

**OP. NO. 03-041**

**EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. –  
ESTABLISHMENT OF CHARTER SCHOOLS.**

**ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT  
CONFLICT OF INTERESTS ACT.**

**Authority for public charter school to contract with local school board, institution of higher education, or third party for use of building and grounds owned by limited liability company in which participant in charter school application has ownership interest. No authority for Board of Education to grant waiver should proposed contractual arrangement or individual's ownership interest in limited liability company violate Conflict of Interests Act.**

The Honorable John A. Rollison, III  
Member, House of Delegates  
August 19, 2003

#### **Issues Presented**

You ask whether § 22.1-212.6(C) permits a school system to enter into a contract with a limited liability company formed by a participant in an application for a charter school. You also ask whether it would be a violation of the State and Local Government Conflict of Interests Act for the individual to work for, and participate in the management of, the charter school while owning an interest in the limited liability company that will contract with the school board to provide a facility for the charter school. Lastly, you inquire whether the Board of Education may grant a waiver if the proposed arrangement between the school board, charter school and limited liability company violates the State and Local Government Conflict of Interests Act.

#### **Response**

It is my opinion that a public charter school is authorized to contract with a local school board, an institution of higher education, or a third party for the use of a building and grounds. You do not relate the specific contractual arrangements for the use of the building and grounds owned by the limited liability company, but nothing suggests that the public charter school is without authority to contract for such use. Although a participant in the charter school application has an ownership interest in the limited liability company, nothing suggests that the contemplated contracts will be anything other than agreements among distinct legal entities.

It is further my opinion that the facts are insufficient for me to determine whether the proposed contractual arrangement between the school board and the limited liability company, and the individual's ownership interest in the limited liability company violates the State and Local Government Conflict of Interests Act. If such a prohibition did exist, however, the public charter school laws do not authorize the Board of Education to grant a waiver.

## **Background**

You advise that a group of individuals have requested school board approval of an application for a public charter school. A participant in the charter school application occupies several roles with respect to the proposed school, serving as founder, president, headmistress, and member of the board of directors. As headmistress, the individual's responsibilities include financial accounting and reports. You relate that the individual has formed, and has an ownership interest in, a limited liability company that has purchased real estate on which will be constructed the building to house the public charter school. You also advise that, under the proposed arrangement, the school board will pay rent to the limited liability company for use of the building as a charter school.

## **Applicable Law and Discussion**

Sections 22.1-212.5 through 22.1-212.16 comprise the statutory scheme governing the establishment of charter schools ("public charter school laws"). Section 22.1-212.5(A) provides that public charter schools may be established in Virginia to

(i) stimulate the development of innovative programs within public education; (ii) provide opportunities for innovative instruction and assessment; (iii) provide parents and students with more options within their school divisions; (iv) provide teachers with a vehicle for establishing schools with alternative innovative instruction and school scheduling, management and structure; (v) encourage the use of performance-based educational programs; (vi) establish high standards for both teachers and administrators; and (vii) develop models for replication in other public schools ....

To encourage the innovative approaches for which public charter schools are created, the General Assembly has granted schools relief in § 22.1-212.6(B) from certain state and local requirements:

Pursuant to a charter contract and as specified in § 22.1-212.7, a public charter school may operate free from specified school division policies and state regulations, and, as public schools, shall be subject to the requirements of the Standards of Quality, including the Standards of Learning and the Standards of Accreditation.

An approved charter school application constitutes a contract between the public charter school and local school board, and it must address the scope of relief from state and local requirements.<sup>1</sup> Section 22.1-212.7 requires that a contract

reflect all agreements regarding the release of the public charter school from school division policies. Such contract ... shall reflect all

requests for release of the public charter school from state regulations, consistent with the requirements of subsection B of § 22.1-212.6. The local school board or relevant school boards,<sup>[2]</sup> on behalf of the public charter school, shall request such releases from the Board of Education.

You ask whether a waiver exists that would permit the proposed arrangement, whereby the school board will pay the limited liability company for the use of the building and grounds to be occupied by the public charter school. Section 22.1-212.6(C) permits a public charter school to contract with "a school division, the governing body of a public institution of higher education, or any third party for the use of a school building and grounds." Your query does not specify the precise nature of the contractual arrangements contemplated under this proposal. If the public charter school were to contract with the school division for the use of the building, such contract is expressly authorized under § 22.1-212.6(C).

