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February 3, 1989

William K. Simmons
Chancellor
West Virginia Board of Regents
950 Kanawha Boulevard, East
Charleston, West Virginia 25301

Dear Chancellor Simmons:

This will acknowledge receipt of your request dated August 3, 1988, for the advice of the Attorney General with respect to the following two questions:

"Are the citizen members of the West Virginia Board of Regents governed by a conflict of interest policy bulletin as promulgated by the Board, a general statute or any relevant case law in discharging their voting responsibilities as duly appointed members of the Board when an issue arises which impacts their pecuniary interest?"

"Are the constituent group representatives who serve as members of the Board likewise governed by any conflict of interest policy bulletin as promulgated by the Board, statute or case law in the discharging of their duties as voting members of the Board when an issue arises which impacts their pecuniary interests? Does legal authority exist to specifically exempt them from any disqualification as a voting member because of the existence of such a conflict of interest?"

W. Va. Code § 18-26-4 (hereinafter Code) sets out the composition of the Board of Regents. The Board consists of thirteen members, nine of whom are appointed by the governor to six year terms. These nine members are commonly referred to as the "citizen members" of the Board. Code 18-26-4 provides for an additional four members who are deemed to be ex officio. One of these ex officio members is required by statute to be the state

superintendent of schools. The state superintendent of schools is specifically prohibited by statute from voting on any Board of Regents matter. The other three ex officio members of the Board, as provided for in the statute, are the chairman of the advisory council of faculty, chairman of the advisory council of students, and the chairman of the advisory council of classified employees. The last three ex officio members of the Board are commonly referred to as "constituent group representatives." The statute specifically permits these members of the Board to vote.

The chairman of the advisory council of faculty is a faculty member employed by the Board of Regents and elected by the other faculty within the Regents system. Code 18-26-9a. The chairman of the advisory council of students is a student at a Board of Regents institution elected by fellow students. Code 18-26-9b. The chairman of the advisory council of classified employees is a classified employee employed by the Board of Regents and elected by the other classified employees within the Regents system. Code 18-26-9c.

Although you describe the nine "citizen" members of the Board and the three voting "constituent representative" members differently, it is the opinion of this office that the two different types of Board members should be treated identically for the purposes of this opinion. This office has previously opined that "[t]here is no suggestion in the legislative scheme set forth that the Board consists of only nine members appointed by the governor or that ex officio membership and services means less than full entitlement to complete rights, privileges, and obligations associated with membership on the Board." 58 Ops. Att'y Gen. 92 (1979). This office finds nothing today that would suggest that the "constituent representative" members of the Board have any different rights, privileges, or obligations from those of the nine "citizen" members of the Board.

Code 18-26-10e provides in full as follows:

"The provisions of article three, chapter five-A of this Code shall not control or govern the purchase, acquisition or other disposition of any equipment, materials, supplies or printing by the board, except as provided in sections ten-c through ten-f of this article: Provided, that section thirty-six, thirty-seven and thirty-eight, article three of said chapter five-A shall apply to all purchasing activities of the board.

"Neither the board, nor any employee of the board, shall be financially interested, or have

any beneficial personal interest, directly or indirectly, in the purchase of any equipment, materials, supplies or printing, nor in any firm, partnership, corporation or association furnishing them. Neither the board nor any employee of said board shall accept or receive directly or indirectly from any person, firm or corporation, known by the board or such employee to be interested in any bid, contract or purchase, by rebate, gift or otherwise, any money or other thing of value whatsoever, or any promise, obligation or contract for future reward, or compensation.

"A person who violates any of the provisions of the preceding paragraph shall be guilty of a misdemeanor, and upon conviction thereof, shall be confined in jail not less than three months nor more than one year, or fined not less than fifty nor more than one thousand dollars, or both, in the discretion of the court: Provided, that any person who violates any of such provisions by receiving money or other thing of value under circumstances constituting the crime of bribery under the provisions of section three, article five-A, chapter sixty-one of this Code, shall, upon conviction of bribery, be punished as provided in said article five-A of chapter sixty-one."

The Legislature is presumed to know of its prior enactments when it passes a bill. Harbert v. Harrison County Court, 129 W. Va. 54, 39 S.E.2d 177 (1946). Accordingly, it must be presumed that the Legislature was aware of the statute pertaining to membership of the Board of Regents when it enacted the statute regarding conflicts of interest. It is a further rule of construction that repeal of statutes by implication is not favored and should only be resorted to in cases of irreconcilable conflict or inconsistency. Smith v. Siddens, 155 W. Va. 193, 183 S.E.2d 433 (1971); Trumka v. Clerk of Circuit Court, _____ W. Va. _____, 332 S.E.2d 826 (1985). A general statute does not repeal a former statute unless it expresses a plain invitation to do so. General rules of construction require that a specific statute be given precedence over a general statute if the two cannot be reconciled. State ex rel. Simpkins v. Harvey, _____ W. Va. _____, 305 S.E.2d 268 (1983); State v. Turley, _____ W. Va. _____, 350 S.E.2d 696 (1986). The rules of construction require that the two statutes be construed in a manner that places the least restrictions on both statutes.

