

TO: Opioid Abatement Advisory Commission
FROM: Takhmina Rakhmatova, Assistant Attorney General
Anne Edwards, Associate Attorney General
DATE: September 26, 2022
RE: Conflict of Interest Questions Regarding the Opioid Abatement Advisory
Commission Members Reviewing Applications Received in Response to Request
for Grant Applications.

Questions Presented

1. Should members of the Opioid Abatement Advisory Commission (the “Commission”) vote on applications received from applicants other than their organizations in response to a Request for Grant Applications (“RFGA”) targeting Opioid Abatement Trust funds if their organizations have submitted applications?
2. May the Commission members vote on applications received from their organizations in response to the RFGA targeting Opioid Abatement Trust funds?

Brief Answers

1. Yes, based on how the Legislature created the Commission, Commission members should vote on applications from applicants other than their organizations.
2. No, Commission members should not vote on the applications from their organizations.

Legal Authority

RSA 21-G:22 requires executive branch officials to avoid conflicts of interest. A conflict of interest is a “situation, circumstances or financial interest which has the potential to cause a private interest to interfere with the property exercise of a public duty.” Regarding the Commission, we have currently identified two actions by Commission members that could

implicate the conflict of interest: (1) voting on the proposal received from the member's organization; and (2) voting on the applications from other organizations.

Facts

The Commission was established, pursuant to RSA 126-A:85, to “consult with and advise the commissioner of the department of health and human services relative to the proper administration and management of the opioid abatement trust fund.” The Commission consists of certain heads of executive branch departments, members from political subdivisions, and members appointed by the Governor. RSA 126-A:85. In addition, one member is appointed by the New Hampshire Association of Counties; one member is appointed by the Attorney General; three members are appointed by the Governor's Commission on Alcohol and Drug Abuse Prevention, Treatment and Recovery; and one member is appointed by the New Hampshire School Administrators Association.

One of the main duties of the Commission is to award a part of the total funds to “qualifying governmental entit[ies] or program[s]” for projects meeting one of the sixteen criteria listed in RSA 126-A:86. RSA 126-A:83. The statute authorizes state agencies and political subdivisions to apply for the funding. RSA 126-A:86, I (b) (1), (2), and (5). The Department of Health and Human Services (“DHHS”) is tasked with administering the RFGA process and providing the Commission with DHHS' review of the applications received.

A new RFGA will be issued when the balance in the Trust exceeds \$500,000. Each application submitted is preliminary reviewed by DHHS staff for completeness, eligibility of the applicant, and compliance with the RFGA requirements. After its review, DHHS submits, along with its input, the applications passing the preliminary review to the Commission. The

Commission then reviews, discusses, and votes on each application to either recommend the application to the Governor and Executive Council or deny a project. The decisions are made based on a majority vote of the Commission. He-C 1000.

Voting on Applications Submitted by Organizations that are not Represented by a Member

Members of the Commission do not, solely by reason of having an application filed by their organization, have a conflict of interest when reviewing, discussing, and voting on applications submitted by others given that the Legislature established the Commission with the existing membership.

The membership of the Commission is defined by statute, RSA 126-A:85. The Legislature placed the duty on the Commission to advise the Commissioner of DHHS on the selection and award of funding for projects while knowing that the Commission it created consists of members with financial or fiduciary obligations to the organizations that would have the most interest in applying for the funds. The Legislature would not have included members with those interests in the funds, and other matters under the Commission's oversight, if it had not intended for those Commission members to fully participate on the Commission. The statute would lead to an absurd result if every member of the Commission had to recuse themselves from the consideration of all of the applications. At that point, the main purpose of the Commission, to determine the allocation of the funds, would fail. That could not have been the intent of the Legislature in establishing the Commission. As a result of the Legislature's determination of the membership, Commission members should not recuse themselves from consideration of and voting on applications for funding merely because their represented organizations also applied for funding.

Appointed members of public boards and commissions, such as this Commission, must agree to be responsible for the advancement of the public good when doing the Commission's work. They must not place any private interests above their Commission responsibilities when functioning as a Commission member. As a result of this responsibility, if, for some specific reason on a certain application from an organization not connected with the Commission member, a Commission member does not believe they can consider the application with an open mind that is free from prejudice or private influence, then that member should recuse themselves from consideration of that application.

In 2008, the Executive Branch Ethics Committee issued an opinion regarding a similar question about considering and deciding on funding proposals submitted to the Comprehensive Cancer Plan Oversight Board, created pursuant to RSA 126-A:64. The Committee found that there were conflicts and the members should not review or vote on the requests. While we respect the advice of the then-existing Executive Branch Ethics Committee, this 2008 decision did not recognize the Legislature's authority to create boards and commissions with memberships that appear to have potential conflicts of interest. And, we have advised similarly situated boards, such as the Wetlands Board, to continue to perform their functions. Additionally, statutes often have some provisions that conflict with each other. In those cases, the statutes that are more recent in time and more specific in purpose override the more general, older statutes. See *EnergyNorth Natural Gas v. City of Concord*, [164 N.H. 14, 16, 48 A.3d 960 \(2012\)](#) (“To the extent two statutes conflict, the more specific statute controls over the general statute.”)

As a result, in comparing the Commission's statute to the more general conflict of interest statute, we find that the Commission's statute, with respect to the composition of the

Commission and its responsibilities related to the consideration of funding applications, overrides any concerns in the conflict of interest statute with respect to the general function of considering funding applications. However, the conflict of interest statute still applies for individual Commission members and specific conflicts.

Voting on an Application Submitted by a Commission Member's Organization

Having a Commission member vote on a proposal submitted by that member's organization, whether the organization employs the member or the member is a volunteer or board member of the organization, falls more squarely under the conflict of interest statute. The Commission member's vote could directly impact funding of the organization to which they have a financial or fiduciary relationship. Therefore, a Commission member must recuse themselves from voting on the application submitted by their organization.

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