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Volume 7, Issue 5

June 2004

"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

This issue of our newsletter once again focuses on recent advisory opinions issued by the Board. The three opinions reported in this issue were approved by the Board at its June 16, 2004, meeting in Raleigh. Until reviewed and approved by the full Board, opinions are "preliminary." They may, however, be relied upon until finally resolved.

Advisory opinions are one of the most useful tools available to Public Officials to help them understand and comply with Executive Order Number One as they perform their public duties.

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.

Perry Y Newson, Executive Director



ETHICS EDUCATION ***"Have Order, Will Travel"***

We are once again able to travel outside of the Raleigh area to make basic ethics education and awareness presentations. If your board or agency would like such a presentation, please call the Board's offices to make the necessary arrangements.

In addition, Board staff is always available for telephone consultations on conflict of interest questions.

"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

"Advisory Opinions" on the Web

In order to make the Board's advisory opinions more accessible to Public Officials and other interested parties, all opinions from January 1998 forward, select older opinions, and other related information are now available on the Board's web site.

In addition to all "recent" and other select opinions, a "*Comprehensive Index*" of most advisory opinions issued by the Board since its inception in 1977 is now available. This index is arranged alphabetically by general topic, issue, or organization/entity, as appropriate. Related topics are cross-referenced as much as possible. Researchers can identify and examine opinions addressing a particular issue or relating to a covered board or commission.

A "*Topical Index*" is also available. It is organized according to common issues or recurring ethical themes (for example, "Conflict of Interest," "Gifts," and "Employer-Employee Relationships"), and includes summaries of select opinions.

These and other indices will be updated periodically as the Board issues new opinions.

Have you updated your Statement of Economic Interest this year?

All covered Officials must file an updated Statement by May 15 **each year**. See section 9 (b) of the Order. If you have any questions relating to the Statement, please call the Board's offices at 733-2780 and ask for Millie Donavant

Board News

Administrative Officer Retires

On September 1, 2004, something will happen that hasn't happened in the 27-year history of the Board of Ethics: the Board will be without the services of one Mildred M. "Millie" Donavant. It will truly be an historic occasion in the worst sense. No one associated with the Board can remember a time without Millie simply because there hasn't been one. She was there in 1977 when then-Governor Hunt created the Board. She was there when executive director and attorney positions were eliminated, leaving her as the sole staff support for the Board. She was there when the Board was revived amid controversy and once again restored to a position of prominence and influence. Rarely has one individual become so identified with the public entity he or she serves. Rarely has one served so conscientiously and so well.

In recognition of her 33 years with State government, Chairman George Bason and Sandra Johnson, the Board's first executive director and attorney, presented Millie with the Governor's "Order of the Long Leaf Pine" award at the Board's June 16 meeting. A copy of her nomination is attached to this newsletter.

While we hate to see her go, we all wish Millie the very best in her retirement.

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.

RECENT ADVISORY OPINIONS

AO-03-002 (January 8, 2004): A member of the North Carolina Private Protective Services Board (“PPSB”) inquired about the permissible degree of involvement between covered Public Officials and related trade associations under Governor Easley’s Executive Order Number One (“EO One” or “the Order”). The PPSB administers the licensing, education, and training for the private protective services professions in North Carolina. The North Carolina Association of Private Investigators (“NCAPI” or “the Association”) is a trade association which provides continuing education and lobbying services and sometimes applies directly to the PPSB for legislative or regulatory changes relating to the profession. It has three classes of membership: active, associate, and honorary. Honorary members are recommended by the Membership Committee and must be approved by the Board of Directors. They are deemed to have performed exemplary services for or shown special interest in the field of private investigation. The annual membership fee is \$50 for renewing active members and \$75 for new members. Honorary members do not have to pay annual dues.

OPINION: The requester’s first question dealt with *disclosure* of NCAPI *membership*, both active and honorary, on the Board of Ethics’ (“BOE” or “the Board”) Statement of Economic Interest (“SEI”) form. Because a close association with an organization or group raises conflict and appearance of conflict issues, the Board concluded that PPSB members should reveal their NCAPI membership in this situation, particularly if they are “honorary” members in that organization. Depending on the nature of the relationship, which must always be examined on a case-by-case basis, this information can be provided in question 6 on directorships or the “catch-all” question, number 16. However, because of the ambiguity of the SEI form in this context and statements about “mere membership” in earlier advisory opinions, the Board did not feel that a member’s failure to disclose NCAPI membership on earlier SEI forms was an “ethical violation.” They were encouraged to disclose this information at the earliest opportunity.