Though the Board of Regents have no published rules or regulations regarding the voting of Board members on issues which impact on their own pecuniary interests, a recent decision by the West Virginia Supreme Court of Appeals regarding the duties and obligations of members of the Board of Regents is quite instructive on this issue.

In that case, Graf, et al. v. Frame, 352 S.E.2d 31 (W. Va. (1986)), the Court was asked to issue a writ of mandamus ordering a Board of Regents member, who was also an attorney, from instituting any lawsuits against the Board, its member institutions, or employees. Board member Clark Frame, or associates in his law firm, had instituted medical malpractice actions against certain physicians/faculty members employed by the Board of Regents.

The Court first stated that it was clear that a member of the Board of Regents is a "public officer" and, as such, has certain nondiscretionary duties under the West Virginia Constitution, Article III, Section 2, which states: "All power is vested in, and consequently derived from, the people. Magistrates, are their trustees and servants, and at all times amenable to them." The Court stated that the reference to "magistrates" encompasses all "public officers."

The Court in Graf went on to state that a "public officer" such as a Regents member is a fiduciary of the people and that "[a]s a public officer or public employee owes an undivided duty of loyalty to the public whom he serves and is not permitted to place himself in a situation that will subject him to conflicting duties or expose him to the temptation of acting in any manner other than in the best interest of the public." Id. at 36. The Court went on to cite language from its previous decision in State ex rel. Preisler v. Dostert, 163 W. Va. 719, 260 S.E.2d 279 (1979) which recited that "[a] public officer is in the position of a fiduciary and he is under an obligation to serve the public with highest fidelity and undivided loyalty." Graf at 36. The court further opined that:

"A person's status as a public officer forbids him from placing himself in a situation where his private interest conflicts with his public duty. His good faith is of no moment because it is the policy of the law to keep him so far from temptation as to insure the exercise of unselfish public interest. This policy is not limited to a single category of public officer but applies to all public officials." Graf at 36.

The Court then found that one of the obligations of the office held by a Board of Regents member is that the member "is not to place himself in a situation where his private interest conflicts with his public duty" and cited approvingly the language of a Georgia decision stating that public officers "labor under every disability and prohibition imposed by law upon trustees relative to the making of personal financial gain from the discharge of their trusts." Graf at 37. The Georgia decision cited by our Court had found that a Georgia state constitutional provision almost identical to our own West Virginia Constitution, Article III, Section 2, imposed a "positive prohibition" on a public officer to "avoid the collision of personal and public interests."

The Court went on to conclude that Frame's private interest associated with his representation of clients in lawsuits against Board of Regents employees was in conflict with his duties as a Regents member to represent all of higher education. Though the Court went on to analyze the specific and additional duties an attorney member of the Board would have to avoid conflicts of interest in such situations, the general language set out above from the Court's decision would seem to pose the best general rule for determining whether a Board of Regents member faces a conflict of interest when voting on issues which impact on their own pecuniary interests.

Since a public officer is not to place himself in a situation where his private interest may conflict with his public duty, he should refrain from voting on any issue that impacts on his own pecuniary interest.

In summary we conclude:

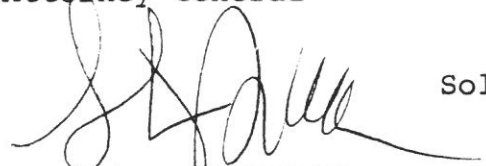
1. All voting members of the West Virginia Board of Regents have the same duties, responsibilities, and obligations under the law in the discharge of their official duties.
2. Board of Regents members are "public officers" subject to the nondiscretionary duties imposed by West Virginia Constitution, Article III, Section 2.
3. A public officer is constitutionally prohibited from placing himself in a situation where his private interest may conflict with his public duty to represent all the people. And his good faith is of no moment because it is the policy of the law to keep a public officer so far from temptation as to insure the exercise of unselfish public interest.

4. When faced with a situation where a Regents member must vote on an issue that impacts on his own pecuniary interest, he has a conflict of interest from which he must remove himself. By not voting on that issue he removes himself from that conflict of interest situation.

Very truly yours,

CHARLES G. BROWN
Attorney General

By

A handwritten signature in black ink, appearing to read "S. D. Herndon", written over a horizontal line.

Solicitor

STEPHEN D. HERNDON

SDH/rm