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“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. ONE

Letter from the Director

On July 18, 2003, the Board held its first meeting of 2003. This newsletter summarizes the highlights of that meeting. Like last year, Board meetings have been minimized to the maximum extent possible due to the budget crisis. Complaints are usually the catalyst for most Board meetings. Such is the case here.

The Board had a fairly full agenda (nowhere near as full as the last meeting, thank goodness) and addressed some important matters. Among other things, the Board resolved eight outstanding complaints according to its recently-amended Internal Operating Procedures (see related article), reviewed and approved a significant advisory opinion, and gave the Director signatory authority for SEI evaluation letters. These and other topics will be discussed separately.

Upon hearing that its Administrative Officer, Millie Donavant, planned to retire at the end of next year, the Board also asked me to see about the possibility of having Millie's "replacement" (no one will ever really be able to replace Millie) train under her direction for an extended period of time, preferably six months. Despite the current and projected tight budget times, the Board strongly felt that this training overlap was essential to the continued smooth functioning of its conflict identification and avoidance program. I wholeheartedly agree.

Finally, it was a pleasure welcoming our newest member, Waheed Haq "Rana" to his first board meeting. Waheed had worked hard to prepare for this meeting, and it showed. His input was as timely as it was helpful. (In fact all members were particularly well-prepared for a lively and impassioned debate on important issues. The Governor is fortunate to have such a talented and dedicated group of individuals serving in such an important position.)

If you would like additional information about the results of the July 18 Board meeting, please do not hesitate to contact Millie or me.

Perry Y. Newson

New Complaint Procedures

Last August, the Board adopted the most significant changes to its complaint procedures in five years. Among other things, the Board made it clear that it will serve an *investigatory* and *advisory* role in dealing with valid complaints. This is consistent with both legal requirements and over 20 years of the Board's operating history.

Starting in January 2003, Board staff had to apply the new complaint procedures for the first time. Before summarizing and discussing the specific complaints, however, this newsletter will outline the major changes to the way in which complaints are handled.

The Board added several stages to the investigation process. Under the Board's new procedures, the Executive Director conducts an *initial review* to make sure all of the necessary requirements have been met for a valid complaint. For example, the Director makes sure the person against whom the complaint has been filed is a covered Public Official subject to the Board's jurisdiction. He also looks to see whether the complaint was filed in time, whether the allegations indicate a probable violation of the Order of a type and magnitude justifying a full investigation by the Board, and whether he believes the Board should exercise its discretion and decline to accept the complaint for any of the reasons listed in section 5 (c) (2) of the Order (e.g., it is frivolous or brought in bad faith).

If during this initial review the Director determines that he needs additional information, he can request it from the complainant or conduct a **limited investigation**. This can involve asking specific questions, requesting documents, or conducting limited, informal interviews, usually over the phone.

New Internal Operating Procedures -- Complaints (continued)

If after the initial review, the Director determines that the Board does not have jurisdiction over the respondent, he shall, after consultation with the Chair, notify the complainant and **terminate the investigation**. This was the only expansion of the Director's complaint-resolution authority. [Note: the Director has dismissed five (5) complaints so far this year for lack of jurisdiction.]

Once the initial investigation has been completed, the Director reports his findings to the Chair and makes appropriate recommendations. The Chair then initiates a full investigation, recommends disposition of the complaint to the full Board, or, in unusual situations, waives any formal recommendation and presents the matter to the full Board for appropriate action. Note the Chair does *not* have the authority to dispose of the complaint. That power lies solely with the full Board.

If a full investigation has not been initiated, the Board reviews the Chair's recommended disposition, if any, and makes a decision based on the written record and information provided by the Director pursuant to his limited investigation. The Board then either resolves the complaint by taking any action it deems necessary or appropriate under the Order *or* it instructs the Director to proceed with a full investigation. If the Board recommends any sanction or punishment, the respondent (but *not* the complainant) may request a full investigation and conference with the Board.

A full investigation is given the highest priority of staff work. Once the Director completes the full investigation, he submits a **written report** to the Chair, with copies to the complainant and respondent. Such parties then may, but do not have to, submit **written responses**. The Chair then reviews the written report and the parties' responses, if any, and requests any additional information he deems necessary to obtain a full understanding of the facts and issues involved. Once he is satisfied that he has acquired sufficient information, he schedules an **informal conference** between the parties and the full Board. This will usually take place at a regular Board meeting.

While the parties may be assisted by counsel if they wish, the **conference** is informal: there is no swearing-in or cross-examination of witnesses. All questioning of the parties and others in attendance takes place in an open, public meeting, but the Board intends to go into closed session to deliberate the final outcome of the complaint. Any final action on the complaint will normally be taken in public.