The Board then addressed the remaining questions by setting out general principles as guidance for prospective conduct in this and other contexts. The issue of “honorary memberships” in trade associations was a question of first impression for the Board. After reviewing the basic rules of conduct as set out in section 7 of the Order, the Board reiterated that it is *not* an impermissible conflict of interest for a Public Official to merely *serve* on a non-public body, like an advocacy organization or trade association, as well as a covered public board. The Board has long found that the governors’ ethics orders do *not* prohibit participation in other professional activities. In many cases, it is expected or even required.

Concerning trade associations in particular, the Board has stated,

Membership in or involvement with related trade associations does not *per se* create an impermissible conflict of interest or the appearance of conflict, but it does create a potential conflict of interest, and Public Officials must be very careful when matters pertaining to or proposed by such associations come before the public body on which they sit. See AO-00-004 (March 20, 2000). While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, “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.

Furthermore, the Board reiterated that there are different conflict of interest/disqualification standards in different situations, namely when a public body/Official is acting in a quasi-judicial versus a quasi-

legislative capacity. A higher standard of disqualification is applied in quasi-judicial proceedings (like individual licensing decisions or disciplinary actions) than quasi-legislative matters (like most rulemaking). After tracing the recent history of the Board's decisions in this area, the Board concluded that it is not *per se* improper for a PPSB member to be an active, associate, or honorary member of the NCAPI. Nor would membership on the Association's governing body be prohibited. The degree of association or involvement with the NCAPI would directly impact the degree to which the member could be involved in proceedings involving the Association and its members. "Mere" membership would not normally constitute the type of "personal relationship" contemplated by section 7 (b) (2) of the Order; a leadership or policy-making position would. An "honorary" membership was deemed to fall somewhere in the middle and needed to be addressed on a case-by-case basis.

Unless there is some personal or other connection between the PPSB member and an NCAPI member, the PPSB member may generally participate in both contested cases (quasi-judicial decisions) and rulemaking (quasi-legislative) proceedings involving a fellow NCAPI member. The PPSB member should *not* participate in matters involving Association members with whom he/she has had personal involvement, worked on a specific project, or has a significant personal or professional relationship. Nor should a member be involved in any matter where he/she has a specific, unique, and substantial interest in the outcome.

If the Association itself is a party to a proceeding before the PPSB, the relevant inquiry is the PPSB member's connection to or degree of association with *the Association*. If a "mere" member, the PPSB member does not have a "personal relationship" with the Association and may generally participate in both quasi-legislative and quasi-judicial proceedings. If serving in a leadership or policy-making position in the Association (for example as an officer or director), the PPSB member should not participate in either a contested case (quasi-judicial proceeding) involving the NCAPI or a rulemaking proceeding (quasi-legislative proceeding) where the NCAPI is the petitioner. He or she may generally participate in rulemaking proceedings where either the NCAPI or a member merely comments on a proposed rule.

"While the Board of Ethics has stated that the ethics order does not intend to keep appointees from participating in professional activities, 'the more involved board members are with persons they are regulating, the greater the risk of conflict of interest while performing public duties.' "

For reasons outlined in the opinion, the Board felt that while an "honorary" NCAPI membership appeared to fall somewhere between a "mere" (active) membership and a leadership position in the organization, it was a special privilege or benefit bestowed upon the recipient by the Association. It was not a situation where an individual merely "signs up," perhaps anonymously, and pays dues. In order for someone to obtain an honorary membership in the Association, there clearly has to be a special relationship between the two. However, the Board felt that whether that special relationship constituted the type of "personal relationship" contemplated by section 7 (b) (2) of the Order was impossible to determine in the abstract and had to be determined on a fact-specific, case-by-case basis. More information about the particular honorary member and *why* he or she was chosen for that honor was needed. It could be for extensive involvement with the Association itself, *or* it could be for having "shown special interest in the field of private investigation" independent of the Association. If the former, the member would more closely resemble one in a leadership position in the organization; if the latter, he or she would be more akin to a "mere" member.

Addressing some specific sub-questions, the Board stressed that members should always serve the best interest of the public, not a trade association. They should not "represent" any particular association or group or appear to be trade association "puppets." Likewise, the Board cautioned members not to run afoul of the provision prohibiting the improper disclosure of confidential information, which could have legal consequences as well.

