



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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B. James Jefferson, Esquire  
County Attorney, Franklin County  
5 East Court Street, Suite 101  
Rocky Mount, Virginia 24151

Dear Mr. Jefferson:

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

## Issues Presented

You ask a number of questions in connection with § 2.2-3119(E), which provides an exception to the general rule that prohibits certain family members or spouses from working in a particular school division if their spouse or relative serves on the school board of that school division. You first ask whether the exception, which applies to certain specifically named planning districts, applies to Franklin County. You then ask whether it is possible for the superintendent to certify that “no member of the Board had any involvement with the hiring decision” when the school board, by statute, retains the ultimate responsibility for hiring school personnel. You further inquire whether the school board member avoids any impermissible conflict if he recuses himself, avoids being physically present during the closed session during which his spouse or relative employee is discussed, avoids voting on the issue, and certifies by affidavit that he had no involvement in the hiring decision. You also ask whether any citizen of the County could bring a civil suit for malfeasance in office and/or seek criminal prosecution against the school board or the superintendent for participating in the hiring of such an individual. Finally, you ask whether it is unconstitutional for the General Assembly to provide the exception for individuals in certain specified areas of the Commonwealth without extending that exception to all.

## Response

It is my opinion that the exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12. It is further my opinion that § 2.2-3119(E) can be harmonized with other statutes that require the school board to retain ultimate authority for hiring decisions. Section 2.2-3119(E) does not require the school board to forfeit that authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent’s recommendation, the non-conflicted school board members then can vote on the applicant. I also conclude that the requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative. Although it is my view that the Code authorizes a Commonwealth’s Attorney or citizens to file suits for violations of the Conflicts Act, such a suit would be unsuccessful when the strictures of § 2.2-3119(E) are followed because no violation of the Act would have occurred. Finally, I am unable to conclude

that § 2.2-3119(E) is unconstitutional, given the presumption of constitutionality of statutes and the highly deferential standard of review that would be applied to judicial scrutiny of this statute.

### **Applicable Law and Discussion**

The General Assembly of Virginia has vested hiring authority for schools in local school boards. Section 22.1-313(A) provides that “[t]he school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals, suspensions and placing on probation.” In addition, § 22.1-293(A) provides that “[a] school board, upon recommendation of the division superintendent, may employ principals and assistant principals.” Section 22.1-295(A) states that “[t]he teachers in the public schools of a school division shall be employed and placed in appropriate schools by the school board upon recommendation of the division superintendent.”

Section 2.2-3119 of the State and Local Government Conflicts of Interest Act (“the Conflicts Act”) provides in relevant part that

Notwithstanding any other provision of this chapter, it shall be unlawful for the school board of any county or city or of any town constituting a separate school division to employ or pay any teacher or other school board employee from the public funds, federal state or local, or for a division superintendent to recommend to the school board the employment of any teacher or other employee, if the teacher or other employee is the father, mother, brother, sister, spouse, son daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of the superintendent, or any member of the school board.

Subsection (E) of § 2.2-3119 carves out an exception to this general rule, by specifying that

The provisions of this section shall not apply to employment by a school district located in Planning Districts 11, 12, and 13 of the father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law, or brother-in-law of any member of the school board provided (i) the member certifies that he had no involvement with the hiring decision and (ii) the superintendent certifies to the remaining members of the governing body in writing that the employment is based upon merit and fitness and the competitive rating of the qualifications of the individual and that no member of the board had any involvement with the hiring decision.<sup>[1]</sup>

A Planning District Commission is a political subdivision of the Commonwealth, chartered under the Regional Cooperation Act by the local governments of each planning district.<sup>2</sup>

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<sup>1</sup> During the 2011 Session, the General Assembly added planning district 3 to this list. 2011 Va. Acts ch. 517. Planning District 3 covers the Counties of Bland, Carroll, Grayson, Smyth, Washington and Wythe; the cities of Bristol and Galax, and the towns of Abingdon, Chilhowie, Damascus, Fries, Glade Spring, Hillsville, Independence, Marion, Rural Retreat, Saltville, Troutdale and Wytheville. The Districts currently covered by the statute include Planning District 11, which covers counties of Amherst, Appomattox, Bedford and Campbell; the cities of Bedford and Lynchburg; the towns of Altavista, Amherst, Appomattox and Brookneal. Planning District 12 is comprised of Franklin, Henry, Patrick and Pittsylvania; the cities of Danville and Martinsville and the town of Rocky Mount. Finally, Planning District 13 includes the counties of Brunswick, Halifax and Mecklenburg and the towns of South Hill and South Boston. See <http://www.dhcd.virginia.gov/CommissiononLocalGovernment/pages/PDC.htm> (listing the different planning commissions and their members).

