup> In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling.<sup>8</sup> The term "non" means "not: reverse of: absence of."<sup>9</sup> The ordinary meaning of "elect[ed]" is "to choose (a person) for an office, position, or membership" especially "to select (a person) for political office by vote."<sup>10</sup> The General Assembly, therefore, clearly intends that members of the Board be citizens of the Commonwealth who are not elected by the people to any office.

Elected members of school boards, boards of supervisors, and mayors clearly are public officers.<sup>11</sup> "[A] public office is a public agency or trust created in the interest and for the benefit of the people."<sup>12</sup> Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.<sup>13</sup> As elected officers, it is presumed that public officials will discharge their duties in accordance with law.<sup>14</sup> Consequently, local elected officials, who are elected to such offices by the citizens, may not be considered "nonelected" citizens. Pursuant to § 23-231.20(A), such public officials may not be appointed to serve on the Board.

In amending § 23-231.20(A), the General Assembly is presumed to have acted with full knowledge of and in reference to the existing law.<sup>15</sup> It is readily apparent that the General Assembly did, in fact, act with full knowledge of the existing law and with the apparent

knowledge that elected citizens currently served on the Board. The fifth enactment clause to the 2004 amendments provides:

That this act shall not be construed to affect existing appointments for which the terms have not expired. However, any new appointments or appointments to fill vacancies made after the effective date of this act shall be made in accordance with the provisions of this act.<sup>[16]</sup>

""The manifest intention of the legislature, clearly disclosed by its language, must be applied.""<sup>17</sup> Thus, it follows that the members of the Board about whom you inquire are not affected by the 2004 amendments.

Therefore, since I conclude that the members about whom you inquire are not affected, it is unnecessary to respond to your question regarding a procedure for current Board members holding local elected positions to resign their positions. Additionally, it is not necessary to address the effect of such resignation on any actions taken by the Board during the period of their membership.

Your final question concerns the procedure to be followed when a "nonelected citizen" is appointed to the Board and later becomes an "elected citizen." It is necessary to determine whether the common law doctrine of incompatibility of offices<sup>18</sup> applies to this fact situation. The cases from the Virginia Supreme Court and prior opinions of the Attorney General all speak of incompatibility of *office* and *officers*.<sup>19</sup> Therefore, a determination must be made whether the person would be a public officer in his capacity as a member of the Board as well as in his capacity as an "elected citizen." In making such a determination, several criteria must be considered. One important consideration is that to constitute a public office, the position must be created by the Constitution of Virginia or by statute.<sup>20</sup> It is a position filled by election or appointment, with a designation or title, and duties concerning the public assigned by law. A frequent characteristic of such a post is a fixed term of office.<sup>21</sup>

As previously noted, persons holding elected offices generally are public officers because: (a) elected offices are created by the Constitution or statute; (b) they have duties concerning the public assigned by law; (c) the offices generally are filled by election; and (d) the offices are for a fixed term. It is equally clear that membership on the Board is a public office. Because § 23-231.20(A) creates positions on the Board and prohibits membership

by an "elected citizen," it is clear that one person may not simultaneously serve as a member of the Board and as an "elected citizen." Therefore, the acceptance of and qualification for an elected office by a previously "nonelected citizen" vacates his membership on the Board, and a successor must be appointed to fill the unexpired term.<sup>22</sup>

## Conclusion

Accordingly, it is my opinion that local elected officials, i.e. school board members, city council members, and mayors, are not "nonelected citizens" as that term is used in § 23-231.20(A). The 2004 amendments provide an exemption from the restricted appointment provision for members appointed prior to July 1, 2004, whose terms have not expired.<sup>23</sup> It is further my opinion that upon the expiration of the terms of the members of the current Board, all future appointments must be made in accordance with § 23-231.20(A). Finally, it is my opinion that after July 1, 2004, application of the common law doctrine of incompatibility of offices results in the vacation of membership on the Board when a "nonelected citizen" is elected to public office.

<sup>1</sup>2004 Va. Acts chs. 856, 889, 1000, *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP0856+pdf>, <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP0889+pdf>, <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+CHAP1000+pdf>, respectively. The amendments to § 23-231.20(A) contained in Chapters 856, 889, and 1000 substantially are the same. Chapter 1000, however, contains amendments in addition to those in Chapters 856 and 889. The codified language reflects the amendments as set forth in Chapter 1000. *Compare* Va. Code Ann. § 23-231.20(A) (LexisNexis Supp. 2004) *with* 2004 Va. Acts ch. 1000, *supra*. For purposes of this opinion, when I refer to the 2004 amendments, I am referring to the amendments contained in Chapter 1000.