RECENT ADVISORY OPINIONS (continued)

AO-04-001B (June 22, 2004) (supersedes AO-04-001A): The Chairman of the Commission for Health Services (“CHS” or “the Commission”) requested an advisory opinion on various conflict of interest/appearance of conflict questions related to a Commission member’s private consulting work for a company petitioning the Commission for approval of its wastewater system. In order to address time-sensitive issues, the Chairman agreed to issue a temporary, interim opinion addressing the matters of the most immediate concern. The Board did so on March 5, 2004 (AO-04-001A). As contemplated at that time, a preliminary advisory opinion was issued on May 6, 2004 (AO-04-001B), which superceded and replaced interim opinion AO-04-001A. However, preliminary advisory opinion AO-04-001B did not address all of the questions posed in the original request. Instead, the Board Chair and Executive Director answered questions 1 through 3 and presented question 4 to the full Board pursuant to section VI (C) (2) of the Board’s Internal Operating Procedures (“Procedures”). The Board met on June 16, 2004, and considered preliminary advisory opinion AO-04-001B and question 4 of the initial request. All parties attended the meeting and provided extensive input to the Board. The Board approved preliminary advisory opinion AO-04-001B with regard to questions 1 through 3 of the initial request. In addition, the Board approved the preliminary determination as to rulemaking with a clarification of the scope of recusal required in “general rulemaking.” Finally, the Board tabled question number four for future resolution.

The Commission was created with the authority to adopt rules to protect and promote the public health and implement the public health programs administered by the Department of Health and Human Services (“DHHS” or “the Department”). As with many covered boards, the Commission has several members who must fill “designated seats”: members who must come from a certain background or profession. One such member must be *either* a registered engineer experienced in sanitary engineering *or* a soil scientist. The gubernatorial appointee who is the subject of this opinion is a licensed soil scientist and an expert on wastewater systems. He was appointed to the Commission in April 2002. One of his clients is a wastewater systems manufacturer seeking Commission approval of its product as “an accepted wastewater system” pursuant to a recently-enacted law. Pursuant to this statute, the Commission makes the decision on whether to approve the manufacturer’s product as an accepted wastewater system. While it was initially filed as a petition for rulemaking, the manufacturer’s request was converted to a petition for approval as an accepted wastewater system. This is a very unique situation for the Commission in that most of what it does is traditional rulemaking. All parties agreed that the past and current situation is highly unusual.

The member in question was hired by the petitioner in August 2003 to assist it in regulatory matters *outside of North Carolina*. He continues to work with the petitioner on several out-of-state matters and states that he expects his relationship and work for the petitioner will be ongoing for the foreseeable future. In late October or early November 2003, the member learned that his client would be petitioning the Commission in the present matter. This client asked the member to work on the specific petition at issue here. The initial petition for rulemaking was filed on October 31, 2003, and first came before the Commission at its November 14, 2003, meeting, at which time the Commission member recused himself from consideration of the petition because of work done for the applicant-company. The Commission chair appointed a sub-committee to review the petition, consult with staff, and report back to the full Commission at its February 2004 meeting. Because the member in question had recused himself from voting on the petition due to his employment with the applicant, the chair intentionally did not include this member on the advisory sub-committee.

At the first meeting of the advisory sub-committee, the Commission member appeared as a consultant for the applicant. After clearly disclosing his consultant role, he sat at the table with company representatives, he asked and answered substantive questions, he talked about various technical issues, he had direct discussions with the two sub-committee members, and he made recommendations. In short, he was a full participant in the meeting on behalf of his employer, the applicant. No objections to his involvement were raised before, during, or immediately after such committee meeting. Several weeks after the first sub-committee meeting,

Commission counsel expressed concern about the member's participation in the sub-committee meetings. Counsel reviewed various Board of Ethics opinions and determined that the member's actions on behalf of the manufacturer might pose a potential conflict of interest or at least the appearance of a conflict. Counsel discussed his concerns with the Commission member, and the member agreed to refrain from any discussions with sub-committee members and DHHS staff regarding his client's petition.