The Board will make a **final report** to the proper officials, and may make such other recommendations as it deems appropriate under the circumstances.

Board News

Department of Agriculture Now Covered. We are pleased to welcome Interim Agriculture Commissioner W. Britt Cobb and all of his exempt employees to the Board of Ethics "family" of covered Public Officials. One of the Commissioner's first official acts was to accept Governor Easley's invitation to bring the Department under Executive Order Number One on public service ethics. Among other things, this means high-level exempt employees will be filing Statements of Economic Interest with the Board (for the first time since 1985) in order to help identify, prevent, and address any conflicts of interest or potential conflicts of interest they might have. We anticipate 100% compliance by the time this newsletter goes to "print." In addition, Commissioner Cobb invited the Executive Director to give a basic ethics education and awareness presentation to a general Department staff meeting on July 14. We commend and thank Commissioner Cobb for not only his verbal support and encouragement of ethics in public service but also his prompt and decisive action along that line. Actions speak much louder than words in this regard.

RESOLUTION OF PENDING COMPLAINTS

The Board addressed and resolved three (3) pending complaints at its July 18 meeting. In addition, the Executive Director reported that he had dismissed five (5) complaints for lack of jurisdiction pursuant to the Board's new Internal Operating Procedures. See related article on the new complaint procedures.

Hildebrandt vs. Bryson, et al (North Carolina Appraisal Board) -- C-2003-001.

On January 21, 2003, Mr. Thomas G. Hildebrandt, Jr. filed a formal complaint against Mr. Bart Bryson, Chairman of the North Carolina Appraisal Board ("NCAB" or "the Appraisal Board ") (C-2003-001), Ms. Roberta Oullette, Assistant Attorney General and staff counsel to the NCAB (C-2003-002), Mr. Thomas R. Miller, Special Deputy Attorney General and Respondent Oullette's direct supervisor in the Attorney General's office (C-2003-003), and Mr. Mel Black, the Executive Director of the NCAB (C-2003-004) (hereinafter collectively referred to as "the Respondents"). On January 23, 2003, the Executive Director determined that Ms. Roberta Oullette, Mr. Thomas R. Miller, and Mr. Mel Black were *not* covered "Public Officials" over whom the Board had disciplinary or other jurisdiction. Therefore, the complaints against them were dismissed pursuant to Governor Easley's Executive Order Number One ("EO One" or "the Order") and the North Carolina Board of Ethics' ("the Board") recently-amended Internal Operating Procedures ("Procedures"). The Director continued his initial review as to Mr. Bart Bryson (case C-2003-001) who *is* a covered Public Official under EO One.

After reviewing the complaint and all accompanying exhibits, the Director requested additional information from the Complainant. Both the Complainant and the Respondent, through counsel for the Appraisal Board, responded to this request and provided additional information relative to the complaint investigation. The Director completed his initial review and found that Mr. Hildebrandt's complaint had both jurisdictional (timeliness) and substantive problems. However, pursuant to §5 (c) (3) of the Order, the Board may unilaterally initiate an investigation if there is reason to believe that a Public Official has or may have violated the Order, and the 90-day "statute of limitations" does not apply.

Giving the Complainant the benefit of the doubt on the timeliness issue, the Board nevertheless voted to accept the Chairman's recommendation that the complaint be dismissed without prejudice for the following reasons.

The heart of Mr. Hildebrandt's ethics complaint was that since Mr. Bryson was involved in the preliminary stages of the Appraisal Board's case against him, Mr. Bryson should not have taken part in the ultimate decisionmaking in that action. Mr. Hildebrandt cast the purported ethical violation as one of improper *ex parte* communications (specifically, Mr. Bryson's communications and interactions with staff members of the Appraisal Board during the investigation and "probable cause" stages of that Board's investigation of Mr. Hildebrandt's case).

Mr. Hildebrandt cited the Board's landmark CRC decision (AO-99-014) as support for his position. He pointed out that "an undisclosed *ex parte* communication" may constitute "legal bias." While this is true, the Director did not believe that internal communications with staff is the kind of "undisclosed *ex parte* communication" contemplated by either the Board of Ethics or the North Carolina Supreme Court in the *Crump vs. Board of Education* case relied upon here.¹ Subsequent to the CRC decision, the Board made it exceedingly clear that what constitutes "legal bias" is a question of law for the particular public body (here,

¹ In *Crump*, the improper *ex parte* communications were with sources outside of the decision-making body itself (the School Board). 326 N.C. 603 (1990). Definitive interpretation of this or any other legal opinion is beyond the scope of this determination.

the Appraisal Board) to determine in conjunction with its independent legal counsel. *See* AO-02-002, p. 2; AO-01-001, p. 4, fn. 3; AO-00-008, p. 3; AO-00-007-B, p. 4. Mr. Hildebrandt acknowledged that this issue would ultimately be decided in the courts (“Any issues of legal bias or conflicts of interests in my [substantive] case will also be adjudicated in due course”). Complaint, p. 2. The Director felt that the Board of Ethics should defer to both the judicial system and the Appraisal Board itself in determining what is or is not “legal bias” in a particular context.

