

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



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Advisory Opinion

2007-014

Question Presented

May an executive branch official, including board members of regulatory boards, whose duties include the inspection and/or regulation of a profession, hold a second job conducting or working for a business that teaches mandatory classes on the law, rules, or code that the official enforces, or coordinate or teach in a state-approved apprenticeship program?

Summary Answer

An executive branch official, including a board member of a regulatory board, who is employed as a regulator for a licensed profession, may engage in or work for a private business that competes with other private businesses to provide licensees with training, mandated by the State, on the law, rules, or codes enforced by that official, if that official follows a proper recusal policy.

Facts

An executive branch official is a board member of, or holds primary employment with, an agency or board that licenses and/or regulates a particular profession. The official's primary duties are inspecting the work of licensees, conducting investigations of licensee misconduct, and prosecuting licensees who are found to have engaged in misconduct. The board member is responsible for authorizing rules and regulations for licensing. Licensees are required by the official's agency or board to complete periodic training on

"The people's government, made for the people, made by the people, and answerable to the people."

Daniel Webster, Jan. 16, 1830

the laws, rules, and codes that govern the profession. Some licensees are required to participate in state approved apprenticeship programs. The agency or board establishes minimum requirements for the mandatory training and approves individuals as instructors. A commercial market exists where several individuals, organizations, and businesses compete for the business of providing the mandatory training to the licensees. Executive branch officials operate such businesses and/or work as instructors for others who operate such businesses. The officials' identity is disclosed in notices and advertising soliciting licensees' attendance. The size of the profession in New Hampshire and the number of executive branch officials is such that each of the officials at issue is well known among the licensees.

Legal Authority

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

Analysis

The conflict of interest statute, 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.

The executive branch official has a financial interest in the second job which constitutes a private interest under RSA 21-G:22. 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).

The remaining question is whether the interest in the job or business of teaching the mandatory continuing education courses has the potential to interfere with the proper exercise of the official's duties as a regulator.

An official has a personal financial interest in having as many licensees as possible choose the course that he or she teaches over competitors' courses. If the official operates the business, presumably his or her profit increases with the number of students.

If the official teaches the courses for a fee, increased numbers of students at the least increases the official's attractiveness as an instructor for businesses and may lead to more teaching opportunities. In our view the potential of this private interest to influence the performance of the official's duties is immediate and definite. Whether purposeful or inadvertent, the potential is great for an official investigating the work or services of a licensee to favor a licensee who recently hired the official to teach the licensee how to do that very work. Similarly, the potential for the official to focus on the particular laws, rules, or codes that he or she teaches in his or her course when conducting investigations is great. As the subjects taught vary from course to course, those who attend the official's course potentially gain, or may be perceived to gain, a distinct advantage.

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." In this circumstance, the official's position with the government as a regulator carries with it an endorsement by the government as a recognized expert in the laws, rules, and codes governing the profession. It is unavoidable that a licensee making the choice of continuing education course trainers would consider that taking the course from the official who will later investigate his or her work, may offer some real or perceived advantage.

The Committee is of the opinion that a Board or Commission member, under the circumstances described in this question, can avoid the potential conflict of interest and misuse of position only if a proper recusal policy is followed. Recusal is a case-by-case determination. Generally, Board members must recuse themselves from matters "because of self interest, bias or prejudice." Black's Law Dictionary 1277 (6th ed. 1990) (defining "recusal"). It is the executive branch official's responsibility to disclose, without prompting, all information of any potential conflict of interest.

The potential conflicts can be found in a board member's role on a board, a board member's role in an apprenticeship program, or in an inspector's role inspecting a student's facility. The manner of recusal will depend on the particular circumstances. For example, any facility that is to be inspected by an executive branch official should be reassigned to another inspector if the facility is owned or operated by a student taught by the official. A board member who has recused himself or herself would not have decision making authority in the determination of who teaches at training seminars or what trainings are required of those subject to regulation.

Recusal requires the 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.

Recusal by a state employee would require the employee's nonparticipation in any matter pending before that employee. As with recusal by a board member described above, recusal means that the employee is not participating in deliberations or debates, making recommendations, giving advice, considering findings, editing, 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.

In performing a recusal analysis, it is appropriate to evaluate whether the executive branch official's position is sufficiently compromised by the number of matters on which the official is recused that the official is unable to effectively perform his or her duties as an executive branch official. In that situation, the recusal policy may be insufficient, and the executive branch official may not perform the activity that gives rise to the conflict of interest.


Conclusion

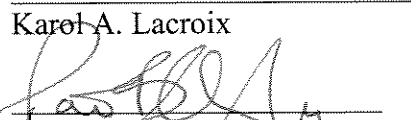
An executive branch official, including a board member of a regulatory board, who is employed as a regulator for a licensed profession, may engage in or work for a private business that competes with other private businesses to provide licensees with training, mandated by the State, on the law, rules, or codes enforced by that official, if that official follows a proper recusal policy.


This Advisory Opinion is issued by the Executive Branch Ethics Committee on November 7, 2007, pursuant to RSA 21-G:30, I (c).


Chairman, David L. Nixon

Vice Chairman, Dale Kuehne


Secretary, John Blair


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