



COMMONWEALTH OF VIRGINIA

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August 14, 2009

The Honorable Samuel A. Nixon, Jr.
Member, House of Delegates
P.O. Box 34908
Richmond, Virginia 23234

Dear Delegate Nixon:

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 ask whether the Information Technology Investment Board may appoint one of its members, the Secretary of Technology, to serve as Chief Information Officer. Further, you ask whether the Secretary could participate in the Board's vote concerning the appointment as CIO.¹ Finally, you inquire about the authority of the Chairman or other members of the Board to act individually, or as a whole, to negotiate or approve changes to an existing contract of the Virginia Information Technologies Agency.

Response

It is my opinion that an individual may not serve simultaneously as the Secretary of Technology and the Chief Information Officer. Further, it is my opinion that the General Assembly has authorized the Virginia Information Technologies Agency, rather than the Information Technology Investment Board, to enter into or modify contracts for the purchase of information technology goods and services.

Background

The Information Technology Investment Board ("Board") is "a supervisory board ... in the executive branch of state government" and "is responsible for the planning, budgeting, acquiring, using, disposing, managing, and administering of information technology in the Commonwealth."² The Secretary of Technology ("Secretary") is an ex officio member of the Board with full voting privileges.³

¹ I decline to render or express an opinion regarding whether the facts you present concerning a vote would constitute a violation of the State and Local Government Conflict of Interests Act ("Conflict Act"). See VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2008 & Supp. 2009). However, I offer general comments concerning the Act governing the participation of supervisory board members in matters in which they have a personal interest.

² Section 2.2-2457(A) (Supp. 2009).

³ See § 2.2-2457(B).

The Board is required to appoint a Chief Information Officer (“CIO”) to “be employed under a special contract for a term not to exceed five years.”⁴ The CIO oversees the operation of the Virginia Information Technologies Agency (“VITA”) “under the direction and control of the Board.”⁵

You relate that you were the chief patron of legislation in 2003 that created the CIO position⁶ (the “2003 Act”). Further, you note this legislation was intended to implement the recommendations of a 2002 Study of the Joint Legislative Audit and Review Commission.⁷ The study noted that the Secretary at that time served also as the state’s CIO,⁸ found that a part-time CIO who was not insulated from the political process was a limiting factor,⁹ and recommended that “the role of State CIO should be transferred to a separate position.”¹⁰ You relate that the Board recently named the Secretary to serve as CIO on an interim basis, which you view as violating the legislative intent and possibly the letter of the 2003 Act.

You state that VITA currently has a Comprehensive Infrastructure Agreement with Northrop Grumman Information Technology, Inc. (“Northrop Grumman”), which VITA entered into in 2005 pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002.¹¹ Thus, you inquire regarding the authority to negotiate or approve contract modifications related to the Agreement.

Applicable Law and Discussion

Prior to 2003, § 2.2-226(A) directed the Secretary to function as the CIO of the Commonwealth.¹² The 2003 Act creating the Board repealed § 2.2-226(A)¹³ and provided that

the Secretary of Technology shall continue to serve as the Chief Information Officer of the Commonwealth for six months after the effective date of this act or until such time as the Information Technology Investment Board has hired the Chief Information Officer as provided by the first enactment of this act.¹⁴

⁴ Section 2.2-2005(B) (Supp. 2009).

⁵ *Id.*

⁶ See 2003 H.B. 1926, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=031&typ=bil&val=hb1926> (“HB 1926”); see also 2003 Va. Acts chs. 981, 1021, at 1536, 1536-53, 1654, 1654-71, respectively (enacting provisions of HB 1926; adding Chapter 20 to Title 2.2, codified as Chapter 20.1; and adding Article 18 of Chapter 24 to Title 2.2, codified as Article 20).

⁷ See J. LEGIS. AUDIT & REVIEW COMM’N, REVIEW OF INFORMATION TECHNOLOGY SYSTEMS DEVELOPMENT, *67 (Feb. 6, 2003), available at <http://jlarc.state.va.us/reports/Rpt289.pdf>.

⁸ *Id.*

⁹ *Id.* at *67-68.

