



COMMONWEALTH of VIRGINIA

Office of the Attorney General

Kenneth T. Cuccinelli, II
Attorney General

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900 East Main Street
Richmond, Virginia 23219
804-786-2071
FAX 804-786-1991
Virginia Relay Services
800-828-1120
7-1-1

The Honorable Dave Nutter
Member, House of Delegates
Post Office Box 1344
Christiansburg, Virginia 24068

Dear Delegate Nutter:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issues Presented

You first ask whether an employee of a school division can seek election to and serve on the corresponding school board of the governing body while still employed by the school board. You also inquire whether a classified state employee who is employed by the Department of Health, whose duties do not include radon testing, can operate a consulting business that specializes in radon testing.

Response

It is my opinion that an employee of the local school division may not serve on the school board of which she is an employee. It is further my opinion that an employee of the Department of Health may operate a consulting business that specializes in radon testing, as long as the employee does so during nonworking hours in a manner that does not conflict with his responsibilities to the Commonwealth, and the business does not conflict with any Department of Health policies governing outside employment.

Applicable Law and Discussion

First, § 22.1-57.3:1(G) provides that “[n]o employee of a school board shall be eligible to serve on the board with whom he is employed.” Employees of a school division are considered employees of the school board.¹ The plain language of this provision would preclude an employee of the school board from serving on the school board.

Second, as an “employee” of a state “governmental agency,”² the Department of Health employee about whom you inquire³ is subject to the State and Local Government Conflict of Interests Act⁴ (the

¹See, e.g., *Tazewell Cty. Sch. Bd. v. Gillenwater*, 241 Va. 166, 167, 400 S.E.2d 199, 199 (1991) (teacher an employee of the school board); see also 2008 Op. Va. Att’y Gen. 43 (school bus driver an employee of the school board).

²“Employee” is defined as “all persons employed by a governmental or advisory agency, unless otherwise limited by the context of its use.” VA. CODE ANN. § 2.2-3101 (2008). “‘Governmental agency’ means each component part of the ... executive ... branch[] of state ... government, including each ... board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.” *Id.*

“Act”). The Act provides minimum rules of ethical conduct for state and local government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees;⁵ (2) it restricts the ability of such officers and employees to have personal interests in certain contracts with their own or other governmental agencies;⁶ and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest.⁷

There is no general prohibition against an employee of the Commonwealth engaging in part-time, outside employment as long as such activities do not conflict with or affect his employment with the Commonwealth and are consistent with the employing agency’s policies concerning outside employment.

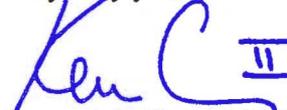
Based on the facts you present, the employee’s official duties do not include radon testing. Therefore, there does not appear to be any overlap between official duties and private business. You do not indicate that the employee’s business provides radon testing for the Department of Health, or for other state agencies. Assuming that is the case, the restrictions governing contracts between the employee and the agency for which he works, and other state agencies, do not come into play.⁸ To the extent the employee’s official duties would call for him to participate in matters affecting the radon testing industry, the employee might have a “personal interest” in such a transaction and would have to disqualify himself from participating in such transactions.⁹

Conclusion

Accordingly, it is my opinion that an employee of the local school division may not serve on the school board. It is further my opinion that an employee of the Department of Health may operate a consulting business that specializes in radon testing, as long as the employee does so during nonworking hours in a manner that does not conflict with his responsibilities to the Commonwealth or with any Department of Health policies governing outside employment.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II
Attorney General

³“[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts [the] State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth.” Section 2.2-3100 (2008).

⁴VA. CODE ANN. tit. 2.2, ch. 31, §§ 2.2-3100 to 2.2-3131 (2008 & Supp. 2010).

⁵See § 2.2-3103 (2008).

⁶See § 2.2-3106(A), (B) (2008).

⁷See § 2.2-3112(A)(1) (2008).

⁸See §§ 2.2-3106; 2.2-3112(A)(1).

⁹Section 2.2-3112(A)(1) (requiring that an employee disqualify himself from participating in a transaction in which the employee has a personal interest).