The Director also believed that the underlying situation with the Appraisal Board’s three complaints was extremely unusual. Mr. Bryson initially recused himself from all three complaints according to the Appraisal Board’s standard procedures. At that time, he apparently had no intention of taking part in the hearing portions of those cases. The Complainant admitted that Mr. Bryson was “demonstrating appropriate ethical behavior” in doing so. After that recusal, however, three other Appraisal Board members were disqualified from hearing Mr. Hildebrandt’s case, thus leaving the Appraisal Board without a legally-required quorum. Without Mr. Bryson, the Appraisal Board would not be able to conduct its official business. After much deliberation, negotiation, and even arguable agreement, it was decided that Mr. Bryson would take part in Mr. Hildebrandt’s case. This decision was made after extensive consultation with and legal advice from counsel for the Appraisal Board.

Whether this difficult decision was reached by agreement, waiver, or “Rule of Necessity,” the Director did not think it was the Board of Ethics’ place or function to substitute its judgment for that of either the Appraisal Board as a whole or the courts in the context of this very complex, unique situation involving questions of law and policy arguably outside of the Board’s jurisdiction. Moreover, the “Rule of Necessity” is a recognized “ethical” as well as legal doctrine allowing the participation of an otherwise disqualified decisionmaker under extenuating circumstances.

Finally, while not expressly cast in those terms, the Director believed that Mr. Bryson’s decision to step back into the underlying case could possibly come under the protection of section 7 (b) (3) of the Order. Section 7 deals with appearances of conflict. Public Officials must take reasonable and appropriate steps to remove themselves from any proceeding in which their impartiality might reasonably be questioned due to the Official’s personal relationship with a participant in the proceeding. Order, §7 (b) (3) (2). Assuming that information gained as a result of one’s official role in an internal investigation of a covered licensee creates the type of “personal relationship” contemplated by this provision of the Order, subsection (3) provides a “safe harbor” for Public Officials having doubts about the allowed extent of their involvement in the matter. According to this section of the Order,

A good-faith determination under this subsection of the allowable degree of participation by a Public Official is presumably valid and only subject to review under Section 8 [on sanctions] upon a clear and convincing showing of mistake, fraud, abuse of discretion, or willful disregard of the provisions of this Order.

The Director believed that Mr. Bryson and his counsel complied with this subsection in spirit at the least and should be afforded its protections. Nor did he think that there had been a clear and convincing showing of the requisite “mistake, fraud, abuse of discretion, or willful disregard” of applicable provisions of the Order.

After extensive discussion and debate, largely over what the Board’s proper role should be in this unique type of complaint situation, the Board voted 5 to 1, with one abstention, to dismiss the complaint without prejudice. The feeling was that the Complainant should not be prevented from reinstating his ethics complaint should credible evidence of an impermissible conflict of interest be discovered in his pending legal action.

***Wright vs. Lattimore, et al* (NC Industrial Commission) -- C-2003-006 & C-2003-008.**

By letter dated July 3, 2003, Ms. Leslie Wright filed a formal complaint against Ms. Chrystal R. Standback (C-2003-005), Mr. Buck Lattimore (C-2003-006), Ms. Renee Riggsbee (C-2003-007), and Ms. Dianne C. Sellers (C-2003-008) of the North Carolina Industrial Commission ("the Commission") (hereinafter collectively referred to as "the Respondents"). Mr. Lattimore is the current chair of the Commission, Ms. Sellers is a current Commission member, Ms. Riggsbee is a former Commissioner, and Ms. Standback is the current Deputy Commissioner.

Because a Board meeting was scheduled to take place just two weeks later, the Executive Director expedited his initial review of the complaints and recommended that the Chair waive his formal recommendation and present the matter to the full Board at its next meeting pursuant to section V (F) (6) (c) of the Board's new Procedures. The Chairman concurred with this approach.