¹⁰ *Id.* at *67.

¹¹ See VA. CODE ANN. §§ 56-575.1 to 56-575.18 (2007 & Supp. 2009).

¹² See § 2.2-226(A) (Supp. 2002); see also 2003 Va. Acts, *supra* note 6, cl. 2, at 1552, 1670, respectively (repealing § 2.2-226).

¹³ *Id.*

¹⁴ *Id.*, cl. 5, at 1552, 1670, respectively.

When a statute creates a specific grant of authority, the authority is deemed to exist only to the extent granted in the statute.¹⁵ Accordingly, it is my opinion that the authority for the Secretary to serve also as CIO was limited to the brief period following the enactment of the 2003 Act to allow the Board time to fill the CIO position.

This conclusion is reinforced when one considers that the Secretary is an ex officio member of the Board. Should the Secretary also serve as CIO, this dual service would require the Board to have a contractual relationship with one of its members.¹⁶ The Conflict Act¹⁷ prohibits board members, who are state officers,¹⁸ from having a personal interest in a contract with their own board.¹⁹

Similarly, the tension between the Board's duty to supervise the CIO,²⁰ the Secretary's duty to serve as a Board member,²¹ and a state officer's duty to disqualify himself from participating in matters in which he has a personal interest²² underscores that a single individual is unable to perform fully the regular duties of all these positions.²³ Thus, such dual service cannot be seen as consistent with the legislative intent for the CIO position.²⁴

While it is my opinion that the offices of Secretary and CIO legally are incompatible, it does not mean that the Board is unable to hire as CIO an individual then serving as Secretary. However, that individual may not serve in both offices simultaneously. When two governmental offices are

¹⁵See, e.g., 2008 Op. Va. Att'y Gen. 126, 127 (citation omitted) (explaining rule of statutory construction known as "*expressio unius est exclusio alterius*").

¹⁶See § 2.2-2005(B) (requiring Board to employ CIO pursuant to contract for term not to exceed five years); § 2.2-2457(B) (making Secretary ex-officio member of Board). You do not indicate whether the Board has entered into a contract with the recently-named CIO.

¹⁷See *supra* note 1.

¹⁸See § 2.2-3101 (2008) (defining "officer" as "any person appointed or elected to any governmental or advisory agency").

¹⁹Section 2.2-3106(A) (2008) ("No officer or employee of any governmental agency of state government ... shall have a personal interest in a contract with the government agency of which is an officer or employee, other than his own contract of employment."). This allows a board member to have a personal interest in the contract, if any, by which he serves as a board member but generally prohibits any additional contract of employment.

²⁰See § 2.2-2005(B).

²¹See § 2.2-2457(B).

²²See § 2.2-3112(A)(1) (2009); see also *infra* note 26.

²³See *Amory v. Justices of Gloucester*, 4 Va. (2 Va. Cas.) 523, 525, 1826 Va. LEXIS 99, *5 (1826) (decreeing that two offices, one of which is subject to control of other, are "incompatible"; suggesting there is legal incapacity to execute duties of the two offices at same time). In this case, the Secretary does not directly supervise the CIO, but has a duty to serve on the board that does supervise the CIO.

²⁴See 2001 Op. Va. Att'y Gen. 192, 193 (citations omitted) (noting that *Virginia Code* constitutes single body of law; legislature is presumed to have intended each enactment to have meaning that is consistent with other provisions of law and that is not superfluous).

incompatible and “[i]n the absence of a statutory provision to the contrary, acceptance of a second incompatible office operates to vacate or surrender the first office.”²⁵

You also inquire whether the Secretary could participate in the Board’s vote concerning his appointment as CIO. The Conflict Act requires governmental officers and employees to disqualify themselves from participating in certain matters in which they have a personal interest.²⁶ The Conflict Act authorizes the Attorney General to render advisory opinions to certain state and local officials based upon a full disclosure of the facts by such officer or employee.²⁷ The Conflict Act is very specific in providing that only the officer or employee with a potential conflict may seek an opinion.²⁸

