

**STATE OF NEW HAMPSHIRE  
EXECUTIVE BRANCH ETHICS COMMITTEE**



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**Advisory Opinion**

**2008-002**

**Questions Presented**

1. May members of the Comprehensive Cancer Plan Oversight Board vote on targeting of funds if their employer organization has submitted a response to a request for proposal?
2. May members of the Comprehensive Cancer Plan Oversight Board vote on targeting of funds if the organization that appointed the Board member has submitted a request for proposal, but the Board member is not employed by the appointing organization?

**Summary Answer**

1. Before any proposals have been submitted for review, members of the Comprehensive Cancer Plan Oversight Board may vote on funding percentages for various program categories in accordance with RSA 126-A:64. Members should not participate in RFP Development Teams that are preparing RFPs for program categories if their employer organization is likely to be submitting proposals within that Program Category. Members should not participate in RFP Review Teams if the Team is reviewing responses from the member's employer organization. Board members should not vote on reallocation of limited funds if a proposal submitted by their employer organization is subject to the reallocation of funds. If a Board member's employer organization's proposal was not selected as a winning proposal by a RFP Review Team, then there is no conflict of interest if the Board member votes on the reallocation of limited funds.

2. Members of the Comprehensive Cancer Plan Oversight Board appointed by an organization that has submitted a proposal for funding do not, solely by reason of their appointment, have a conflict of interest by participating in decisions involving his or her appointing organization.

### Facts

RSA 126-A:64 states:

There is hereby established in the office of the state treasurer the comprehensive cancer plan fund, [the “Fund”] to be administered by the department of health and human services. The department is authorized to accept public sector and private sector grants, gifts, donations, and appropriations for deposit into the fund. The fund shall be nonlapsing and continually appropriated to the department, and shall be used to implement the provisions of the New Hampshire comprehensive cancer plan as developed by the New Hampshire comprehensive cancer collaboration. The fund shall be expended annually for the following purposes, ***with allocations determined by the comprehensive cancer plan oversight board:....***(Emphasis added).

The portion of the statute highlighted above was added in the 2008 legislative session.

The Comprehensive Cancer Plan Oversight Board (the “Board”) was established pursuant to RSA 126-A:65. The Board has certain statutory members, as well as other members appointed by the Board itself. The Board includes, among others, the following:

- Two members from the Department of Health and Human Services, appointed by the commissioner.
- Two members from the American Cancer Society, appointed by the organization.
- Two members from the Dartmouth-Hitchcock Healthcare System, appointed by the organization.
- Two members from the New Hampshire Hospital Association, appointed by the association.
- Two members of the public who are cancer survivors, appointed by the American Cancer Society.

Before the 2008 amendments, RSA 126-A:64 established the funding percentages for seven different program categories: tobacco use prevention; diet and exercise; early detection and screening for breast and cervical cancer; early detection and screening for colorectal cancer; survivorship and cancer support for those affected by prostate cancer; identification and promotion of treatment and support services for survivors; and data collection and analysis of minority population behavioral risk and cancer rates (the “Program Categories”). With the 2008 modifications to the statute, the Board will establish the funding percentages going forward.

Each year, requests for proposals (“RFPs”) are issued seeking proposals for funding within each Program Category. Each Program Category has a different RFP Development Team that designs the RFP for its assigned Program Category. The RFP Development Teams also create scoring formulas for evaluating each proposal submitted in response to each RFP.

Proposals submitted in each Program Category are reviewed by RFP Review Teams. Each Program Category has a different RFP Review Team. Each proposal is scored in accordance with the scoring system developed by the RFP Development Team. The highest scoring proposal for each Program Category is deemed to be the successful proposal. The RFP Review Teams and Development Teams include Board and non-Board members.

In 2008, there was insufficient money to fully fund each successful proposal. As a result, the Board voted to allocate the \$750,000 available for 2008 among three Program Categories. The other proposals did not receive funding in 2008.

The organizations that appoint members of the Board are also likely to be organizations that submit responses to RFPs produced by the RFP Development Teams.

### **Legal Authority**

RSA 21-G:21, II; RSA 21-G:22; RSA 21-G:23

### **Analysis**

RSA 21-G:22, requires executive branch officials to avoid conflicts of interest. A conflict of interest is a “situation, circumstance or financial interest which has the potential to cause a private interest to interfere with the proper exercise of a public duty.” RSA 21-G:21, II. Executive branch officials are also prohibited from participating “in any matter in which they, or their spouse or dependents, have a private interest which may directly or indirectly affect or influence the performance of their duties.” RSA 21-G:22.

