

OP. NO. 05-029

**ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT
CONFLICT OF INTERESTS ACT — VIRGINIA PUBLIC PROCUREMENT ACT
– ETHICS IN PUBLIC CONTRACTING.**

No violation of Conflict Act or Procurement Act for member of health regulatory board to vote for his board to contract with organization that administers licensure examinations; no violation to vote for board to become member of such organization; any reimbursement of allowable expenses to board member must be consistent with Conflict Act. Violation of Conflict Act and Procurement Act for board member to vote to contract with or to join organization where there is existing arrangement that organization will employ board member subsequent to his board service or for board member to accept payment of monies in excess of allowable per diem payments and travel reimbursement allowances.

The Honorable Robert A. Nebiker
Director, Department of Health Professions
June 21, 2005

Issues Presented

You ask whether it would be a violation of the State and Local Government Conflict of Interests Act, §§ 2.2-3100 through 2.2-3131 (the "Conflict Act"), or the Virginia Public Procurement Act, §§ 2.2-4300 through 2.2-4377 (the "Procurement Act"), for members of health regulatory boards to vote to contract with or join an organization in the business of administering licensure examinations where the Department of Health Professions reimburses the board members for per diem and expenses as allowable under state law and travel regulations. You next ask whether it would be a violation for board members to vote to contract with or join an organization that extends an offer of employment as a paid examiner to members once they leave their respective board or provides payment to the board member in excess of the allowable per diem payments and travel expense reimbursement.

Response

It is my opinion that it is not a violation of the Conflict Act or the Procurement Act for a board member to vote to authorize his board to contract with an organization in the business of administering licensure examinations or become a member of such organization, provided that reimbursement of allowable expenses incurred by board members while performing examination related services is consistent with § 2.2-3103(1) of the Conflict Act. It is further my opinion, however, that a board member who votes to approve a contract or to join an organization where, at the time of the vote, there is an existing arrangement concerning prospective employment of such board member after departure from his board or who accepts the payment of monies from an organization in excess of allowable per diem payments and travel reimbursement allowances would violate § 2.2-3103(1), (3), (5)-(6), § 2.2-3106(A), and § 2.2-3112(A)(1) of the Conflict Act as well as § 2.2-4369(3)-(4) of the Procurement Act.

Background

You state that most examinations used by health regulatory boards to determine the competency of candidates for licensure are developed and administered by national or regional organizations. You note that a candidate who achieves a passing score on an examination is accepted as meeting one of the criteria established in law or regulation for either licensure or certification. Additionally, you relate that boards have the duty and responsibility to ensure that candidates are appropriately examined, and they routinely vote to accept examination results from a national or regional testing agency by either joining the organization or entering into a contract with the organization.¹

You relate that organizations providing testing services generally receive compensation from fees collected directly from candidates or from billing the board. When a board member participates in examination development or serves as an examiner, that board member is entitled to be reimbursed by the Department for per diem payments pursuant to § 2.2-2813(B)² and travel expenses as allowable under state law and travel regulations. In some cases, you note that such organizations may offer to pay members or staff the cost of travel and expenses in excess of allowable reimbursement. In other cases, an organization may, as a matter of its organizational bylaws, extend an offer of future employment, such as employment as a paid examiner, to members once they leave the board in question.

Applicable Law and Discussion

In enacting the Conflict Act, the General Assembly recognizes that our system of government is dependent in part upon its citizens maintaining the highest trust in their public officers and employees. The purpose of the Act is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised by inappropriate conflicts.³ The Act provides minimum rules of ethical conduct for state government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees;⁴ (2) it restricts the personal interest such officers and employees may have in certain contracts with their own or other governmental agencies;⁵ and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest.⁶

The Conflict Act applies to state and local government officers and employees.⁷ As a member of a health regulatory board you are an "officer"⁸ of a state "governmental agency,"⁹ subject to the Conflict Act's prohibitions and restrictions. When the subject matter of a state officer's outside business interest is closely related to the officer's official responsibilities, this Office previously has warned the officer to be alert to potential violations of the Act.¹⁰ Such violations may arise from either the use of confidential information obtained in the officer's official capacity¹¹ or because some outside employment opportunity has been offered in an attempt to influence the officer's official actions.¹²

You ask whether it would be a violation of the Conflict Act or the Procurement Act for members of health regulatory boards to vote to contract with or join an organization in the business of administering licensure examinations where the Department of Health Professions reimburses the board members for per diem and expenses as allowable under state law and travel regulations. It is my opinion that such facts do not describe conduct in violation of the Conflict Act as

it appears that the board members would not be performing acts that would constitute "prohibited conduct" pursuant to § 2.2-3103.¹³ Similarly, you do not present any facts that would demonstrate that board members would have a "personal interest in a contract"¹⁴ or a "personal interest in a transaction"¹⁵ as defined in § 2.2-3101. Reimbursement, however, of allowable expenses incurred by board members while performing examination related services must be limited to the per diem payments established by §§ 2.2-2104 and 2.2-2813(B) and to the travel expenses allowable under state law and travel regulations.¹⁶ Additionally, the vote of a board member to enter into a contractual relationship with a licensure examination organization would not violate the Procurement Act provided the amount of the reimbursement remains within the allowable state guidelines, and there is no arrangement concerning prospective employment with a bidder, offeror, or contractor that would constitute a violation of § 2.2-4369.¹⁷