Implied in your question is whether the limited liability company qualifies as a "third party" under § 22.1-212.6(C) if the public charter school were to contract with the company for the use of the building. I assume that the limited liability company you describe has been organized in accordance with the Virginia Limited Liability Company Act.<sup>3</sup> Section 13.1-1002 defines "limited liability company" as "an entity that is an unincorporated association that is organized and existing under [the Virginia Limited Liability Company Act]." The Supreme Court of Virginia has determined that

a limited liability company is an unincorporated association with a registered agent and office. It is an independent entity which can sue and be sued and its members are not personally liable for the debt or actions of the company. In contrast to a partnership, a limited liability company in Virginia is an entity separate from its members and, thus, the transfer of property from a member to the limited liability company is more than a change in the form of ownership; it is a transfer from one entity or person to another.<sup>[4]</sup>

The facts you provide do not suggest that the proposed contractual arrangement will be anything other than agreements among distinct legal entities. Accordingly, the facts presented do not demonstrate any impediment to such an arrangement among the public charter school, school board, and limited liability company.

You next ask whether the State and Local Government Conflict of Interests Act, §§ 2.2-3100 through 2.2-3127, is applicable to a charter school employee who owns an interest in a limited liability company that will provide a facility to the charter school. You believe that the General Assembly's intention in enacting the charter school laws was to relieve charter schools from as many regulations as possible.

The State and Local Government Conflict of Interests Act contains three types of restrictions on the conduct of state and local government officers and employees. First, the Act describes generally prohibited and unlawful conduct applicable to all state and local government officers and employees.<sup>5</sup> Second, the Act "proscribes certain conduct relating to contracts by state and local government officers and employees."<sup>6</sup> Third, the Act "proscribes certain conduct by state and local government officers and employees having a personal interest in a transaction."<sup>7</sup>

You have requested an opinion pursuant to § 2.2-505. I note that this opinion does not operate as a conflict of interests advisory opinion under § 2.2-3126. Section 2.2-3126(A)(3) authorizes the Attorney General to render advisory opinions to state officers and employees. Section 2.2-3126(B) authorizes Commonwealth's attorneys to render advisory opinions to local employees and officials. If a Commonwealth's attorney determines that a particular action would violate the conflict of interests laws, "the officer or employee affected ... may request that the Attorney General review the opinion. A conflicting opinion by the Attorney General shall act to revoke the opinion of the attorney for the Commonwealth."<sup>8</sup> A state or local officer or employee shall not be prosecuted for a knowing violation of the conflict of interests laws if the alleged violation results in his good faith reliance on a written opinion of the Attorney General or Commonwealth's attorney.<sup>9</sup> Consequently, an opinion rendered pursuant to § 2.2-505 does not operate as an opinion having the same effect as a conflict of interests advisory opinion rendered pursuant to § 2.2-3126 and should not be relied upon for such purposes. All conflict of interests advisory opinions are fact-dependent, and such opinions are limited to the facts that are fully disclosed.<sup>10</sup>

Employees of public charter schools are deemed employees<sup>11</sup> of the local school board granting the charter.<sup>12</sup> Accordingly, public charter school employees are subject to the requirements of the State and Local Government Conflict of Interests Act. You indicate that the individual intends to be the president, headmistress, and a member of the board of management of the school. As an employee of the charter school, the individual is deemed to be an employee of the local school board granting the charter and is, therefore, subject to the Act.

Section 2.2-3109(A) provides that "[n]o ... employee of any governmental agency of local government shall have a personal interest in a contract with the agency of which he is an ... employee other than his own contract of employment." Section 2.2-3101 defines "personal interest in a contract" as "a personal interest that an ... employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business that is a party to the contract." Under the Act, a "business" includes "a corporation, partnership, sole proprietorship, firm, enterprise, franchise, association, trust or foundation, or any other individual or entity carrying on a business or profession, whether or not for profit."<sup>13</sup> A limited liability company is an unincorporated association organized and existing under the Virginia Limited Liability Company Act.<sup>14</sup> A limited liability company, therefore, is a "business" within the meaning of the State and Local Government Conflict of Interests Act.

Section 2.2-3101 defines "personal interest" as

a financial benefit or liability accruing to an ... employee or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership

interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of (i) or (iv) above.