<sup>2</sup> VA. CODE ANN. § 22.1-70 (2006).

Like other government entities, school boards may delegate responsibilities to subordinate officers. For example, the school board can delegate to the superintendent “such other duties as may be prescribed . . . by the school board.”<sup>3</sup>

With respect to your first question, the fact that Franklin County is a member of two planning districts, Planning District 12 and Planning District 5,<sup>4</sup> does not alter the fact that it is in Planning District 12. Because it is located in Planning District 12, it falls under the plain language of § 22.1-293(E).

One could read § 2.2-3119(E) to require the school board to have no involvement with the decision to hire an employee who is married to or related to a school board member. Such a reading would conflict with several statutes: § 22.1-313(A) (providing that the ultimate responsibility for hiring in a school division rests with the school board) and §§ 22.1-293 (providing for the school board to make hiring decisions with respect to principals and assistant principals) and 22.1-295 (providing for the school board to make hiring decisions with respect to teachers). “When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both. However, when two statutes do conflict, and one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling.”<sup>5</sup> Section 2.2-3119(E) can be harmonized with §§ 22.1-293, 22.1-295(A) and 22.1-313(A). The plain language of § 2.2-3119(E) does not require the school board to have no involvement in the hiring decision. It simply requires that *at the time the superintendent presents the hiring recommendation* to the school board, he must certify that “no member of the school board had any involvement in the [superintendent’s] hiring decision.”<sup>6</sup> In other words, the superintendent is making a certification that he reached an independent determination of the merit of the candidate without any involvement by school board members. When presented with the superintendent’s recommendation, school board members – save the school board member married to or related to the applicant – can then vote on hiring the candidate.

In response to your third question, § 2.2-3119(E) is satisfied if the school board member who is married to or related to the person seeking employment recuses himself from participating in the decision and certifies on the record that he had no involvement in the hiring decision. If, in addition to these requirements, the school board member in this situation also avoids being physically present at the closed session during which the employee is discussed, and certifies by affidavit that he had no involvement in the hiring decision, the school board member certainly would satisfy § 2.2-3119(E).

You next ask whether a citizen or a commonwealth’s attorney could file suit for a violation of the Conflicts Act if one of the specified relatives of a school board members is hired to work in the school division covered by § 2.2-3119(E). Section 2.2-3126(B) authorizes the attorney for the Commonwealth to enforce the provisions of this chapter with respect to officers of local government. The Code further provides that “[i]rrespective of whether an opinion of the attorney for the Commonwealth or the Attorney General has been requested and rendered, any person has the right to seek a declaratory judgment or other judicial relief as may be provided by law.”<sup>7</sup> I can find no precedent for the precise scope of the relief a citizen can seek under this provision. Nevertheless, if the school board and the superintendent have followed the strictures of § 2.2-3119(E), such a suit would not be successful because no *knowing* violation of the

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<sup>3</sup> See VA. CODE ANN. §§ 15.2-4200 through 15.2-4222 (2008 & Supp. 2010).

<sup>4</sup> The General Assembly expressly has authorized a locality to belong to more than one planning district. Section 15.2-4220 (2008).

<sup>5</sup> Viking Enter. v. County of Chesterfield, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (internal citations, quotation marks, and alternations omitted).

<sup>6</sup> VA. CODE ANN. § 2.2-3121 (2008).

<sup>7</sup> Section 2.2-3126(B).

Conflicts Act could be established. Even if the court were to conclude that the school board could not delegate its hiring authority to the superintendent in any circumstance, and therefore § 2.2-3119(E) is a nullity, or, alternatively, that § 2.2-3119(E) is found to be unconstitutional, a superintendent or school board member who relies on an express and presumptively valid provision of the Code could not have committed a *knowing* violation of the law.

I further note that a commonwealth's attorney can provide advisory opinions to local government officials with respect "to whether the facts in a particular case would constitute a violation of" the Conflicts Act.<sup>8</sup> A good-faith reliance on a written advisory opinion, made after full disclosure of the facts, would shield the requester from a prosecution for violations of the Conflicts Act.<sup>9</sup>

Finally, you ask whether the limited conflicts exception in § 2.2-3119(E) for Planning Districts 11, 12, and 13 violates any provision of the Virginia or United States Constitutions. Article IV, § 14 of the Virginia Constitution imposes certain restrictions on the power of the General Assembly to impose a "local, special or private law."

