OP. NO. 05-094

CONSTITUTION OF VIRGINIA: EXECUTIVE (EXECUTIVE AND ADMINISTRATIVE POWERS).

ADMINISTRATION OF GOVERNMENT: OFFICE OF THE GOVERNOR – GOVERNOR.

Executive Order is permissible to extent Governor is ensuring that laws are faithfully being executed, addition of sexual orientation as protected employment class within state government was intended to, and in fact did, alter public policy of Commonwealth. Changing public policy of Commonwealth is within purview of General Assembly and, therefore, beyond scope of executive authority and is unconstitutional.

The Honorable Robert G. Marshall
Member, House of Delegates
February 24, 2006

Issue Presented

You ask whether it is consistent with the powers of the Governor of the Commonwealth of Virginia to issue an executive order changing the Commonwealth's nondiscrimination policy to include sexual orientation as a protected class.[1]

Response

It is my opinion that while Executive Order No. 1[2] is permissible to the extent the Governor is ensuring that the laws are faithfully being executed, the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. It is further my opinion that changing the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.

Background

On December 16, 2005, Governor Mark R. Warner revised Executive Order No. 1 adding sexual orientation to the list of protected classes under the Commonwealth's nondiscrimination policy. The order provided that:

> By virtue of the authority vested in me as Governor, I hereby declare that it is the firm and unwavering policy of the Commonwealth of Virginia to assure equal opportunity in all facets of state government.
>
> This policy specifically prohibits discrimination on the basis of race, sex, color, national origin, religion, sexual orientation, age,

or political affiliation, or against otherwise qualified persons with disabilities.

State appointing authorities and other management principals are hereby directed to take affirmative measures, as determined by the Director of the Department of Human Resource Management, to emphasize the recruitment of qualified minorities, women, disabled persons, and older Virginians to serve at all levels of state government. This directive does not permit or require the lowering of bona fide job requirements, performance standards, or qualifications to give preference to any state employee or applicant for state employment.

Allegations of violations of this policy shall be brought to the attention of the Office of Equal Employment Services of the Department of Human Resource Management. No state appointing authority, other management principals, or supervisors shall take retaliatory actions against persons making such allegations.

Any state employee found in violation of this policy shall be subject to appropriate disciplinary action.

The Secretary of Administration is directed to review annually state procurement, employment, and other relevant policies for compliance with the non-discrimination mandate contained herein, and shall report to the Governor his findings together with such recommendations as he deems appropriate. The Director of the Department of Human Resource Management shall assist in this review.

This Executive Order supersedes and rescinds Executive Order Number Two (98), Equal Opportunity, issued by Governor James S. Gilmore III on January 17, 1998.

This Executive Order shall become effective upon its signing and shall remain in full force and effect until amended or rescinded by further executive order.[3]

Applicable Law and Discussion

Before addressing the specific issue of whether the Governor has the authority to create by executive order a protected class based upon sexual orientation, it is necessary to review the Governor's general authority to issue executive orders.

The Supreme Court of Virginia has noted that "[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws."[4] No provisions of the Constitution of Virginia or any statute explicitly grant to the Governor the authority to issue executive orders. Governors historically have issued executive orders based upon the authority inherent in the constitutional duty of a Governor to "take care that the laws be faithfully executed."[5] Prior opinions of the Attorney General recognize that the Constitution grants to the Governor a general reservoir of powers as chief executive of the Commonwealth.[6] Thus, the authority of the

Governor to issue executive orders is well established in the law and history of the Commonwealth.

The scope of such authority, however, is limited. A Governor may not use an executive order to (or by any other means) exercise any of the legislative power that is vested solely in the General Assembly.[7] The Governor may not legislate by executive order. This is the essence of the separation of powers doctrine. Examples of situations in which executive orders are appropriate are:

1. Whenever the Code of Virginia expressly confers that authority upon the Governor;[8]

2. Whenever there is a genuine emergency that requires the Governor to issue an order, pursuant to his constitutional responsibility and power, to abate a danger to the public regardless of the absence of explicit authority;[9] and

3. