

99-033

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

HOUSING: VIRGINIA HOUSING DEVELOPMENT AUTHORITY ACT.

Loans made by Virginia Housing Development Authority to its employees to finance purchase or improvement of single family homes are considered payments which are excepted from general contract prohibitions of State and Local Government Conflict of Interests Act. HDA employee applicants are not required to disqualify themselves from participating in their loan transactions, to publicly disclose their loans and record their disqualification, and refrain from voting or acting on behalf of HDA with respect to their loans.

Mr. Sam Kornblau
Chairman, Board of Commissioners
Virginia Housing Development Authority
September 10, 1999

You ask whether the State and Local Government Conflict of Interests Act, Chapter 40.1 of Title 2.1, §§ 2.1-639.1 through 2.1-639.24 (the "Act"), prohibits the Virginia Housing Development Authority ("HDA") from making loans to its employees to finance the purchase or improvement of single-family homes. If such loans are not prohibited, you also inquire whether the Act requires that HDA employees disqualify themselves from participating in any capacity in their HDA loan transactions and whether they must disclose their loans and disqualification in HDA's public records. You state that the loans will be made available to HDA employees consistent with the procedures, requirements and eligibility criteria, and according to the terms and conditions (including principal amounts, interest rates and maturities), established by HDA for loans made available to the general public.

Chapter 1.2 of Title 36¹ creates the HDA² and details its powers and duties. Specifically, HDA makes loans to persons and families of low and moderate income to finance the acquisition of single-family homes or for rehabilitation of their homes.³ The HDA has also adopted detailed rules and regulations which establish procedures, requirements, and eligibility criteria to be satisfied in order for persons and families to qualify for such loans.⁴

Section 2.1-639.6(A) restricts the personal interest a state employee may have in a contract with the governmental agency that employs him, "other than his own contract of employment."⁵ Section 2.1-639.2 defines "contract" as

any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the ... political subdivision, whether or not such agreement is executed in the name of the ... political subdivision.

In a 1985 opinion addressing the issue you present, the Attorney General states that "[a]n [HDA] loan to an employee would be an agreement within the Act's definition of a 'contract.'"⁶ The 1985 opinion notes the Act's definition of a "personal interest" as "a financial benefit or liability accruing to an ... employee or to a member of his immediate family."⁷ Accordingly, the opinion concludes that "[a]n [HDA] employee, being a party to a loan agreement with the [HDA], would have a 'personal interest in a contract' as that term is defined in [the Act]," and "[a]ny such personal interest in a contract which accrues to an [HDA] employee is prohibited unless specifically

excepted by the Act."⁸ The opinion concludes that there is no applicable exception and thus "[HDA] loans to employees are prohibited by [the Act]."⁹

At its 1987 Special Session, the General Assembly enacted § 2.1-639.9(A)(7) to include as an exception to the general contract prohibitions of § 2.1-639.6 "[g]rants or other payments under any program wherein uniform rates for, or the amounts paid to, all qualified applicants are established solely by the administering governmental agency."¹⁰ When new provisions are added to existing legislation by amendment, a presumption arises that, "in making the amendment the legislature acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts."¹¹ It is presumed further that the legislature acted purposefully with the intent to change existing law.¹² Because the Act contains no definition of what constitutes a "payment," the plain and ordinary meaning of that term is controlling.¹³ A "payment" is defined as "[t]he fulfillment of a promise, or the performance of an agreement."¹⁴ When a lender lends money, it is fulfilling its part of an agreement with the borrower. Consequently, it is my opinion that a loan is a "payment" within the meaning of § 2.1-639.9(A)(7).

Based on the above, therefore, the exception provided in § 2.1-639.9(A)(7) for "payment under any program wherein uniform rates for, or the amounts paid to, all qualified applicants are established solely by the administering governmental agency" is applicable to HDA loans. Such loans, therefore, are excepted from the Act's general contract prohibitions, and, in my opinion, may be made available to HDA employees.

You next inquire whether the Act requires employee applicants for an HDA loan (1) to disqualify themselves from participating in their loan transactions, (2) to refrain from voting or acting on behalf of the HDA with respect to their loans, and (3) to disclose their loans and their disqualification in the public records of the HDA.

The exception provided in § 2.1-639.9(A)(7) is one of eight exceptions contained in § 2.1-639.9 applicable to the general prohibition in § 2.1-639.6(A) against a state employee having "a personal interest in a contract with the [governmental] agency of which he is an ... employee." When the General Assembly intends a statute to impose requirements, it knows how to express its intention.¹⁵ Thus, whereas several of the exceptions in this statute do provide that the employee not participate in the contract, the employee disqualify himself from participation, and the employee have his disqualification publicly recorded, these requirements are not imposed in § 2.1-639.9(A)(7).¹⁶ It is my opinion, therefore, that such requirements are not applicable to the exception set forth in § 2.1-639.9(A)(7).

¹Sections 36-55.24 to 36-55.52 (entitled "Virginia Housing Development Authority Act").

²See § 36-55.27 (continuing HDA within Department of Housing and Community Development as political subdivision).

³See, e.g., §§ 36-55.30, 36-55.32.

⁴See 13 VAC 10, chs. 40, 50 (Law. Coop. 1996 & West Supp. 1999).

⁵See also § 2.1-639.2 (defining "employee," "governmental agency").

⁶1985-1986 Op. Va. Att'y Gen. 33, 34.

⁷Section 2.1-639.2; see also 1985-1986 Op. Va. Att'y Gen., *supra*, at 34 (quoting former Act's definition of "personal interest" as "a personal and financial benefit or liability accruing to an

officer or employee or to such person's spouse, or any other relative who resides in the same household").

⁸1985-1986 Op. Va. Att'y Gen., *supra*, at 34.

⁹*Id.*

¹⁰1987 Va. Acts ch. 1, at 1, 5. The meaning of § 2.1-639.9(A)(7) has not changed since the 1987 enactment.

¹¹Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

¹²Cape Henry v. Natl. Gypsum, 229 Va. 596, 331 S.E.2d 476 (1985); Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982).

¹³See Commonwealth v. Orange-Madison Coop., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1997 Op. Va. Att'y Gen. 135, 136.

¹⁴Black's Law Dictionary 1129 (6th ed. 1990).

¹⁵*Compare* 1998 Op. Va. Att'y Gen. 87, 88 (noting that if General Assembly intended to require Board of Pharmacy to promulgate specific regulations, it would have expressed this intention).

¹⁶See § 2.1-639.9(A)(1), (3)-(5).