<sup>2</sup>You ask related questions regarding a procedure for removing current Board members whose service is disqualified by the 2004 amendments, and the effect their removal would have on actions by the Board during their membership. Since I conclude that there is an exemption for members appointed to the Board prior to the 2004 amendments, it is unnecessary to respond to these inquiries.

<sup>3</sup>See Va. Code Ann. § 1-12(A) (LexisNexis Repl. Vol. 2001) (requiring laws enacted at regular session of General Assembly to take effect on July 1 following adjournment of session).

<sup>4</sup>See 2004 Va. Acts ch. 1000, *supra* note 1.

<sup>5</sup>*City of Richmond v. Sutherland*, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

<sup>6</sup>*Cape Henry Towers, Inc. v. Nat'l Gypsum Co.*, 229 Va. 596, 331 S.E.2d 476 (1985); *Wisniewski v. Johnson*, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982).

<sup>7</sup>See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>8</sup>See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 514 S.E.2d 345 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att'y Gen. 10, 11.

<sup>9</sup>Webster's Third New International Dictionary of the English Language Unabridged 1535 (1993).

<sup>10</sup>*Id.* at 731 (1993).

<sup>11</sup>See Va. Code Ann. § 15.2-1400(A) (LexisNexis Repl. Vol. 2003) (providing that qualified voters shall elect governing body for each locality).

<sup>12</sup>63C Am. Jur. 2d *Public Officers and Employees* § 2, at 458 (1997), *quoted in* 2000 Op. Va. Att'y Gen. 24, 26.

<sup>13</sup>See Op. Va. Att'y Gen.: 2000, *supra* note 12, at 26; 1996 at 149, 150; see also *United States v. Leon*, 468 U.S. 897, 974 n.28 (1984) (noting that all state officials are "servants of the people" (quoting Warren E. Burger, *Who Will Watch the Watchman?*, 14 Am. U. L. Rev. 1, 14 (1964))); *Boorde v. Commonwealth*, 134 Va. 625, 629, 114 S.E. 731, 732 (1922) (noting that "judges are the servants of the people" (quoting *Burdett v. Commonwealth*, 103 Va. 838, 848, 48 S.E. 878, 881 (1904))).

<sup>14</sup>*Ours Props., Inc. v. Ley*, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

<sup>15</sup>See *supra* note 5, and accompanying text.

<sup>16</sup>2004 Va. Acts ch. 1000, cl. 5, *supra* note 1.

<sup>17</sup>*Sykes v. Commonwealth*, 27 Va. App. 77, 80, 497 S.E.2d 511, 512 (1998) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944))).

<sup>18</sup>See, e.g., *Shell v. Cousins*, 77 Va. 328, 331-32, 1883 Va. LEXIS 62, \*5-8 (1883); 1984-1985 Op. Va. Att'y Gen. 244, 244.

<sup>19</sup>See *Dean v. Paolicelli*, 194 Va. 219, 236, 72 S.E.2d 506, 516-17 (1952); see also *Shell*, 77 Va. at 330-31; *Bunting v. Willis*, 68 Va. (27 Gratt.) 144, 160-62, 1876 Va. LEXIS 12, \*27-29 (1876); Op. Va. Att'y Gen: 1984-1985, *supra* note 18, at 244; 1982-1983 at 393, 393-94.

<sup>20</sup>See Op. Va. Att'y Gen.: 2000, *supra* note 12, at 26; 1977-1978 at 322, 323.

<sup>21</sup>See 1977-1978 Op. Va. Att'y Gen., *supra* note 20, at 322.

<sup>22</sup>See *Dean*, 194 Va. at 219, 72 S.E.2d at 506.

<sup>23</sup>You ask related questions regarding a procedure for removing current Board members whose service is disqualified by the 2004 amendments, and the effect their removal would have on actions by the Board during their membership. Since I conclude that there is an exemption for members appointed to the Board prior to the 2004 amendments, it is unnecessary to respond to these inquiries.

[Back to November 2004 Opinion Index](#)