Executive branch officials have a financial interest in the success or failure of his or her employer outside of state government. In describing the common law on conflict of interest, the New Hampshire Supreme Court has described the restriction as follows:

In New Hampshire the requisite personal interest has been defined as a pecuniary interest which is immediate, definite, and capable of demonstration; not remote, uncertain, contingent and speculative, that is, such ‘that men of ordinary capacity and intelligence would not be influenced by it.

*Marsh v. Town of Hanover*, 113 N.H. 667, 673 (1973)(internal citations and quotations omitted).

With regard to the Board, there are four actions by Board members that could implicate the conflict of interest law: (1) Setting funding percentages for the seven Program Categories; (2) RFP Development Team decisions; (3) RFP Review Team selection of winning proposals; and (4) allocation of limited funds.

A. General Propositions – Conflict of Interest

As a general proposition, we are of the opinion that conflict of interest issues arise when a Board member has a direct financial or fiduciary relationship with an organization that submits a proposal in response to a RFP. A direct financial or fiduciary relationship includes, but is not limited to, employees and board members of the organization. We do not believe, however, that the conflict of interest law is triggered by members of the Board who are appointed by an organization, but do not otherwise have a financial or fiduciary relationship with that organization. Thus, the mere fact that a Board member was appointed by, but does not otherwise have a financial or fiduciary relationship with, an entity that has a project before the Board does not, by itself, create a conflict of interest.

These general propositions must be applied to the various decisions made by the Board.

B. Vote on Funding Percentages

With regard to the first decision point, setting funding percentages, we conclude that the possibility a given organization is likely to submit a proposal is too attenuated to create a conflict of interest. This conclusion is strongly influenced by the Board's statutory authority. Board members are required by statute to set funding percentages before RFPs are issued. In granting this authority to the Board, the General Court specifically filled the Board with members of organizations likely to submit proposals. The Committee is guided by the fundamental principle of statutory construction that statutes will not be construed in such a way as to render them ineffective.

If the literal significance of statutory language, as applied to the facts of a particular case, makes the meaning absurd, strange, or inexplicable, it cannot be adopted as the only test of the legislative purpose, without either imputing to the Legislature a senseless design, or judicially evading the duty of ascertaining the intent.

*St. Paul's Church v. City of Concord*, 75 N.H. 420, 423 (1910).

When the requirements of a constitutional statute are plain and positive, courts are not called upon to give reasons why it was enacted. ... It is never lawful, in the construction of statutes, to impute useless or frivolous conduct to the legislature.

*Weeks v. Waldron*, 64 N.H. 149, 150 (1886)(citation omitted).

The General Court chose to create a Board whose members include individuals with a financial or fiduciary relationship to organizations likely to submit proposals for funding. In addition, the General Court chose to amend the law in 2008 to give the Board the specific obligation to establish funding percentages for Program Categories.

We are able to harmonize the conflict of interest law with the authority of board members having



a financial or fiduciary relationship with a bidding organization. Membership on the Board is defined by statute. The legislature would not have directed that a Board include persons with a direct interest in matters appearing before the Board if those members could not fully participate on the Board merely because of their status. In addition, we are of the opinion that appointed members of public boards and commissions must be devoted to the advancement of the public good and not the private interests from which the members come. In accepting a public office and the opportunity to shape public policy, board and commission members assume an obligation to adhere to the standards of conduct which the public rightfully expects of those holding positions of public trust.

There must be a balance, however, between the Board's advancement of the public good and the possibility that a person may use a public office to take advantage of the office for personal gain. The public will rightly cease to support those who appear to pursue their private interests at the expense of the public good. As was stated by the Supreme Court in *Town of Hanover*, a conflict of interest arises when the pecuniary interest is immediate, definite, and capable of demonstration; not remote, uncertain, contingent and speculative. This opinion is consistent with this goal of balancing the legislative intent to have potentially interested Board members who are experts in their fields vote on the initial funding percentages for Program Categories when the Board member's interest has not yet crystallized by the submission of a proposal.

Thus, because the General Court placed the duty on the Board to determine funding percentages for each Program Category, knowing that the Board was constituted, in part, by members with financial or fiduciary obligations to organizations with a interest in funding projects from the Fund, we conclude that Board members do not violate RSA 21-G:22 when voting on funding percentages, even if their employer organization is likely to be a future bidder for money from the Fund.

#### C. RFP Development and Review Teams

Board members sit on RFP Development and Review Teams. This is not a specific statutory role of Board members. It is the Committee's understanding that Board members do not sit on teams that involve areas in which their employer organizations are likely to submit proposals. The Committee agrees that such separation is necessary to avoid conflicts of interest. Board members should not participate in RFP Development or Review Teams related to Program Categories where they have a financial or fiduciary relationship with a potential or actual bidder for funds.

