

ADMINISTRATION OF GOVERNMENT GENERALLY: WORKFORCE
TRANSITION ACT OF 1995.

EDUCATIONAL INSTITUTIONS: GENERAL PROVISIONS.

Separate, nonprofit foundation organized for charitable, scientific and educational purposes to benefit state university is not state agency or institution for purposes of Act.

The Honorable Jean W. Cunningham

Member, House of Delegates

September 3, 1996

You ask whether a public university foundation is an "agency or institution of the Commonwealth" for the purposes of § 2.1116.23(E) of the *Code of Virginia*, a portion of the Workforce Transition Act of 1995¹ (the "Act").² If so, you next ask whether an individual receiving transitional severance benefits would lose those benefits should he or she become employed by such a foundation. Finally, you ask what penalties and/or remedies would apply to an individual who takes early retirement under the Act and is immediately employed by a state university foundation.

You relate that a state employee who took the early retirement plan offered by the State seeks employment by a state university foundation.³ You advise that the Act precludes such retiree's reemployment by any agency or institution of the Commonwealth while he is receiving transitional severance benefits.

A 1985 opinion of the Attorney General recognizes that separate, nonprofit foundations organized for the benefit of state universities "need only comply with the laws that govern such corporations."⁴ Other prior opinions of the Attorney General recognize that tax-exempt foundations organized for the purposes of administering endowments and providing other

financial management arrangements for state universities are not a part of the universities.⁵

Private foundations established to support the educational activities of state institutions of higher education are not subject to a governor's executive order directing investments by agencies and institutions of the state.⁶ A 1982 opinion of the Attorney General concludes that boards of visitors of various state colleges and universities may hold and invest funds independently of the State Treasurer.⁷

Finally, a 1986 opinion of the Attorney General concludes that "[t]here exists no legislation in Virginia authorizing the State to audit private funds administered by independent foundations supporting the public institutions of higher education in the Commonwealth. Likewise, there exists no such authority for the State to supervise foundation decision-making."⁸ That opinion notes that such foundations "are customarily established, with some exceptions, as independent corporations under the Virginia Nonstock Corporation Act," and, as such, are governed by that Act and "by their individual articles of incorporation and bylaws."⁹

Accordingly, I conclude that a separate, nonprofit foundation established for the benefit of a state university is not an "agency or institution of the Commonwealth" for the purposes of § 2.1116.23(E).¹⁰

¹Sections 2.1116.20 to 2.1116.26.

²Section 2.1116.23(A) provides for transitional severance benefit payments from the date of involuntary separation based on the number of years of state service. Section 2.1116.23(B) requires the terminating agency's payroll department to compute transitional severance benefits. Section 2.1116.23(E) provides for the cessation of "[t]ransitional severance benefit payments if a terminated employee is reemployed or hired in an individual capacity as

an independent contractor or consultant by any agency or institution of the Commonwealth during the time he is receiving such payments."

³You do not specify which state university foundation will employ the retiree. Furthermore, you do not identify the purpose(s) for which the foundation was formed. Therefore, I shall assume that the state university foundation is not an agency of the institution, but is a separate, nonprofit corporation chartered under the laws of the Commonwealth and organized solely for charitable, scientific and educational purposes to benefit the university. I shall assume also that such foundation is permitted to engage in all lawful activities incidental to its stated purpose(s).

⁴1984-1985 Op. Va. Att'y Gen. 46, 47.

⁵See Op. Va. Att'y Gen.: 1984-1985 at 45 (income from proposed gift to private tax-exempt foundation's Eminent Scholars Fund at University of Virginia is eligible for state matching funds, to be applied to salary of eminent scholar); 1977-1978 at 26, 26 (endowment which, when donated to institution or its foundation, was created for purpose other than to attract and retain eminent scholars, or was unrestricted, does not qualify for matching appropriation, even though institution may use funds to attract and retain such scholars); 1974-1975 at 14, 14 ("while one institution may want its own tax exempt foundation to administer its endowment, another may choose to rely on one or more other types of financial management arrangements for such purpose").

⁶See 1990 Op. Va. Att'y Gen. 1, 5 n.2.

The state policy toward such independent endowments is set forth in § 239.2. "[I]n measuring the extent to which the Commonwealth shall finance higher education in Virginia, the availability of the

endowment funds and unrestricted gifts from private sources of institutions of higher education received by such institutions shall not be taken into consideration in, nor used to reduce, state appropriations or payments, but such funds shall be used in accordance with the wishes of the donors thereof to strengthen the services rendered by these institutions to the people of the Commonwealth." Section 239.2(2).

⁷1982-1983 Op. Va. Att'y Gen. 89.

⁸1986-1987 Op. Va. Att'y Gen. 54, 55.

⁹*Id.* at 54.

¹⁰Since I answer your first inquiry in the negative, it is unnecessary to address your last two inquiries.