As part of his initial review (see related article at the beginning of this newsletter), the Executive Director determined that Deputy Commissioner Chrystal Redding Standback and former Commissioner Renee S. Riggsbee were *not* covered "Public Officials" and the Board lacked jurisdiction over these individuals. Therefore, pursuant to the Board's recently-amended Internal Operating Procedures, section V (F) (4), the Director notified all parties that the attempted complaints against Ms. Standback and Ms. Riggsbee were dismissed. This action was reported to the Board at the July 18 meeting.

The Board proceeded to address the complaints against Mr. Buck Lattimore (C-2003-006) and Ms. Dianne C. Sellers (C-2003-008) who are covered Public Officials over whom the Board has jurisdiction.

Again wishing to avoid dismissals on "technicalities" like timeliness, the Board decided the case on substantive grounds. [Note: pursuant to §5 (c) (3) of the Order, the Board may unilaterally initiate an investigation *if* there is reason to believe that a Public Official has or may have violated the Order, and the 90-day "statute of limitations" does not apply. The Executive Director did not recommend such action in this case.]

The Board agreed that the Complainant had not alleged "specific facts indicating that a violation of [the] Order has occurred." Procedures, §V (F) (1) (a). The real gist of her complaint was that the Industrial Commission, through the members and staff assigned to her case, did not agree with her claims and dismissed them. The Board did not feel that this was an allegation of unethical conduct. It did not see its role as reviewing substantive actions by State agencies in the absence of some credible evidence or allegations of a conflict of interest or the appearance of conflict as covered by the Governor's Order. Vague allegations of conspiracy and racism are likewise not within the Board's purview.

Therefore, the Board agreed with the Executive Director's recommendation and found that Ms. Wright's complaint did not allege specific facts indicating a probable violation of the Order of the type and magnitude justifying a full investigation by the Board. Accordingly, the Board dismissed the complaints against Mr. Lattimore (C-2003-006) and Ms. Sellers (C-2003-008) with prejudice.

ADVISORY OPINIONS ISSUED

Finally, the Board addressed and issued one formal advisory opinion at its July 18, 2003, meeting. The full text of this and most opinions can be viewed on the Board's web site: <http://www.doa.state.nc.us/doa/ethics>.

AO-03-001 (July 18, 2003): A member of the Environmental Management Commission ("EMC" or "the Commission") inquired whether given his recent change from full-time employment with an environmental advocacy organization to that of an independent contractor on a project-by-project basis, with a corresponding change in employment responsibilities, did the standards and restrictions of previous advisory opinions still apply? The Board found that some had changed. The impact of the Public Official's employment with the CCNC was the subject of two advisory opinions in late 2000 (see AO-00-007-A and AO-00-007-B). Mr. Dan Besse was formerly employed as the Conservation Political Director for the Conservation Council of North Carolina ("CCNC" or "the Council"), an environmental advocacy organization. The Council is a membership organization. It has both individual and organizational members. While organizational members do not set Council policy or direct staff members, they may be represented on a Lobbying Advisory Council ("LAC") which advises the Council on policy issues. Among other things, member groups of the LAC advise and guide CCNC's lobbying efforts by helping develop CCNC's legislative agenda. LAC members also have access to the Council's full-time environmental lobbyist and are given special briefings during the legislative sessions.

CCNC has as many as 1500 individual members. Prospective members are not "screened" in any way. All that is required to become a member is to provide some basic personal information (name, address, phone number) and submission of the appropriate membership contribution (from \$10 to \$30).

In addition to the basic "membership contributions" (dues), both individual and organizational members sometimes make donations to the CCNC. Some of these donations are significant. CCNC members receive an annual contribution solicitation letter for general organizational support. On behalf of its "attached" political action committee ("PAC"), CCNC solicits donations from certain members. As Conservation Political Director, Mr. Besse would sometimes personally call select members to ask for additional donations. He did not solicit donations from group members.

Mr. Besse's employment relationship with CCNC changed from that of Conservation Political Director-employee to an independent contractor. He now provides contract services on a project-by-project basis. His initial contract will involve writing and editing a weekly bulletin on state legislative and political environmental news. He will not regularly attend or participate in CCNC board meetings. Moreover, his present contract does *not* involve the solicitation of contributions from CCNC members, and Mr. Besse does not anticipate performing that type of service in the future.

OPINION: In AO-00-007-B, the Board of Ethics established the general parameters for when Mr. Besse should be allowed to participate in (a) contested cases or (b) rulemaking proceedings involving (i) his employer (CCNC) or (ii) its members, given his financial and/or "personal" relationship with each. This significant opinion was extremely fact-driven:

This case involves a significant, and perhaps even extreme, financial interest in the form of not only an employer-employee relationship but also a relatively unique and near-symbiotic relationship between employee, employer, and employer-members. There is direct involvement here between the employee/Public Official and at least some of his employer's members. This case involves much more than a situation where someone "draws a paycheck" from an entity involved in the public

decision-making process. In that respect, it may help define the limits of allowable participation in quasi-legislative rulemaking.