As an "employee" subject to the Act, § 2.2-3109(A) would prohibit the individual from having a "personal interest in a contract" with the local school board. Your letter suggests that the school board and the limited liability company will have a contract for the lease of the school building and grounds. Assuming that is the case, the individual would have a prohibited interest in the contract if her interest in the limited liability company meets any of the criteria in the Act's definition of "personal interest." You do not indicate the level of the individual's ownership interest in the limited liability company. Consequently, I am without sufficient facts to determine whether a prohibited personal interest may exist. I note, however, that § 2.2-3110(A)(1) may apply to this situation. Section 2.2-3110(A) provides that the prohibited conduct relating to contracts shall not apply to:

1. The sale, lease or exchange of real property between an ... employee and a governmental agency, provided the ... employee does not participate in any way as such ... employee in such sale, lease or exchange, and this fact is set forth as a matter of public record by the governing body of the governmental agency or by the administrative head thereof[.]

I am without sufficient facts to determine whether § 2.2-3110(A)(1) applies in this circumstance.

You also inquire whether the public charter school laws, which authorize relief for public charter schools from certain state requirements, override a prohibited conflict of interests. The applicable statutes, §§ 22.1-212.6(B) and 22.1-212.7, concern relief given by the Board of Education from "state regulations." The public charter school laws do not define the term "regulation"; however, its ordinary meaning is consonant with that contained in the Administrative Process Act, which defines "regulation" as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic

laws."<sup>15</sup> The provisions of the State and Local Government Conflict of Interests Act are not "regulations" within the ordinary meaning of the term. It is reasonable to conclude that the Board of Education has the power to exempt public charter schools from the requirements of its own regulations, but nothing in the public charter school laws suggests that the Board may waive the requirements of state law, let alone state laws unrelated to the Board's authority.

### **Conclusion**

Accordingly, it is my opinion that a public charter school is authorized to contract with a local school board, an institution of higher education, or a third party for the use of a building and grounds. You do not relate the specific contractual arrangements for the use of the building and grounds owned by the limited liability company, but nothing suggests that the public charter school is without authority to contract for such use. Although a participant in the charter school application has an ownership interest in the limited liability company, nothing suggests that the contemplated contracts will be anything other than agreements among distinct legal entities.

It is further my opinion that the facts are insufficient for me to determine whether the proposed contractual arrangement between the school board and the limited liability company, and the individual's ownership interest in the limited liability company violates the State and Local Government Conflict of Interests Act. If such a prohibition did exist, however, the public charter school laws do not authorize the Board of Education to grant a waiver.

<sup>1</sup>Va. Code Ann. § 22.1-212.7 (LexisNexis Supp. 2002).

<sup>2</sup>"[A] public charter school operated by two or more school boards and chartered directly by the participating school boards" is defined in § 22.1-212.5(B) as a "regional public charter school."

<sup>3</sup>Va. Code Ann. §§ 13.1-1000 to 13.1-1073 (Michie Repl. Vol. 1999 & LexisNexis Supp. 2003).

<sup>4</sup>Hagan v. Adams Prop. Assocs., 253 Va. 217, 220, 482 S.E.2d 805, 807 (1997) (citations omitted) (holding that transfer of real property from its owners to limited liability company in which owners were members was "sale" entitling realtor to commission on gross sales amount).

<sup>5</sup>See Va. Code Ann. § 2.2-3103 (LexisNexis Repl. Vol. 2001).

<sup>6</sup>Section 2.2-3105 (LexisNexis Supp. 2003).

<sup>7</sup>Section 2.2-3111 (LexisNexis Repl. Vol. 2001).

<sup>8</sup>Section 2.2-3126(B) (LexisNexis Supp. 2003).

<sup>9</sup>Compare § 2.2-3121(A) and (B) (LexisNexis Supp. 2003) (providing that state officer or employee, or local officer or employee, shall not be prosecuted for knowing violation of State and Local Government Conflict of Interests Act if

alleged violation resulted from good faith reliance on written opinion of Attorney General, or Commonwealth's attorney, respectively).

<sup>10</sup> *Id.* (noting that written opinions of Attorney General and Commonwealth's attorneys are made "after a full disclosure of the facts").

<sup>11</sup> "‘*Employee*’ means all persons employed by a governmental ... agency...." Section 2.2-3101 (LexisNexis Supp. 2003). "‘*Governmental agency*’ means each component part of the legislative, executive or judicial branches of state and local government, including ... each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers of duties." *Id.*

<sup>12</sup> Section 22.1-212.13(A) (Michie Repl. Vol. 2000).

<sup>13</sup> Section 2.2-3101.

<sup>14</sup> Section 13.1-1002 (LexisNexis Supp. 2003).

<sup>15</sup> Section 2.2-4001 (LexisNexis Supp. 2003).

[Back to August 2003 Index](#)