



# COMMONWEALTH of VIRGINIA

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July 31, 2015

The Honorable T. Scott Garrett, M.D.  
Member, House of Delegates  
2255 Langhorne Road, Suite 4  
Lynchburg, Virginia 24501

Dear Delegate Garrett:

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

## Issue Presented

By statute, § 63.2-1720(C) of the *Code of Virginia*, a person who has been convicted of certain offenses “while employed in a child day center” may not be employed there. The precise question presented is whether that phrase refers to (1) an offense committed *during the period of time* an individual is employed in a child day center, or (2) an offense committed *within the scope of employment* in a child day center.

## Applicable Law and Discussion

Child day centers licensed by the Department of Social Services are required to conduct background checks on their prospective employees.<sup>1</sup> Section 63.2-1720 generally prohibits these facilities from hiring any person who has been convicted of a “barrier crime” as defined in § 63.2-1719.<sup>2</sup> However, § 63.2-1720 provides an exception that allows a child day center to hire a person who has been “convicted of not more than one misdemeanor offense under § 18.2-57 if 10 years have elapsed following the conviction, unless the person committed [the] offense *while employed in a child day center* or the object of the offense was a minor.”<sup>3</sup>

In this context, the phrase “while employed in a child day center” is ambiguous. It could mean an offense committed during the period of employment at a child day center, or it could mean an offense

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<sup>1</sup> VA. CODE ANN. § 63.2-1720 (Supp. 2014). For purposes of § 63.2-1720, an “employee” of a child day center means an individual who is “involved in the day-to-day operations of [the] agency or who [is] alone with, in control of, or supervising one or more children.” *Id.*

<sup>2</sup> Certain offenses other than “barrier crimes” are also included in the prohibition. *See* §§ 63.2-1719 (2012), 63.2-1720.

<sup>3</sup> Section 63.2-1720(C) (emphasis added).

committed within the scope of employment in a child day center. Because the statute is ambiguous, we must examine the language of related statutes to determine the intent of the General Assembly.<sup>4</sup>

Section 63.2-1726 is a related statute. It provides that children's residential facilities, like licensed child day centers, are prohibited from employing persons with certain criminal convictions.<sup>5</sup> It lists the offenses that generally bar an individual from employment at a children's residential facility<sup>6</sup> and provides an exception that allows a children's residential facility to hire "persons who have been convicted of not more than one misdemeanor offense under § 18.2-57 or 18.2-57.2, if 10 years have elapsed following the conviction, unless the person committed such offense *in the scope of his employment, volunteer, or contractual services.*"<sup>7</sup>

Although similar to the exception in § 63.2-1720(C) that applies to employees at child day centers, the exception in § 63.2-1726 for children's residential facilities has a key difference: it refers to "in the scope of his employment" rather than "while employed in." It must be assumed that the General Assembly chose its words with care in enacting the two statutes.<sup>8</sup> Because the two statutes use different words in similar contexts, the General Assembly must have intended the different words to mean different things. The phrase "in the scope of his employment" means the offense must have occurred in connection with the individual's work at a covered facility. It must therefore be concluded that the different phrase "while employed in" means the offense happened during the period of employment, but not necessarily in the scope of employment.<sup>9</sup>

### Conclusion

Accordingly, it is my opinion that the phrase "while employed in a child day center" in § 63.2-1720(C) refers to an offense committed during the period of time an individual is employed at a child day center, regardless of whether or not the offense was committed within the scope of employment

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<sup>4</sup> *Cf. Seaboard Fin. Corp. v. Commonwealth*, 185 Va. 280, 286 (1946) ("It is a cardinal rule of construction that statutes dealing with a specific subject must be construed together in order to arrive at the object sought to be accomplished.").

<sup>5</sup> The hiring prohibition also applies to certain volunteers and contractors at children's residential facilities. *See* § 63.2-1726 (Supp. 2014).

<sup>6</sup> *Id.* The list of crimes barring employment in a children's residential facility is slightly different than the list of "barrier crimes" barring employment at licensed child day centers. *Compare* § 63.2-1719 *with* § 63.2-1726.

<sup>7</sup> Section § 63.2-1726(B) (emphasis added).

<sup>8</sup> *See Williams v. Commonwealth*, 61 Va. App. 1, 7 (2012) (quoting *Coles v. Commonwealth*, 44 Va. App. 549, 557-58 (2004)).

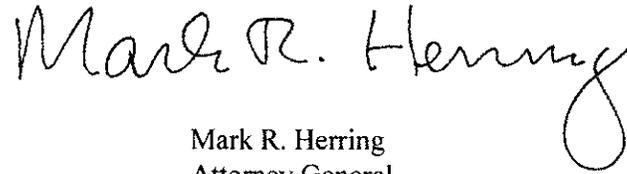
<sup>9</sup> I note that a 2008 Report of the Joint Commission on Health Care, entitled "Impact of Barrier Crime Laws on Social Service and Health Care Employers" (Senate Document No. 11) reaches the opposite conclusion, without considering the different wording between § 63.2-1726 (for children's residential facilities, requiring that the barrier crime be committed "in the scope of . . . employment") and § 63.2-1720(C) (for child day centers, requiring only that the barrier crime be committed "while employed" at the facility).

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there.

With kindest regards, I am

Very truly yours,

A handwritten signature in black ink that reads "Mark R. Herring". The signature is written in a cursive style with a large, looping flourish at the end of the word "Herring".

Mark R. Herring  
Attorney General