At the next sub-committee meeting on the petition, the Commission member again appeared with the company and its attorneys. In discussions with Commission counsel before the meeting began, the member advised that he would not participate in the discussions or do anything that might be construed as attempting to influence the sub-committee members or department staff. The member said that he was only there to advise the attorneys for his client. Counsel reiterated his position that the member's attendance in his role as a private consultant might constitute a conflict of interest or appearance of a conflict. The member indicated that he did not believe his mere presence should be interpreted as influencing the sub-committee and that he did not believe that the Board of Ethics' advisory opinions prohibited attendance at the meetings. The member remained at the sub-committee meeting and sat with the company representatives behind the attorneys for the applicant-company. He did not speak to or participate in any discussions with the sub-committee members or staff regarding the petition during the meeting. He did discretely advise the attorneys for the company during the meeting. He has not attended any subsequent sub-committee meetings.

OPINION: The Board first stated that in situations such as this, there needs to be immediate and full disclosure of the employment relationship between the Public Official and the individual or entity appearing before the Official's public body. At the *latest*, this would be when the Official is hired or retained by the petitioner or applicant or when the Official knows or should know that his or her existing client will petition or appear before the Official's public body. Depending on the particular situation, the Official might need to disclose serious discussions or negotiations of employment with an individual or entity appearing before or intending to appear before the Official's public body on a particular matter.

Second, the Official needs to take extreme care not to "use or disclose *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." Section 7 (a) (4) of the Order (emphasis added). A "personal financial interest" would obviously include one's role as a paid consultant for an applicant appearing before an Official's particular board or commission. This includes, but is not limited to, the improper use or disclosure of confidential information.

Third, the member in question should totally and absolutely recuse himself from the decision-making process, wherever that might take place. When it comes to the ultimate decision-making at the full Commission meeting, the member obviously should not vote or otherwise take any action on his client's petition. Moreover, he should not discuss it with or answer questions from other Commission members or staff. Finally, he should not openly advise his employer's attorneys, technical experts, or other representatives at the Commission meeting. The Board's directives are also clear when it comes to trying to do indirectly what one is prohibited from doing directly (sometimes referred to as "lobbying" in the Board's opinions). Thus the Commission member could not attempt to influence fellow Officials or staff to vote or act a certain way when he himself was prevented from participating due to a conflict or appearance of conflict. This prohibition is not limited to a particular location (e.g., the meeting room) and would include trying to influence a decision through someone else (like an agent or proxy).

The Board then proceeded to address questions 1 through 3 of the initial request. Questions 1 and 3 asked, in essence, the extent to which the basic rules stated above apply to the Commission member here while he is serving on a committee, specifically a self-contained ad hoc advisory sub-committee comprised solely of covered Public Officials. While the Board has not issued a comprehensive opinion dealing with the Order's applicability to sub-committees, it has given seemingly contradictory answers to questions involving advisory bodies. After reviewing some of these earlier decisions and noting the unique factual and procedural posture of this case, the Board stated that the member in question should not participate in,

influence, or attempt to influence the efforts of the Commission's ad hoc sub-committee dealing with his client's petition. This would include lobbying fellow Commission/sub-committee members or staff, or openly advising his employer's attorneys, technical experts, or other representatives at sub-committee meetings. However, the Board did not find that the member was prohibited from merely attending such sub-committee meetings.

Question number 2 sought further definition of the scope of a Public Official's recusal in quasi-judicial decision-making. The Board reiterated that the Commission member should totally and absolutely recuse himself from the decision-making process, wherever the decision-making might take place. Everyone, including the member in question, agreed that he should not vote or otherwise take any direct action on his client's petition. Moreover, he should not directly or indirectly attempt to influence the Commission's decision. This has been interpreted to mean that he should not discuss his client's petition with other Commission members or staff. This included such discussions at or surrounding sub-committee meetings.

The Board also offered prospective guidance relative to the scope of recusal in rulemaking. Because of the unique, almost hybrid nature of the current proceeding before the Commission as well as its unusual procedural history, and because the Commission member here has a specific, substantial, and readily identifiable financial interest in all matters directly relating to the petition, the Board felt that he should not participate in any related rulemaking proceedings. This would include any rulemaking petitions by his client's competitors and general rulemaking related to innovative and accepted wastewater systems that could affect the financial interests of the member's client or the client's competitors.

As stated above, the Board tabled question number 4 dealing with whether the Commission member could continue to work for the petitioner in this unique situation.