AO-00-007-B (October 9, 20020), page 4. Indeed, the Board determined that despite this significant personal and financial relationship, Mr. Besse should generally be allowed to participate in rulemaking proceedings when either CCNC or its members merely **comment** on proposed rules. The same result obviously holds true under the current situation.

Likewise, on the other end of the spectrum, Mr. Besse recognizes and acknowledges that he should not participate in either a contested case involving his contract employer, CCNC, or in a rulemaking proceeding when CCNC is the petitioner.

The most difficult question involves Mr. Besse's possible participation when a CCNC **member** is a party to a contested case or a petitioner in a rulemaking proceeding. In AO-00-007-B, the Board found that Mr. Besse should *not* so participate "[b]ecause of the significant relationship, both financial and otherwise, between Mr. Besse, CCNC, and CCNC's members." AO-00-007-B, page 5. The Board made it clear that it was dealing with "a significant, and perhaps even extreme, financial interest" in the original Besse situation. That situation appears to have changed.

Consequently, based on the facts of this case, the Board determined that Mr. Besse should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* CCNC member is a participant. There are many caveats, however, and Mr. Besse was advised to exercise extreme caution to avoid real or apparent conflicts in particular cases.

For example, Mr. Besse should not participate in cases involving members whom he has personally solicited for donations while the CCNC's Conservation Political Director, or with whom he has worked on a specific project or program, or with whom he had or has a significant relationship. In addition, because of their access to and close association and relationship with CCNC's leaders and policymakers, including the board of directors, Mr. Besse should exercise extreme caution when an LAC member is a party to a contested case or the petitioner in a rulemaking proceeding.

Moreover, Mr. Besse should observe a general "cooling off" period for a reasonable length of time, depending on the nature of the proceeding (contested case vs. rulemaking), the particular member involved, and other relevant factors. See, e.g., AO-02-002 (April 24, 2002); AO-00-008 (September 11, 2000); AO-98-014 (July 31, 1998). This would be determined on a case-by-case basis with an eye toward avoiding even the appearance of a conflict of interest. Executive Order One ("EO One" or "the Order"), section 7 (b). Mr. Besse would always be free to remove himself from the decision-making process if he personally feels that personal, financial, or professional interests or associations could improperly influence his objectivity in a given situation. If doubts still exist, Mr. Besse should seek appropriate guidance from the presiding officer and the Commission's legal counsel pursuant to section 7 (b) (2) of the Order.

In all cases involving either CCNC or one of its members, Mr. Besse should fully **disclose** the situation before participating in the process.

Don't forget that the full texts of most opinions, as well as comprehensive and topical indexes, are available for your reading pleasure on the Board's web site:
www.doa.state.nc.us/doa/ethics.

What is an “Advisory Opinion”?

Since 1977, “advisory opinions” have been an integral part the Board of Ethics’ effort to educate and assist covered “Public Officials” as they strive to conduct the public’s business in the best interest of the public. The issuance of advisory opinions is mandated by executive order. The current version is Executive Order Number One, which was issued January 12, 2001 (“EO One” or “the Order”). Section 5(d) of the Order requires the Board to answer questions relating to “real or reasonably-anticipated fact settings or circumstances.” The Board’s “Rules & Regulations” establish procedures for the request and issuance of advisory opinions. Opinions are intended to have prospective application only.

Those entitled to request an advisory opinion are (1) “Public Officials” as that term is defined by section 3 of the Order, (2) those responsible for appointing or supervising a Public Official, (3) Agency heads (which term includes the chair of each covered board), and (4) legal counsel for covered Agencies or boards.

The Board’s rules establish the procedure for issuing advisory opinions. First, the Board’s Executive Director drafts a preliminary advisory opinion which is reviewed by the Board Chairman. After incorporating the Chairman’s comments or suggestions, 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. All interested parties are notified of the final result.

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.

All advisory opinions, both preliminary and final, are based upon the particular facts presented and issues raised in the specific request for an advisory opinion. As such, the scope of each opinion is limited to the request made and should only serve as a recommendation to the particular parties involved. They may, however, serve as a general guide to other individuals similarly situated.

Did you forget to update your Statement of Economic Interest by

May 15?

If you have not had any material changes since your last filing, you may use the new No-Change Form (“Short Form”). Be sure to sign whichever statement you use, have it notarized, and return it to the Board. But do it

NOW!