



COMMONWEALTH of VIRGINIA

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January 5, 2007

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The Honorable Danny W. Marshall, III
Member, House of Delegates
P.O. Box 439
Danville, Virginia 24543

Dear Delegate Marshall:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You ask several questions concerning § 22.1-296.1(C), which requires local school boards to obtain certifications from contractors and certain others regarding prior criminal convictions.

Applicable Law and Discussion

Since 1985,¹ § 22.1-296.1 has established that local school boards' applications for employment require certain statements of prospective employees regarding their criminal history. In 2006, the statute was amended to address such certification from contractors and their employees ("certification information"):

C. Prior to awarding a contract for the provision of services that require the contractor or his employees to have direct contact with students, the school board shall require the contractor and, when relevant, any employee who will have direct contact with students, to provide certification that (i) he has not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child; and (ii) whether he has been convicted of a crime of moral turpitude.

Any person making a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and, upon conviction, the fact of such conviction shall be grounds for the revocation of the contract to provide such services and, when relevant, the revocation of any license required to provide such services. School boards shall not be liable for materially false statements regarding the certifications required by this subsection.

¹See 1985 Va. Acts ch. 487, at 779, 779 (adding § 22.1-296.1 to provide that local school board employment applications require certification that applicant has not been convicted of any offense involving sexual molestation, physical or sexual abuse or rape of child).

For the purposes of this subsection, "direct contact with students" means being in the presence of students during regular school hours or during school-sponsored activities.^[2]

Question One

You ask whether § 22.1-296.1(C) applies to all contractors providing services to a school system. For instance, you ask whether the law applies to soft drink vendors who may walk down a hallway and, therefore, be in the presence of students.

The certification information that a local school board must require of contractors and their employees does not apply to all contracts. Section 22.1-296.1(C) stipulates that school boards must require the certification prior to awarding a contract "for the provision of services that require the contractor or his employees to have direct contact with students."

To determine whether the requirements of the statute attach to a particular contract, it is necessary first to determine whether the contract is one for the provision of services. Section 22.1-296.1(C) does not define "services." The conduct of local school boards in contract matters is governed by the Virginia Public Procurement Act.³ The Procurement Act imposes requirements on public bodies' entering into contracts for, among other things, the purchase of "services." The Procurement Act defines "services" as "any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies."⁴ It is my opinion that a local school board should rely on the definition of "services" in the Procurement Act in determining the scope of its responsibilities under § 22.1-296.1(C).

When the proposed contract is for the provision of services, the next inquiry is whether the services require the contractor or his employees to have direct contact with students. Section 22.1-296.1(C) provides that "'direct contact with students' means being in the presence of students during regular school hours or during school-sponsored activities."

Returning to your example, a contract to provide soft drinks would be a contract for the purchase of goods. Therefore, such a contract is not subject to § 22.1-296.1(C). A contract to maintain vending machines would be a contract for services. Such a contract is subject to the certification requirement if the contractor or his employees are required to have direct contact with students, which would include an expectation that the contractor would be in the presence of students during regular school hours or during school-sponsored activities in order to comply with the contract's terms. A service contract that restricted service of vending machines to times outside regular school hours and school-sponsored activities (for example, on Saturdays and Sundays) would not be subject to § 22.1-296.1(C).

²2006 Va. Acts ch. 790, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+CHAP0790>.

³See VA. CODE ANN. §§ 2.2-4300 to 2.2-4377 (2005 & Supp. 2006); see also 1982-1983 Op. Va. Att'y Gen. 433, 433 (concluding that school board is "public body" within meaning of § 11-37, predecessor to § 2.2-4301, of Procurement Act).

⁴VA. CODE ANN. § 2.2-4301 (Supp. 2006).

Consequently, it is my opinion that § 22.1-296.1 applies to school board contracts for services where the contractor or his employees reasonably could be expected to be in the presence of students during school hours or during school-sponsored activities in order to comply with the contract's terms. It further is my opinion that whether a particular contract is one for services that requires the contractor or his employees to be in the presence of students must be determined from the particular terms of the contract.

Question Two

You next ask whether the contractor is responsible for affirming certification information for his subcontractors.

Section 22.1-296.1(C) requires local school boards to obtain certification information from contractors and their employees. Subcontractors and their employees are not specifically included; however, a question arises regarding whether certification from subcontractors and their employees is implied.