As is the case when the Board is voting on the initial setting of funding percentages, no proposals will have been received when the RFP Development Team is preparing RFPs. Nevertheless, we conclude that a conflict of interest does arise when a Board member is preparing a RFP if the Board member knows that he or she has a financial or fiduciary relationship with an organization likely to submit a proposal. A RFP can be drafted to inherently favor one organization over another. Similarly, the scoring criteria can be drafted in such a way to also favor one organization over another.

The Board member's involvement on a RFP Review Team that is evaluating a proposal submitted by a Board member's employer is an even more direct conflict of interest. In that case, the Board member's vote can directly affect funding given to an organization to which he or she has a financial or fiduciary relationship.

#### D. Allocation of Limited Funds

When the Board is in the position, as it was in 2008, of allocating limited funds among winning proposals, the Committee is of the opinion that a conflict of interest arises among Board members with financial or fiduciary relationships with organizations that submitted winning proposals. Unlike the vote on funding percentages made before proposals have been submitted, the Board is voting on actual proposals when allocating limited funds. The vote on allocating limited funds will result in either reduced funding for a specific proposal, or elimination of funding altogether. In this case, the financial and fiduciary obligation to the organization is too definite, and recusal is required. Board members who have a financial or fiduciary relationship with an organization that submitted a non-winning proposal do not have a conflict of interest when voting on allocation of limited funds.

#### E. Other Considerations

Particular situations, circumstances, or financial interests might arise during the course of a member's service on the Board that could create a prohibited conflict of interest requiring remedial action, such as recusal from deliberations in a particular matter. Thus, if a Board member personally believes he or she is unable to be objective in a particular circumstance, he or she should recuse him or herself.

Recusal requires the Board member's complete nonparticipation in all relevant proceedings. Recusal means that the member is not participating in deliberations or debates, making recommendations, giving advice, considering findings, editing related minutes, rules, guidelines, or decisions, or in any other way assuming responsibility for or participating in any aspect of the work or decision-making relating to the matter where there are potential conflicts of interest. It does not mean that the member must leave the room during a public meeting, although a member may voluntarily choose to do so. A recused member who chooses to remain in the room should sit in the audience area. If the public body is in non-public session, once the member has recused, he or she has no more right to be in the room than any other member of the general public. The member's recusal must be noted in the minutes of the Board or Commission meetings. The entry should include a specific reference to the deliberations and decisions from which the member was recused. Similarly, the record of any rule making or adjudicatory proceeding must include a clear statement of the member's recusal.

#### F. Misuse of Position

The misuse of position statute, RSA 21-G:23, prevents an executive branch official from using "his or her position with the state to secure privileges or advantages for himself or herself, which are not generally available to governmental employees, or to secure governmental privileges or advantages for others." The analysis under this provision is similar to the analysis discussed

above. The misuse of position law is not directly implicated in the initial vote on funding percentages, but is an issue relative to other Board decisions. Thus, the recusal obligation for misuse of position statute does apply, however, when there is a conflict of interest as discussed above.

#### G. Quorum Issues

You have also raised a concern that if a recusal policy is followed, the Board may not have a sufficient number of remaining members to constitute a quorum. Because this issue is outside the jurisdiction of the Committee, we recommend you discuss this issue with your legal counsel.

#### **Conclusion**

Members of the Comprehensive Cancer Plan Oversight Board may vote on funding percentages for various program categories in accordance with RSA 126-A:64. Members should not participate in RFP Development Teams that are preparing RFPs for program categories if their employer organization is likely to be submitting proposals within that Program Category. Members should not participate in RFP Review Teams if the Team is reviewing responses from the member's employer organization. Board members should not vote on reallocation of limited funds if a proposal submitted by their employer organization is subject to the reallocation of funds.

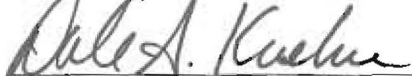
If a Board member's employer organization's proposal was not selected as a winning proposal by a RFP Review Team, then there is no conflict of interest if the Board member votes on the reallocation of limited funds.

Members of the Comprehensive Cancer Plan Oversight Board appointed by, but not employed by nor having a fiduciary relationship with, an organization that has submitted a proposal for funding do not, solely by reason of their appointment, have a conflict of interest by participating in decisions involving his or her appointing organization.

This Advisory Opinion is issued by the Executive Branch Ethics Committee on December 3, 2008 pursuant to RSA 21-G:30, I (c).

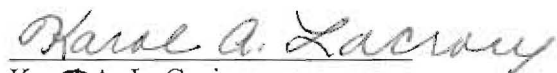


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