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Volume 3, Issue 4

December 2000

"WHEREAS, THE PEOPLE OF NORTH CAROLINA ENTRUST PUBLIC POWER TO ELECTED AND APPOINTED OFFICIALS FOR THE PURPOSE OF FURTHERING THE PUBLIC, NOT PRIVATE OR PERSONAL, INTEREST..."
EXECUTIVE ORDER NO. 127

Letter from the Chairman

This issue of our newsletter focuses primarily on recent advisory opinions issued by the Board. You will find opinions that address a wide variety of ethical issues and concerns.

We remain ready and willing to assist Public Officials with any specific ethical dilemma they face as they perform their public duties, but we also hope that this publication will serve as a useful guide for Public Officials to reference should ethics questions of a general nature arise.

To request an advisory opinion from the Board, or to obtain a copy of the full text of an opinion included in this newsletter, please contact the Board's staff at (919) 733-2780.

George F. Bason 

ETHICS EDUCATION:



"HAVE ORDER, WILL TRAVEL"

If your agency or organization would like to receive ethics training, contact the Board at (919) 733-2780 to arrange a convenient time and place.

Training sessions will provide basic information about ethical obligations under Executive Order 127 and can be tailored to address particular issues or situations faced by your agency or group.

"But if you ask what is the good of education in general, the answer is easy: that education makes good men, and good men act nobly."

Plato

What are "Advisory Opinions"?

One of the main duties of the Board of Ethics is to help Public Officials comply with Executive Order 127. One way the Board does so is through "advisory opinions." Section 4(h) of the Order requires the Board to answer questions relating to "real or reasonably-anticipated fact settings or circumstances." Opinions are intended to have prospective application only.

Those entitled to request an advisory opinion are (1) Public Officials, (2) those responsible for appointing or supervising a Public Official, and (3) agency heads, agency legal counsel, and "ethics liaisons." The Board may also issue an advisory opinion on its own motion.

A request for an opinion must be in writing and should include, among other information, a concise statement of the question or circumstances to be considered.

The Board's Executive Director drafts a preliminary advisory opinion which is reviewed by the Board Chairman. If agreed to by the Chairman, the preliminary opinion is sent to the requester and may be relied upon until the full Board meets and approves, disapproves, or modifies the opinion.

The Board may decline to issue an opinion if (1) it determines that the request is frivolous, (2) the matter has already been considered and decided by the Board, or (3) the matter is not one with respect to which a ruling or determination would be appropriate.

Section VI of the Board's "Rules & Regulations" covers the request and issuance of advisory opinions.

Recent Advisory Opinions...

AO-99-018 (September 21, 1999): A Public Official asked whether her employment by a private non-profit organization which might appear before the public bodies on which she serves created an impermissible conflict of interest. The official is a member of a commission covered by Executive Order 127 and an advisory committee which is not. She is also employed as the executive director of a private non-profit community organization which will possibly, if not likely, appear before one or both of the State entities to secure support for its initiatives.

OPINION: Noting that Public Officials should avoid both conflicts of interest and the appearance of a conflict of interest, the Board of Ethics found that should the appointee's employer appear before the Commission, her participation in the matter as either a commission member or as a representative of her employer would create, at a minimum, the appearance of conflict of interest. If her employer does appear before the Commission, she should disclose her financial and personal relationship with the petitioner and refrain from participating in discussion or voting on the matter.

AO-2000-01 (January 20, 2000): A commission asked whether its members should attend a social event sponsored by a trade association made up of individuals regulated by the commission. Among other things, the commission licenses and disciplines individuals who are members of the trade association. The commission is also a member of an international organization of licensing law officials and administrators. The international organization was holding its midyear meeting in North Carolina. As part of this meeting, the trade association planned to sponsor or co-sponsor a social event for all of the international organization members, not just the North Carolina delegation or commission members. Neither the trade association nor the international organization is covered by the ethics order.