Every statute is to be read so as to "promote the ability of the enactment to remedy the mischief at which it is directed." The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which, absent constitutional infirmity, must always prevail. All rules are subservient to that intent. Further, it is a universal rule that statutes ..., which are remedial in nature, are to be "construed liberally, so as to *suppress the mischief* and advance the remedy," as the legislature intended.^[5]

Without certification information from subcontractors and their employees, the legislative intent that public school children be shielded from direct contact with persons with certain criminal histories would be thwarted. Therefore, subcontractors and their employees must be included among the persons from whom the school board must require certification information.

Question Three

You next inquire whether the statement, "has not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child"⁶ applies only when there is a case of sexual molestation or rape or whether it applies to all felony convictions.

The 1985 Session of the General Assembly enacted § 22.1-296.1.⁷ In its original form, § 22.1-296.1 provided that "[a]s a condition of employment for all of its public school employees, every school board shall require on its application for employment certification that the applicant has not been convicted of any offense involving the sexual molestation, physical or sexual abuse or rape of a child."⁸

⁵Bd. of Supvrs. v. King Land Corp., 238 Va. 97, 103, 380 S.E.2d 895, 897-98 (1989) (citations omitted) (emphasis in original).

⁶VA. CODE ANN. § 22.1-296.1(C) (2006).

⁷See 1985 Va. Acts, *supra* note 1.

⁸See § 22.1-296.1.

In 1996,⁹ the General Assembly amended § 22.1-296.1 to provide that:

As a condition of employment for all of its public school employees, *whether full-time or part-time, permanent, or temporary*, every school board shall require on its application for employment certification that the applicant has not been convicted of *a felony, a crime of moral turpitude, or any offense involving the sexual molestation, physical or sexual abuse or rape of a child.*^[10]

The 1996 amendment makes clear the legislative intent that, for prospective employees of a local school board, the individual must certify that he has not been convicted of: (1) a felony; (2) a crime of moral turpitude; or (3) any offense involving the sexual molestation, physical or sexual abuse or rape of a child.

In 2003, the General Assembly reworded the criminal certification requirement. The 2003 enactment changed the relevant part of § 22.1-296.1(A) to its present form:

As a condition of employment for all of its public school employees, whether full-time or part-time, permanent, or temporary, every school board shall require on its application for employment certification *(i) that the applicant has not been convicted of a felony, ~~a crime of moral turpitude~~, or any offense involving the sexual molestation, physical or sexual abuse or rape of a child; and (ii) whether the applicant has been convicted of a crime of moral turpitude.*^[11]

As a result of the 2003 legislation, an applicant for employment is not required to certify that he has not been convicted of a crime of moral turpitude. Instead, he merely must disclose the fact.

Given the history of amendments to § 22.1-296.1, prospective employees of school boards must certify that they have not been convicted of a felony or of any offense involving the sexual molestation, physical or sexual abuse or rape of a child. Other rules of statutory construction support this conclusion. If the legislature intended “a felony” to be limited to only those felonies involving the sexual molestation, physical or sexual abuse or rape of a child, then the use of the term “felony” is meaningless, as “any offense” would include such a felony. An important rule of statutory construction is that “every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.”¹² The 2006 amendment¹³ requires contractors and their employees to provide the same certification as that required of applicants for employment by the school board. Therefore, such certifications should be given the same interpretation.

⁹The 1987 Session of the General Assembly also amended § 22.1-296.1. *See* 1987 Va. Acts ch. 359, at 446, 446. The 1987 amendment made it a Class 1 misdemeanor to make a materially false statement on a certification, which was also grounds for revocation of a teaching certificate. *See id.*

¹⁰1996 Va. Acts ch. 960, at 2343, 2343.

¹¹2003 Va. Acts ch. 723, at 981, 981. The General Assembly had also amended § 22.1-296.1 in 1997. *See* 1997 Va. Acts ch. 103, at 147, 148 (adding requirement to subsection B that, for applications for employment requiring direct contact with children, applicant must certify that he “*has not been the subject of a founded case of child abuse and neglect*”).

¹²*Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); *see also* 2006 Op. Va. Att’y Gen. No. 05-075, available at http://www.vaag.com/OPINIONS/2006opns/05-075_Albo.pdf.

¹³*See supra* note 2 and accompanying text.

Accordingly, it is my opinion that § 22.1-296.1(C) requires affected persons to certify that they have not been convicted of any felony or of any offense involving the sexual molestation, physical or sexual abuse or rape of a child and to disclose whether they have been convicted of any crime of moral turpitude.

Question Four

You next inquire what specific crimes would be considered crimes of moral turpitude.

