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July 16, 2008

David G. Edwards, DDS, President  
West Virginia Board of Dental Examiners  
P.O. Box 1447  
Crab Orchard, West Virginia 25827-1447

Re: Applicability of the Discretionary Salary Increase "Freeze"  
to the Board of Dental Examiners

FILED  
2008 JUL 29 PM 1:03  
OFFICE WEST VIRGINIA  
SECRETARY OF STATE

Dear Dr. Edwards:

On April 8, 2008, your predecessor, Dr. James W. Vargo, DDS, requested an opinion of the Attorney General on the following legal issue:

The question arises as to whether or not the Governor's Office may effectively control the Board's exercise of its authority over its budget and the Board's authority to set the compensation of its employees. In other words, may the Governor's Office refuse to allow the Board to grant discretionary salary increases to its employees?

The genesis of this request was a statement made to the Executive Director of the West Virginia Board of Dental Examiners by a member of the Governor's staff, that any discretionary raises for the Board's staff would not be approved by the State Budget Office and thus could not be implemented. The staff member's statement was based on a memorandum of April 29, 2005, hereinafter referred to as "the freeze memo," signed by the individual designated as the Governor's chief of staff and addressed to cabinet secretaries.

For the reasons discussed herein, it is the opinion of this office that the Board is not bound by the "freeze" on discretionary salary increases.

The Board of Dental Examiners

The Board is created and governed by the *West Virginia Dental Practice Act*, West Virginia Code §§ 30-4-1 *et seq.* The Governor appoints the members of the Board, who thereafter may only

be removed for "neglect of duty, incompetency or official misconduct."<sup>1</sup> The Legislature has empowered the Board with the sole authority to "[h]ire, fix the compensation of and discharge the employees necessary to enforce the provisions of [the Act]."<sup>2</sup>

As is the case with most other boards created in Chapter 30 of the West Virginia Code, the Board operates solely from funds it collects through licensure fees. The fees and other monies (except for fines) collected by the Board are deposited in a special revenue fund, which is used by the Board to administer the *Dental Practice Act*.<sup>3</sup> None of the Board's expenses, including staff compensation, are permitted to be charged against the general revenue fund.<sup>4</sup>

### The "Freeze" on Discretionary Salary Increases for State Employees

On April 29, 2005, the Governor's chief of staff issued a memorandum directed to all cabinet secretaries, memorializing the Governor's request made in a previous cabinet meeting that the secretaries not grant merit or other discretionary salary advancements to state employees until further notice. For your reference, a copy of the April 29, 2005 "freeze memo" is attached as Exhibit 1.

The "freeze memo" included a cover memorandum directing the cabinet secretaries to "duplicate and distribute the attached memorandum to all department heads in each agency within your department for their information." The Board did not receive a copy of the "freeze memo," since the Board does not report to a cabinet secretary or to any state agency within the executive branch. In fact, no board created in Chapter 30 of the West Virginia Code reports to a cabinet secretary or to an agency head within the executive branch of government.

Notwithstanding the autonomous structure of Chapter 30 boards, persons acting on behalf of the Governor's office have apparently construed the "freeze memo" as applying to such boards. For example, in 2007, Joe E. Smith, on behalf of the Governor's office, responded in writing to a Chapter 30 board's request to grant merit increases to certain members of its staff.<sup>5</sup> In his letter, Mr. Smith asks whether this board is aware of the restrictions imposed by the "freeze memo" and concludes by directing the board to advise the Governor's office if it is the board's intention "to

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<sup>1</sup>West Virginia Code §§ 30-4-4(b)(4) and -4-4(d).

<sup>2</sup>West Virginia Code § 30-4-5(2).

<sup>3</sup>West Virginia Code § 30-4-7(a).

<sup>4</sup>*Id.*

<sup>5</sup>Joe E. Smith is not an employee of the Governor's office. He is currently under contract as a consultant for the Governor's office.

ignore the express wishes of [the Governor's office]." For your reference, a redacted copy of Mr. Smith's letter is attached as Exhibit 2.

Mr. Smith has sent identical letters to other Chapter 30 boards that have requested discretionary salary increases for their employees.

### The Scope of the Governor's Authority Over the Board

The general powers of the Governor derive from Article VII, Section 5 of the West Virginia Constitution, which provides that "[t]he chief executive power shall be vested in the governor, who shall take care that the laws be faithfully executed." Although the Governor appoints the members of the Board, the Board does not administratively report to the Governor or to any executive branch agency under the control of the Governor. Indeed, inasmuch as the West Virginia Code allows Board members to be removed only for specific cause, it is clear that members of the Board, unlike cabinet secretaries and agency heads, do not serve at the will and pleasure of the Governor.