The essence of prohibited special legislation is the existence of an arbitrary separation of persons, places, or things of the same class, with the result that some of them will, and some will not, be affected by the law. Nonetheless, constitutional prohibitions against special laws do not proscribe classification. All classifications import some degree of discrimination, but the legislature is not required to achieve mathematical nicety. The classification, however, must be natural and reasonable, and appropriate to the occasion. Routinely, legislation pertains to specific classifications of persons, places or property. Such an enactment is nonetheless "general," provided the classification is reasonable, not arbitrary, and applies to all persons who are similarly situated as well as to all parts of the State where like conditions exist."<sup>10]</sup>

"Importantly, the necessity for and the reasonableness of the classification are primarily questions for the legislature. If any state of facts can be reasonably conceived that would sustain it, that state of facts at the time the law was enacted must be assumed. And the burden is upon the assailant of the legislation to establish that it does not rest upon a reasonable basis, and is essentially arbitrary."<sup>11</sup> Finally, and importantly, "[a]ny reasonable doubt regarding the constitutionality of an enactment must be resolved in favor of the law's validity."<sup>12</sup>

Other potentially applicable vehicles for challenge are the Equal Protection Clause and the substantive due process aspect of the Fourteenth Amendment to the United States Constitution.<sup>13</sup> Government employment free of any conflict of interest does not implicate any suspect classes or

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<sup>8</sup> *Id.* If the local government official disagrees with the conclusion of the Commonwealth's Attorney, he can seek a potentially overriding opinion from the Office of the Attorney General. *Id.*

<sup>9</sup> Section 2.2-3121(B).

<sup>10</sup> *Holly Hill Farm Corp. v. Rowe*, 241 Va. 425, 430-31, 404 S.E.2d 48, 50 (1991) (citations and internal quotation marks omitted).

<sup>11</sup> *Id.* at 431, 404 S.E.2d at 50 (citations and internal quotations omitted).

<sup>12</sup> *Id.* at 430, 404 S.E.2d at 50 (citations and internal quotations omitted).

<sup>13</sup> The Fourteenth Amendment of the United States Constitution provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This provision includes both a procedural and a substantive component. *Etheridge v. Medical Ctr. Hosp.*, 237 Va. 87, 97, 376 S.E.2d 525, 530 (1989). The Fourteenth Amendment of the United States Constitution also provides that "[n]o State ... shall deny to any person within its jurisdiction of the equal protection of the laws." U.S. Const. amend. XIV, § 1.

fundamental rights, so the distinction would be reviewed under the highly deferential rational basis scrutiny.<sup>14</sup>

[E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.<sup>15]</sup>

Given the “strong presumption in favor of the constitutionality of statutes,”<sup>16</sup> the highly deferential standard of review that would be applied to the classification at issue here, and the great reluctance of the Attorney General to declare any statute unconstitutional,<sup>17</sup> I am unable to conclusively determine that § 2.2-3119(E) is unconstitutional.<sup>18</sup>

### Conclusion

Accordingly, it is my opinion that the exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12. It is further my opinion that § 2.2-3119(E) can be harmonized with other statutes that require the school board to retain ultimate authority for hiring decisions. Section 2.2-3119(E) does not require the school board to forfeit that authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent’s recommendation, the non-conflicted school board members then can vote on the applicant. I also conclude that the requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative. Although it is my view that the Code authorizes a Commonwealth’s Attorney or citizens to file suits for violations of the Conflicts Act, such a suit would be unsuccessful when the strictures of § 2.2-3119(E) are followed because no violation of the Act would have occurred. Finally, I am unable to conclude that § 2.2-3119(E) is unconstitutional, given the presumption of constitutionality of statutes and the highly deferential standard of review that would be applied to judicial scrutiny of this statute.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II  
Attorney General

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<sup>14</sup> *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 457-58 (1988); *see also Hess v. Snyder Hunt Corp.*, 240 Va. 49, 55, 392 S.E.2d 817, 821 (1990).

<sup>15</sup> *Advanced Talking Co. v. Fairfax Cnty. Bd. of Sprvrs.*, 280 Va. 187, 191, 694 S.E.2d 621, 623-24 (2010) (quoting *FCC v. Beach Comm’nics, Inc.*, 508 U.S. 307, 313-15 (1993)).

<sup>16</sup> *FFW Enters. v. Fairfax County*, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010).

<sup>17</sup> *See, e.g.*, 2007 Op. Va. Att’y Gen. 30, 34-35.

<sup>18</sup> *But see Thompson v. Gallagher*, 489 F.2d 443 (5th Cir. 1973) (finding Equal Protection violation in city employee classification); *Dean v. Paolicelli*, 194 Va. 219, 237-38, 72 S.E.2d 506, 517-18 (1952) (finding a violation of the prohibition on special laws).