OPINION: Executive Order 127 does not directly address the question of when "gifts" or other favors (such as free meals or vendor-sponsored banquets) are ethically proper. In the present situation, the problem is not compromising the public trust for some reception or banquet, but rather the potential perception or appearance that the sponsor (here, the trade association) would be gaining some unfair advantage or influence over the public body that regulates its members. That risk is mitigated by virtue of the fact that the proposed social event (be it a hospitality room, reception, or some other reasonable and customary meeting-related event) is open to **all members** of the host organization, which is international in scope. The Board felt this approach was consistent with not only a reasonable interpretation of EO 127 but also North Carolina General Statutes §133-32, which involves gifts and favors from public contractors to State officials and employees. Reasonably interpreted, EO 127 is intended to protect the public interest, not prevent Public Officials from attending beneficial meetings clearly within the scope of their official duties and functions. Therefore, commission members were free to attend the association-sponsored social event.

AO-2000-002 (February 4, 2000): A commission asked whether allowing subcommittee members to participate in grant reviews when a State agency with which they are connected is the potential recipient of such grant constituted a conflict of interest in violation of Executive Order 127. Among other things, the commission assists the Department Secretary in making grants for use in pursuing the commission's objectives. As part of the grant review process, the commission utilizes various committees and sub-committees to evaluate grant pre-applications. Ultimately, sub-committees make recommendations to an executive committee which then makes a recommendation to the full commission.

OPINION: The Board of Ethics does not cover "advisory boards" and thus would not have jurisdiction over the commission's committees or advisory subcommittees. However, the Board noted that it supported the commission's policy of allowing subcommittee members to answer questions about a grant application from an agency or group with which they are connected or in which they have an interest, but not allowing those persons to vote on such a grant request. The Board also stated that when a commissioner's own agency appears before the full commission concerning such a grant application, the interested member should not participate in voting or discussion in order to avoid a conflict of interest or the appearance of a conflict.

AO-2000-003 (March 21, 2000): A board member asked whether his participation in discussion and voting on specific requests by one public body of which he is a member to another would constitute an impermissible conflict of interest under Executive Order 127. By virtue of the member's designation as a regional representative on the board, he was appointed to an *ex officio* nonvoting position on a related local public body. The two public bodies have overlapping general goals and objectives, but the local body can and does apply for and receive funding from the larger board.

OPINION: After noting its jurisdictional limitations, the Board of Ethics found that while the appointee can and should recuse himself if he determines that his "personal relationship" with the local body would compromise his ability to protect the overall public interest and fulfill his duties as a member of the statewide board, based upon the relatively unique facts of the present case, the Executive Order does not require that persons serving as nonvoting *ex officio* members of legislatively-mandated local bodies recuse themselves when matters involving those local bodies come before the larger board for consideration.

Recent Advisory Opinions (continued)

AO-2000-004 (March 20, 2000): A licensing/regulatory board asked several questions involving fundamental conflict and appearance of conflict issues relating to (1) board members' involvement with related professional organizations, (2) their status as a school owner licensed and regulated by the board on which he/she sits, and (3) their potential access or exposure to confidential trade/financial information. The board's duties include establishing rules and conducting reviews for the approval of the trade schools. The current board chairman is the co-owner of such a school and is the former chairman of a trade association whose purpose is to afford school owners an arena in which to discuss issues and concerns affecting the profession in general and their businesses in particular. The association does not lobby or appear before the board. The chairman resigned his leadership position in the association shortly before the board's first meeting. The board's enabling act mandates that five board members must be licensed by the board, and also requires that when selecting board members, consideration must be given to geographical distribution, practice setting, clinical specialty, and other factors that will promote diversity of the profession on the board.

OPINION: Preliminarily, the Board of Ethics noted that when statutes require that interested persons be appointed to regulatory or licensing boards, the Board of Ethics does not find that such persons have an impermissible conflict of interest due to their personal or financial interest. The Board of Ethics does, however, find that these appointees have the **potential** for conflict of interest and must recuse themselves from discussing or voting on matters before their board that will specifically impact or effect their business or license (including the licenses of those they employ or are employed by). This potential for conflict of interest does not usually effect the board member's ability to participate in the licensing of other persons in the industry with whom the board member has no financial or personal relationship. Nor will it effect the board member's ability to participate in general regulatory decisions affecting the industry as a whole. The degree of allowable participation, if any, must be determined on a case-by-case basis.