AO-04-002 (April 26, 2004): The Rules Review Commission ("RRC" or "the Commission") asked whether separate lawsuits filed against it by two state agencies (the Pharmacy Board and the Environmental Management Commission) created a conflict of interest which would prevent the RRC from acting on other rules promulgated by those same agencies while those lawsuits were pending. The EMC and four environmental groups sued the RRC after the RRC rejected the EMC's proposed stormwater rules. In addition to various legal challenges relating to specific rejection of the stormwater rules, the plaintiffs also raised constitutional objections to the RRC. An earlier lawsuit by the Pharmacy Board contained similar challenges. None of the lawsuits contained any allegations of conflict of interest or "unethical" conduct by RRC members. The EMC lawsuit did not even name RRC members individually.

OPINION: Executive Order Number One and the Board of Ethics cover individuals, not the public bodies on which they serve. As has been stated many times, the Board has limited jurisdiction. It was never contemplated that the Board would generally involve itself in telling boards and commissions how to conduct their substantive business absent a legitimate conflict of interest issue. Even then, the Board would not try to prohibit the commission from doing its statutorily-mandated job; rather it would address the situation from the perspective of whether individual Public Officials should participate in the decision-making process given their particular situations (*i.e.*, their personal, familial, or financial bias or conflict). With no allegations of conflict of interest against any RRC member, the Board determined that a lawsuit, in and of itself, against the RRC did *not* create a conflict of interest or the reasonable appearance of conflict under Executive Order Number One which would prevent the Commission from performing its statutorily-mandated function, whatever that is determined to be. The RRC could continue to determine the validity of rules promulgated by either the EMC or the Pharmacy Board while current litigation against the RRC initiated by those agencies was pending.

Nomination of Millie Donavant for the “Order of the Long Leaf Pine”

With the wholehearted approval and support of the Chairman of the North Carolina Board of Ethics, I would like to nominate Mildred M. “Millie” Donavant to receive the Order of the Long Leaf Pine. Millie has been with State government for over 33 years, and she has loyally served the Board of Ethics for 27 of those years. I can think of no one more deserving of this great honor.

As the sole staff person for the Board of Ethics for most of her career, Millie Donavant has steadfastly and unwaveringly upheld the highest ethical standards and protected the public interest day in and day out for over a quarter of a century. She has demanded that covered Public Officials, both the ordinary and the famous, Democrat and Republican, comply with often onerous and always resented financial disclosure requirements; she has issued formal and informal advisory opinions that have shaped the way Public Officials conduct the public’s business; and she has investigated and helped resolve ethics complaints in often controversial situations.

As impressive as Millie’s accomplishments are, they are even more remarkable when you put them in context. Millie had the quintessential modest beginning. She often talks of the poverty of her youth in rural North Carolina. As soon as she could, she set out into the working world armed only with a high school education and the determination to succeed on her own. Her natural intelligence and extraordinary work ethic carried her further than anyone would have deemed possible.

When she joined the Board of Ethics soon after its creation by then Governor James B. Hunt in 1977, she knew absolutely nothing about public service ethics, conflict of interest, financial disclosure, legal research, or even computers. (They didn’t even have personal computers then.) Primarily through self-education and dogged persistence, she mastered these and many other related areas. It was a good thing. In a relatively short time the director’s and secretary’s positions were eliminated, leaving only Millie to support the Board and administer ethics orders under two governors spanning six separate terms. She was basically on her own. It was during this long period of time that she had to deal with recalcitrant filers and powerful Public Officials.

Millie has always articulated high ideals and inspired others to join in their pursuit. Ever since I have known her, Millie has been a tireless advocate for public service ethics without being an irrational zealot. She has never wavered from the goal of treating every person fairly and equally within the bounds of relevant ethics rules. An Official’s social status or political stature did not matter.

Millie is the embodiment of great achievement through quiet, steady, persistent commitment to not only a difficult job but also an ideal. She believes in public service ethics. She has lived it for over 27 years. In one way or another she has touched literally tens of thousands of Public Officials in North Carolina. Many have been guided by her efforts without even knowing it. Who is to say how many embarrassing or worse ethics scandals she has prevented with her advice or warnings? It is entirely possible there would not even be an effective, respected Board of Ethics were it not for Millie Donavant. She nurtured it, cared for it, and brought it through its dark period into what will hopefully be its bright and lasting future. The Board and the people of North Carolina owe Millie a tremendous debt of gratitude. The Order of the Long Leaf Pine is a fitting reward for such a long and distinguished career in public service.

Perry Y. Newson, Executive Director
NC Board of Ethics