You next ask whether it would be a violation for board members to vote to contract with or join an organization that extends them an offer of paid employment as an examiner once they leave their respective board or that provides payment to such members in excess of the allowable per diem rates and travel expenses. When the subject matter of a board member's future employment and compensation is closely related to the board member's official responsibilities, as in this factual situation, there is, at the very least, the appearance of a violation of the Conflict Act. Prior opinions have held that the Conflict Act restricts the private financial activities of officers of state governmental agencies when there is a close relationship between the officers' private financial activities and their official duties.¹⁸ Section 2.2-3103 provides that no state officer or employee shall:

1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law;

...

3. Offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency;

...

5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties...; [or]

6. Accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties[.]

Section 2.2-3103(1) prohibits a board member from accepting money or reimbursement for expenses for services he may perform for the testing agency

under the contract in excess of the compensation and expenses paid by the board. In addition, a board member may not accept any money or reimbursement for expenses under § 2.2-3103(3) in exchange for his vote to award a contract to a testing agency that provides such benefits. Further, it may reasonably be inferred that a board member's acceptance of an employment opportunity may tend to influence him in the performance of his official duties under § 2.2-3103(5). Finally, although you present no information that the inclusion of an employment opportunity for participating boards members or payment of costs and travel expenses in excess of allowable state rates has been offered to influence such board members to vote to join or contract with that organization, it presents at least the appearance of impropriety. Additionally, if a board member knows, or reasonably should know, that the employment opportunity is being offered to influence him, it would constitute a violation of § 2.2-3103(6).

Section 2.2-3106(A) provides that "[n]o officer or employee of any governmental agency of state government ... shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment." Section 2.2-3112(A)(1) further requires an officer of a state governmental agency to "disqualify himself from participating in the transaction if (i) the transaction has application solely to property or a business ... in which he has a personal interest ... or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4."¹⁹ Personal interest includes "salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, ... that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually."²⁰ Personal interest in a transaction includes a personal interest of an officer in any matter considered by his agency when the officer may realize a reasonably foreseeable direct or indirect benefit as a result of the agency's action.²¹ In the facts you present, where there is an offer of employment or payment of costs and expenses in excess of the allowable state reimbursement rates, or a combination of both, which exceeds or may be reasonably anticipated to exceed \$10,000 annually, board members would have a personal interest in such a contract and could not vote to enter into that contract without violating the Conflict Act. From the facts you present, the availability of future employment where a board member's personal interest may be anticipated to exceed \$10,000 annually is a reasonably foreseeable direct benefit;²² and, as a result, such a board member's vote would violate §§ 2.2-3106(A) and 2.2-3112(A)(1) of the Conflict Act.

Lastly, Article 6 of the Procurement Act,²³ specifically, § 2.2-4369, prohibits a public employee, in this case a health regulatory board member, having official responsibility for a procurement transaction from participating in that transaction on behalf of the public body when he has a pecuniary interest in the procurement transaction, or knows that he is negotiating, or has an arrangement concerning prospective employment with a bidder, offeror, or contractor.²⁴ Thus, a board member who votes to award a contract to a business organization when he knows that he may receive payment from the contractor in excess of Department per diem payments and travel expense reimbursement allowances or have an arrangement concerning prospective employment as an examiner would violate the Procurement Act.

Conclusion

Accordingly, it is my opinion that it is not a violation of the Conflict Act or the Procurement Act for a board member to vote to authorize his board to contract with an organization in the business of administering licensure examinations or

become a member of such organization, provided that reimbursement of allowable expenses incurred by board members while performing examination related services is consistent with § 2.2-3103(1) of the Conflict Act. It is further my opinion, however, that a board member who votes to approve a contract or to join an organization where, at the time of the vote, there is an existing arrangement concerning prospective employment of such board member after departure from his board or who accepts the payment of monies from an organization in excess of allowable per diem payments and travel reimbursement allowances would violate § 2.2-3103(1), (3), (5)-(6), § 2.2-3106(A), and § 2.2-3112(A)(1) of the Conflict Act as well as § 2.2-4369(3)-(4) of the Procurement Act.

¹I note that § 54.1-2400(2) provides, among the general powers and duties of a health regulatory board, the duty "[t]o examine or cause to be examined applicants for certification or licensure." In my view, a health regulatory board has the implied power to make arrangements to examine applicants for licensure. When a statute is silent on the method by which a regulatory power is to be exercised, any reasonable method not in conflict with the Constitution or statutes of the Commonwealth may be selected. See 1992 Op. Va. Att'y Gen. 53, 56.