In 2005, the Legislature created eight executive branch departments currently under the control of the Governor.<sup>6</sup> Each department is headed by a secretary who is appointed by the Governor with the advice and consent of the Senate, and who serves at the will and pleasure of the Governor.<sup>7</sup> Moreover, the Legislature listed the specific agencies and boards which have been placed under the control of the eight executive branch departments.<sup>8</sup> The Legislature did not include any Chapter 30 boards within this structure; as a result, Chapter 30 boards do not report to an agency head, a cabinet secretary or the Governor. It follows, then, that the West Virginia Board of Dental Examiners, a Chapter 30 board, is not bound by an instruction issued by the Governor's chief of staff such as the April 2005 "freeze memo."<sup>9</sup>

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<sup>6</sup>West Virginia Code § 5F-1-2(a). The eight executive branch departments are as follows: (1) Department of Administration; (2) Department of Education and the Arts; (3) Department of Environmental Protection; (4) Department of Health and Human Resources; (5) Department of Military Affairs and Public Safety; (6) Department of Revenue; (7) Department of Transportation; and (8) Department of Commerce.

<sup>7</sup>West Virginia Code § 5F-1-2(b).

<sup>8</sup>West Virginia Code § 5F-2-1.

<sup>9</sup>We note that in the past when the Governor has chosen to exercise his supervisory authority over subordinate government officials with regard to fiscal matters, he has done so by Executive Order. See, e.g., *Ruby v. Insurance Commission*, 475 S.E.2d 27 (W. Va. 1996) (per curiam) (Governor issued Executive Order imposing 10% reduction in spending authority); *State ex rel.*

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### Conclusion

In conclusion, it is the opinion of this Office that the West Virginia Board of Dental Examiners is not bound by the so-called freeze on discretionary salary increases for state employees. Neither the Governor, his chief of staff nor the State Budget Office have authority to fix the salaries of the Board's staff. That authority specifically rests, by statute, with the Board. Moreover, given that the statutory grounds for removal of Board members by the Governor require findings of neglect of duty, incompetency, or official misconduct, it would not be legally permissible for Board members to be removed from office for exercising their clear legal authority to give raises to deserving Board staff.

Denying the Board the ability to adjust the salaries of its employees, if such adjustment would not cause an overdraft or deficit in the Board's special revenue account appropriated by the Legislature, would constitute a usurpation of the Board's power by the Governor's office. Therefore, absent an overdraft or deficit, it is incumbent upon the State Budget Office to perform its ministerial duty to process the necessary paperwork to implement discretionary salary increases for Board staff.

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<sup>9</sup>(...continued)


*Board of Education v. Caperton*, 441 S.E.2d 373 (W. Va. 1994) (Governor issued Executive Order imposing 1.5% cut in public education expenditures and 5% cut in all non-educational and non-arts expenditures; *State ex rel. West Virginia Board of Education v. Miller*, 168 S.E.2d 820 (W. Va. 1969) (Governor issued Executive Order mandating job freeze on all new positions unless the position and salary therefor were approved by the Governor). The "freeze memo" authored by the Governor's chief of staff on April 29, 2005, is not an official Executive Order.

Indeed, the Governor's chief of staff does not hold a position created by law which requires him to take an oath or execute a bond; therefore, he is not a "public officer" within the meaning of Section 8, Article 4 of the West Virginia Constitution, but rather is a mere employee. See *State ex rel. Key v. Bond, State Auditor*, 118 S.E. 276 (W. Va. 1923). Because the Governor's freeze policy was contained only in a memorandum authored and signed by an employee, without issuance of an Executive Order by the Governor, it is of questionable authority and effect. That is not to say, however, that the conclusion of this opinion would change if an Executive Order had been entered with regard to the Governor's freeze policy. Executive Orders may only be legally applied to those state agencies and personnel which are under the Governor's control. See *State ex rel. West Virginia Board of Education v. Miller* (Governor's job freeze Executive Order cannot be legally applied to State Board of Education because it does not answer to the Governor). As set forth earlier in this opinion, the West Virginia Board of Dental Examiners does not fall under the Governor's control.

If you have any questions regarding this matter, please do not hesitate to contact our office.

Very truly yours,

DARRELL V. McGRAW, JR.  
ATTORNEY GENERAL

By  Deputy  
KELLI D. TALBOTT

By  Assistant  
ANTHONY D. EATES II