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VIRGINIA
CONFLICT OF INTEREST AND
ETHICS ADVISORY COUNCIL

MEMORANDUM

To: Virginia Conflict of Interest and Ethics Advisory Council

From: G. Stewart Petoe, Executive Director

Date: November 23, 2021

Re: Formal Advisory Opinion 2020-F-001 Personal Interest in a Transaction Exists When Officer of State Agency Provides Volunteer Services to an Organization

ISSUE PRESENTED

You ask about a situation where an officer of a state agency is presented with a grant application submitted by a nonprofit organization on whose board he serves. The officer did not play any part in the drafting or submission of the application. You ask whether the officer would be deemed to have a personal interest in the transaction of evaluating the grant application. You note that while the officer serves on the board and regularly provides volunteer services to the nonprofit, he does so without receiving any compensation. You point out that under the definition of "personal interest," the officer does not have a personal interest in the nonprofit.

DISCUSSION

The State and Local Government Conflict of Interests Act (COIA) defines a "personal interest" as:

a financial benefit or liability accruing to an officer or 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, \$5,000 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, \$5,000 annually; (iv) ownership of real or personal property if the interest exceeds \$5,000 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; or (vi) an option for ownership of a business or real or personal property if the ownership interest will

consist of clause (i) or (iv).¹

Under COIA, "personal interest in a transaction" is separately defined as:

a personal interest of an officer or employee in any matter considered by his agency. Such personal interest exists when an officer or employee or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction....²

When the General Assembly defined the term "personal interest in a transaction," it did not limit the definition to situations where an officer or employee has a personal interest in the property or business that is the subject of the transaction. The General Assembly also inserted the words "represents or provides services to any individual or business" and expressly stated that "such...represented or served individual or business" creates a personal interest for an officer or employee if the individual or business is the subject of the transaction or may be impacted by the transaction. This cannot be interpreted as additional verbiage with no meaning. "We must assume...the legislature chose, with care, the words it used when it enacted the relevant statute."³ "A word or clause contained in a statute may only be rejected as surplusage if it 'appears to have been inserted through inadvertence or mistake, and which is incapable of any sensible meaning,' or is otherwise repugnant to the rest of the statute."⁴

Had the General Assembly wished to limit personal interests in transactions to only those situations where an officer or employee has a personal interest in the business that is the subject of the transaction, it would have done so. Therefore, it must be concluded that if an officer or employee provides services, even for free, to a business, he will have a personal interest in any transaction that involves the business.⁵ His lack of a personal interest in the business is irrelevant.

It should be noted that the General Assembly has provided one exception where providing services to a business does not create a personal interest in a transaction that involves the business, provided that the officer or employee does not otherwise have a personal interest in the business. When "an elected member of a local governing body serves without remuneration as a member of the board of trustees of a not-for-profit entity and such elected member or member of his immediate family has no personal interest related to the not-for-profit entity," a personal interest in a transaction "shall not be deemed to exist."⁶ However, this exception applies only to elected local officials; it

¹ VA. CODE § 2.2-3101 (2021).

² *Id.*

³ Barr v. Town & Country Properties, Inc., 240 Va. 292, 295 (1990).

⁴ Hodges v. Dep't of Soc. Servs., Div. of Child Support Enforcement, 43 Va. App. 463, 470 (2004), *citing* Burnette v. Commonwealth, 194 785, 788-89 (1953).

⁵ Under COIA, "business" includes "a corporation, partnership...trust or foundation, or any other...individual or entity carrying on a business or profession, whether or not for profit." VA. CODE § 2.2-3101 (2021).

⁶ *Id.* *Cf.* Va. Op. Att'y Gen. 12-022, 2012 Va. AG LEXIS 14 (Mar. 30, 2012) (if an elected member of a local governing body is selected to serve on the board of the local community action agency as a volunteer, he may, in his

does not apply to nonelected local officers and employees, nor does it apply to state officers and employees.⁷

Even if a personal interest in a transaction exists, it may still be possible for an officer or employee to participate in the transaction. Virginia Code § 2.2-3112 specifies when having a personal interest in a transaction is absolutely prohibited and under what circumstances an officer or employee may still participate.

CONCLUSION

If the officer of a state agency provides volunteer services to a nonprofit organization, he will have a personal interest in any transaction that involves the nonprofit or in any transaction that might cause the nonprofit to realize a reasonably foreseeable direct or indirect benefit or detriment. If the officer finds himself involved with such a transaction, he should carefully review Virginia Code § 2.2-3112 to determine if he can participate or if he should withdraw from the transaction. He also might consult with the Conflict of Interest and Ethics Advisory Council for guidance in making this determination.

role as a member of the governing body, participate in transactions that involve the board, as he does not have a personal interest in the board).

⁷ Also, this exception clearly applies only to nonprofit businesses. It would not apply to any other types of businesses, nor would it apply in a situation where an attorney or other professional provided pro bono services to an individual. In those cases, a personal interest in a transaction would exist.