Finally, you inquire about the authority of the Chairman or other members of the Board, individually or as a whole, to negotiate or approve changes to VITA’s Comprehensive Infrastructure Agreement with Northrop Grumman. The General Assembly has assigned the authority to procure information technology goods and services for the Commonwealth to VITA.²⁹ Such authority includes the power of the CIO to “direct the modification or suspension of any major information technology project” when he deems such action appropriate.³⁰ While the Board is “responsible for the ... acquiring ... of information technology in the Commonwealth,”³¹ the fact that the direct control of procurement is assigned to VITA makes clear that the Board’s duties and powers in this area are supervisory and do not include the duty and power directly to procure information technology goods and services for the Commonwealth.³² Therefore, it is my opinion that pursuant to its supervisory power, the Board may

²⁵See Op. Va. Att’y Gen.: 1980-1981 at 279, 280; *see also* 1974-1975 at 251, 251 (“The acceptance of an incompatible office operates as a surrender of the former office.”). You do not indicate whether the contract contemplated by § 2.2-2005(B) has been signed. I express no opinion on whether the appointment of the Secretary as CIO for purposes of the above rule can precede signing of the contract.

²⁶See § 2.2-3112(A)(1) (providing that each state officer of any governmental or advisory agency having personal interest in transaction “[s]hall disqualify himself from participating in the transaction if (i) the transaction has application solely to ... a business or governmental agency in which he has a personal interest ... or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4”); *see also* § 2.2-3101 (defining “business,” “personal interest in a transaction,” and “personal interest”); 2009 Va. Acts ch. 781, § 4-6.01(a), (c)(6)(b), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?091+bud+24-6.01> (stating minimum CIO salary is \$136,806).

²⁷See § 2.2-3126(A)(3) (2008) (directing Attorney general to render advisory opinions to state officer seeking advice); *see also* § 2.2-3121(A) (2008) (providing that state officer may not be prosecuted for knowing violation of Conflict Act if such violation results from good faith reliance on written opinion of Attorney General made in response to written request and based on full disclosure of facts).

²⁸See *id.* This is particularly important given the enforcement responsibilities of the Attorney General.

²⁹See, e.g., § 2.2-2012(A) (2008); § 56-575.16 (2008); *see also* 2009 Va. Acts, *supra* note 26, at § 4-5.04(b)(1)(a). This authority is subject to any required procedures or approvals. *See, e.g.,* § 2.2-4309(A) (2008).

³⁰See § 2.2-2015 (2008); *see also* § 2.2-2006 (2008) (defining “major information technology project”).

³¹Section 2.2-2457(A).

³²See § 2.2-2005(B) (providing that CIO exercises his powers under direction and control of Board); § 2.2-2012(A) (providing that information technology may be purchased by other agencies “to the extent authorized by VITA”); § 2.2-2458 (Supp. 2009) (listing powers and duties of Board).

The Honorable Samuel A. Nixon, Jr.
August 14, 2009
Page 5

instruct VITA to modify an existing contract in accordance with any required procedures or approvals; however, the Board is not itself authorized to modify the Comprehensive Infrastructure Agreement.³³

Conclusion

Accordingly, it is my opinion that an individual may not serve simultaneously as the Secretary of Technology and the Chief Information Officer. Further, it is my opinion that the General Assembly has authorized the Virginia Information Technologies Agency, rather than the Information Technology Investment Board, to enter into or modify contracts for the purchase of information technology goods and services.

Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Mims', with a stylized flourish at the end.

William C. Mims

1:1216; 5:57; 1:941/09-053

³³Further, I note that such supervisory power is a power of the Board and not that of its individual members. Unless specifically provided by law, public bodies may authorize the transaction of public business only through motions duly adopted at public meetings conducted in accordance with The Freedom of Information Act. *See* §§ 2.2-3710(A), 2.2-3712(G) (2008). It is possible for a public body to adopt a motion authorizing certain officers or employees to act on its behalf. *See, e.g.*, § 2.2-604 (2008). However, the Board cannot “delegate any duties or responsibilities to the chairman other than to preside over meetings or act as the spokesperson for the Board in public meetings.” Section 2.2-2457(C).