²Section § 2.2-2813(B) provides in pertinent part that "[s]ubject to the provisions of subsections C and D, members of boards, commissions, committees, councils and other collegial bodies, who are appointed at the state level, shall be compensated at the rate of \$50 per day, unless a different rate of compensation is specified by statute for such members, plus expenses for each day or portion thereof in which the member is engaged in the business of that body."

³See § 2.2-3100 (LexisNexis Supp. 2004).

⁴See § 2.2-3103 (LexisNexis Repl. Vol. 2001).

⁵See § 2.2-3106(A), (B) (LexisNexis Supp. 2004).

⁶See § 2.2-3112(A)(1) (LexisNexis Supp. 2004).

⁷"[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts [the] State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth." Section 2.2-3100.

⁸"*Officer*" means any person appointed or elected to any governmental or advisory agency ... whether or not he receives compensation or other emolument of office." Section 2.2-3101 (LexisNexis Supp. 2004).

⁹"*Governmental agency*" means each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties." *Id.*

¹⁰ See COI Adv. Op. No. 90-A16 (1990) (noting that § 2.1-639.4(4), predecessor to § 2.2-3103(4), prohibits state officer from using confidential information acquired by reason of public position and which is not available to public).

¹¹ *Id.*

¹² See COI Adv. Op.: No. 9-A19 (1989) (concluding that § 2.1-639.4(5), predecessor to § 2.2-3103(5), prohibits member of Advisory Commission on Mapping, Surveying, and Land Information Systems from offering consulting services similar to those provided by agency advised by Commission); No. 8-A24 (1988) (concluding that private radon testing services performed by radiation specialist in Department of Health may potentially violate Act).

¹³ Section 2.2-3103 sets out generally prohibited and unlawful conduct applicable to state and local government officers and employees.

¹⁴ " *Personal interest in a contract* ' means a personal interest that an officer ... has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business that is a party to the contract." Section 2.2-3101. "Personal interest" includes "salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, ... that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually." *Id.*

¹⁵ " *Personal interest in a transaction* ' means a personal interest of an officer ... has in any matter considered by his agency. Such personal interest exists when an officer ... or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction." *Id.*

¹⁶ Reimbursement in excess of statutory per diem would be considered accepting money or other thing of value for services performed. See § 2.2-3103(1).

¹⁷ Section 2.2-4369 provides in pertinent part that "[e]xcept as may be specifically allowed by subdivisions A 2, 3 and 4 of § 2.2-3112, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:

" ...

"3. The employee ... has a pecuniary interest arising from the procurement transaction; or

"4. The employee ... is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor."

For purposes of Article 6 of the Procurement Act, § 2.2-4368 defines "public employee" to mean "any person employed by a public body, including elected officials or appointed members of governing bodies." Section 2.2-3112(A)(2)-(4) permits an officer to participate in a transaction: (a) if he is a member of a

business, profession, occupation, or group of three or more persons who are affected by the transaction; (b) when a party to the transaction is a client of his firm and he does not personally represent or provide services to the client; or (c) if the transaction affects the public generally. The officer must comply with any declaration requirements. See § 2.2-3112(A)(2)-(3).

¹⁸ See AG COI:00-A06 (2000) (concluding that it is not conflict of interest for environmental health manager employed by state Health Department to teach course for regional health environment association).

¹⁹ See *supra* note 15.

²⁰ Section 2.2-3100.

²¹ See *id.*

²² Prior opinions of this Office have distinguished what constitutes a reasonably foreseeable direct or indirect benefit. See, e.g., COI Adv. Op.: No. 02-A02 (2002) (concluding that membership on Virginia Racing Commission and votes thereon do not constitute direct or indirect benefit even though he is also member of Virginia Thoroughbred Association); No. 90-A7 (1990) (concluding that reasonably foreseeable direct or indirect benefit to personal interest from rezoning of tract of land is too remote to establish personal interest in transaction)); No. 9-A06 (1989) (concluding that reasonably foreseeable direct or indirect benefit to business from potential hiring of business by prospective client is too remote to establish "personal interest in a transaction"). You relate that in some cases, organizations will extend offers of future employment to board members. Where the organization's bylaws specifically provide for, and in fact, contemplate future employment of former board members, it is my opinion that such a provision constitutes a reasonably foreseeable direct benefit.

²³ See §§ 2.2-4367 to 2.2-4377 (LexisNexis Repl. Vol. 2001 & Supp. 2004) (Ethics in Public Contracting). The provisions of Article 6 "supplement, but shall not supercede, other provisions of law including, but not limited to, the [Conflict Act]." Section 2.2-4367 (LexisNexis Rep. Vol. 2001). The provisions of Article 6 also "apply notwithstanding the fact that the conduct described may not constitute a violation of the [Conflict Act]." *Id.*

²⁴ Section 2.2-4370 also prohibits any "public employee or former public employee having official responsibility for procurement transactions [from accepting] employment with any bidder, offeror or contractor with whom [he] dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless [he] provides written notification to the public body ... prior to commencement of employment by that bidder, offeror or contractor." *Id.*

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