In answering the specific questions, the Board of Ethics found that it was **not** a conflict of interest for the board chairman and current school owner to serve as chairman if he had previously been the chairman of a related trade organization. The board also found that it was **not** a conflict of interest for the chairman to serve on the board or act as its chairman if the school of which he is a co-owner is an active member of the trade association. Nor does an impermissible conflict of interest exist solely because a member of the licensing board is currently the owner of a school that is regulated by the board. This does create the **potential** for either a conflict of interest or the appearance of a conflict. While a board member's membership in a professional organization does not automatically give rise to an actual conflict of interest, the board cautioned that "the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties." Individual board members must weigh this risk carefully and exercise caution so as not to give rise to a conflict of interest, or the appearance thereof, by virtue of serving in both roles. Therefore, the chairman/board member should recuse himself from participating in discussion or voting when matters specifically involving his school, his own license, the licenses of his employees, and the licenses of his school's students come before his board.

The most difficult questions related to the member's involvement in reviewing and approving other schools given the fact that applicant schools are required to provide information about the internal operation of the school, including sensitive financial information, in their applications. In this case, the Board of Ethics was not able to provide a complete solution to the problem. The subject board was in the best position to determine how to reconcile the competing interests of ensuring a diverse representation on the board while neither giving nor appearing to give a competitive advantage to a business owner as a result of his public position on such board. The Board of Ethics pointed out that a Public Official may not use information gained in the course of, or by reason of, his or her official responsibilities in a way that would affect a personal financial interest of the Public Official or a business with which the Official is associated. Nor can a covered Public Official improperly use confidential information. The situation whereby a sitting board member may have access to sensitive business information of competitors, particularly financial information, creates a significant **potential** for conflict and the appearance of conflict. The board member in question must exercise extreme caution in this situation. The Board of Ethics determined that it would create, at a minimum, an appearance of conflict for a board member who is also a school owner to review and approve schools **if** he has to review confidential business information (including financial information) in order to do so. This does not mean, however, that school-owner board members should be shut completely out of the review process. To the extent possible, the legislative goal to include all relevant perspectives should be furthered. The licensing board is in the best position to try and meet this difficult goal.

AO-2000-005 (March 16, 2000): A special "grants committee" inquired as to whether awarding a grant to the employee of a board chairman (although not their particular board) who had a connection to both the grant applicant (as a listed "participant" in and supporter of the proposed study) and the body assigned to pass judgment on the application (the "grants committee" through his two appointees to that committee) would constitute either a conflict of interest or the appearance of a conflict of interest. After an extensive screening process (including an anonymous peer review), the committee evaluates all grant proposals and determines the amount of funding, if any, to be awarded to each grant applicant. This is in effect the "final

Recent Advisory Opinions (continued)

decision” on the grant application. The grant applicant works for the same company as the board chairman and such company has offered to allow the applicant to use its facilities during the initial part of the proposed study. Neither the chairman nor the company will have any involvement with or responsibility for actual project completion. Nor will they receive any financial benefit for allowing the applicant to use their facilities for the study.

OPINION: After noting the Board of Ethics’ lack of jurisdiction over both the grant applicant and the grants committee, the Board opined that considering the grant request under these circumstances would create neither an actual conflict of interest nor enough of a reasonable appearance of conflict of interest to taint the grant process, particularly in the absence of any indication that either the chairman or his company would receive any compensation for allowing the applicant to conduct research at their facilities. The Board did not feel that the connection between the applicant, the chairman, and the decision-making body was sufficient to create an actual or reasonably perceived conflict of interest. The Board did not feel that a “reasonable person” would conclude that the committee in general or the two committee members appointed by the chairman would allow such a tenuous, non-financial interest to compromise the public interest. The Board of Ethics noted, however, that if the two committee members appointed by the chairman felt that their personal relationship with the chairman was such that they could not give an unbiased review of the applicant’s grant request, they should disclose such relationship to the presiding officer, seek appropriate guidance, and consider removing themselves from the process. While not required, the Board agreed that any appearance concerns could be eliminated or significantly reduced by either (1) having the grant applicant not rely on the chairman as a “participant” in the study or (2) having the two committee members who are appointed by the board chairman not vote on the grant application.