I find no statute or case that contains an exhaustive list of crimes of moral turpitude. Determining whether a particular crime involves moral turpitude begins with an examination of the nature of the crime. The Supreme Court of Virginia has defined a crime involving moral turpitude as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”¹⁴

The Virginia Supreme Court has held that crimes involving dishonesty, including petty larceny¹⁵ and making a false statement to obtain unemployment benefits,¹⁶ are crimes of moral turpitude that may be used to impeach witnesses. The Virginia Supreme Court and the Court of Appeals of Virginia also have determined that drunkenness and illegal possession of liquor,¹⁷ assault and battery,¹⁸ gambling,¹⁹ transportation of untaxed liquor,²⁰ and indecent exposure²¹ are not crimes constituting moral turpitude.

Therefore, it is my opinion that whether a certain crime involves moral turpitude depends on the facts and the nature of the crime.²² However, crimes involving dishonesty do involve moral turpitude.

Question Five

You further ask whether there are there specific guidelines for a school system to follow should a contractor be unable to verify that each employee of the business or an employee of a subcontractor has not committed an act prohibited by § 22.1-296.1(C).

¹⁴Tasker v. Commonwealth, 202 Va. 1019, 1024, 121 S.E.2d 459, 463 (1961) (quoting Parr v. Commonwealth, 198 Va. 721, 724, 96 S.E.2d 160, 163 (1957)), *quoted in* Great Coastal Express, Inc. v. Ellington, 230 Va. 142, 147, 334 S.E.2d 846, 850 (1985).

¹⁵Bell v. Commonwealth, 167 Va. 526, 538, 189 S.E. 441, 447 (1937).

¹⁶C. & O. Ry. Co. v. Hanes, 196 Va. 806, 813, 86 S.E.2d 122, 126 (1955).

¹⁷Pike v. Eubank, 197 Va. 692, 700, 90 S.E.2d 821, 827 (1956).

¹⁸Burford v. Commonwealth, 179 Va. 752, 766, 20 S.E.2d 509, 514 (1942).

¹⁹Parr, 198 Va. at 725, 96 S.E.2d at 164.

²⁰Burford, 179 Va. at 765, 20 S.E.2d at 514.

²¹Chrisman v. Commonwealth, 3 Va. App. 89, 100, 348 S.E.2d 399, 405 (1986).

²²*Id.* at 94, 348 S.E.2d at 401 (noting that in determining whether crime is one involving moral turpitude, it is not punishment that makes crime infamous, “but rather the *nature* of the crime”) (emphasis in original); *see also* Tasker, 202 Va. at 1024-25, 121 S.E.2d at 463-64 (contributing to delinquency of minor may or may not involve moral turpitude, depending on facts shown by record on which conviction was based).

Section 22.1-296.1(C) directs local school boards to require certification information from the contractor and the relevant employees “[p]rior to awarding a contract.” The statute is silent on the school board’s response in the event the certification information is not provided. The bidder or offerer who fails to provide such certification has failed to satisfy a statutory requirement that must be met before a contract is awarded.

Accordingly, it is my opinion that where a contractor or any relevant employee fails to meet the requirements of § 22.1-296.1(C), the contractor is not eligible for an award of the contract.

Question Six

Finally, you ask whether the school system has the sole responsibility to enforce § 22.1-296.1.

Section 22.1-296.1(C) provides that any person who makes “a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and, upon conviction, the fact of such conviction shall be grounds for the revocation of the contract to provide such services and, when relevant, the revocation of any license required to provide such services.” In a broad sense, this provision embraces three different forms of “enforcement,” i.e., a misdemeanor, contract revocation, and license revocation.

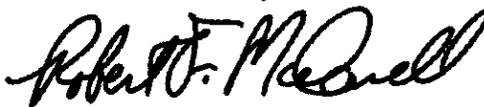
Thus, there are three possible consequences to a materially false certification: (1) prosecution for a misdemeanor; (2) if convicted of a misdemeanor, the contract may be revoked; and (3) such a conviction may result in the loss of a license required to provide the services. Any person having knowledge suggesting that a person has made a materially false statement on a certification may report the relevant information to local law enforcement authorities or to the appropriate office of the Commonwealth’s attorney for prosecution. Persons who have knowledge of a false statement might include school system personnel, but such knowledge is not limited to that group.

In the event of a conviction for a materially false certification, the right to revoke the contract rests with the parties to the contract, the school board and the contractor. Such a conviction may also be the basis to revoke any license required to provide the services. Section 22.1-296.1 does not preclude any person having knowledge of the conviction from reporting it to the licensing agency, which alone has the ability to revoke the license.

Therefore, it is my opinion that in the event of a materially false certification, the school board has the authority to revoke a contract. It further is my opinion that revocation of a required license is within the purview of the licensing agency.

Thank you for letting me be of service to you.

Sincerely,



Robert F. McDonnell