

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



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**Advisory Opinion**

**2007-012**

**Question Presented**

Do the ethics laws prohibit an executive branch official directly involved in the regulation of charities or other non-profits from soliciting money on their behalf?

**Summary Answer**

No, provided the solicitation does not create a conflict of interest and the executive branch official does not improperly use his or her position in State government to benefit the charity or other non-profit.

**Facts**

Executive branch officials in certain departments regulate charitable and other non-profit organizations and various aspects of their operations. The character of the regulation varies from direct oversight of the creation and maintenance of the organizations and their finances to indirect regulation such as inspecting food service or facilities at a non-profit. Executive branch officials engage in various levels of participation in and support for non-profit organizations. In some instances, where the mission of the non-profit helps fulfill the responsibilities of a state department, the official may participate in, provide support to, or partner with the non-profit as part of his or her work duties. It is also the case that hundreds of state employees have

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

*Daniel Webster, Jan. 16, 1830*

served on the State Employees' Charitable Campaign Management Team and as coordinators of the campaigns in state offices across New Hampshire, and thousands of state employees have participated in the State Employees' Charitable Campaign, which raises funds for a number of charities through voluntary payroll deductions. Many state employees in their personal capacity, during non-work hours, otherwise participate in, donate to, volunteer for, and/or solicit funds for charities and other non-profits.

### **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 a conflict 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 term "private interest" is not defined in the ethics statutes. In describing the common law on conflict of interest the New Hampshire Supreme Court has described the applicable 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 definition of conflict of interest, however, extends beyond a financial interest to a "situation" or "circumstance" which has the potential to cause a private interest to interfere with the proper exercise of a public duty. The interest does not rise to the level of a conflict of interest if it is "attenuated and unsubstantial."<sup>1</sup>

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<sup>1</sup> *Opinion Of The Justices*, 104 N.H. 261, 264-65 (1962) (finding a decision participated in by the chairman of the state Board of Education to locate a facility in Concord did not give rise to a conflict of interest even though he was a stockholder, officer or attorney for public utilities which may sell additional electricity to the facility because that relationship was too attenuated and unsubstantial).

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.”

Circumstances may exist where the mission of a charity or other non-profit is so closely aligned with the duties of the official’s department that in the judgment of the Commissioner or agency head it is proper for an executive branch official in his or her official capacity and during work hours to participate in, provide support to, or partner with the non-profit. A conflict of interest does not exist in this circumstance.

Nor does participation in or coordination of the State Employees’ Charitable Campaign constitute a conflict of interest, as this statewide fundraising effort is specifically endorsed and encouraged by the Governor and Executive Council, and thus has been found to be consistent with the state’s overall duties and mission.

Except in these circumstances, it would be a violation of RSA 21-G:23 for an executive branch official to use his or her position with the state to promote or encourage participation in, support for, or contributions to a charity or other non-profit, whether during work hours or non-work hours. Except where the department or agency head has determined such activities are approved as part of carrying out the department’s duties, use of any government resources, such as support staff time, state equipment, or supplies would also be prohibited as improper use of the official’s position to secure governmental advantages for others.

There are other selected circumstances where the Committee believes that an executive branch official should proceed very cautiously before soliciting funds for a charity or other nonprofit in his or her personal capacity, even if these fundraising efforts may not be barred by the express language of state conflict of interest law or the misuse of position statute.

The Committee does not believe that a commitment to community causes alone constitutes a private interest that might give rise to a conflict of interest within the meaning of RSA 21-G:22; nor that merely securing donations for a nonprofit from private citizens is tantamount to securing “government privileges or advantages for others.”

Nonetheless, an executive branch official would be ill-advised to solicit charitable donations from subordinates under circumstances where those solicited might be likely to perceive that the decision to contribute or refrain from contributing would impact their employment relationship. Similarly, Executive branch officials whose duties include awarding, managing, or evaluating bids, proposals, or contracts with the State for goods or services should exercise great caution before soliciting

contributions, even in a personal capacity, from the vendors with whom they interact in an official capacity. When an executive branch official who controls a potential donor's access to sales or work for the State makes such a solicitation, the business relationship makes it likely that the vendor may not be able to separate a solicitation made in the official's private capacity from its perceived potential influence on the official's exercise of public duties.

Before an executive branch official engages in soliciting for a charity or other nonprofit he or she should thus assess the totality of the circumstances, and should also determine whether any additional restrictions are imposed on his or her position or department by statute, administrative rule, terms of employment, or departmental ethics code.

### **Conclusion**

State ethics laws do not prohibit an executive branch official involved in the regulation of charities or other non-profits from soliciting money on their behalf.

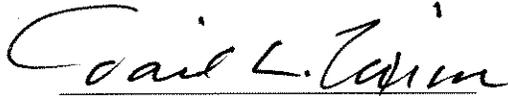
Executive branch officials who regulate charities or other non-profits may solicit money on behalf of a charity or other non-profit provided that the solicitation has been approved by the Commissioner or agency head as approved work that furthers the duties of the department. Participation in the New Hampshire State Employees' Charitable Campaign is not prohibited; indeed it is encouraged.

Other charitable solicitations are generally permitted provided that such solicitations:

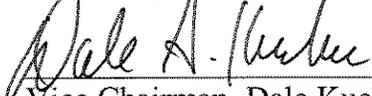
- occur during non-work hours;
- do not involve any reference to or other use of the official's position with the state;
- do not give rise to a prohibited conflict of interest;
- are not otherwise prohibited by terms of statute, administrative rule, terms of employment, or departmental ethics code; and
- do not involve use of any government funded human resources, equipment or supplies.

Additionally, though not expressly prohibited by current ethics laws, executive branch employees are advised to proceed with great caution when solicitation would be directed toward subordinates or state vendors with whom they conduct state business.

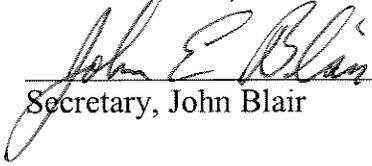
This Advisory Opinion is issued by the Executive Branch Ethics Committee on September 5, 2007, pursuant to RSA 21-G:30, I (c).



Chairman, David L. Nixon



Vice Chairman, Dale Kuehne



Secretary, John Blair

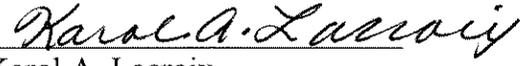
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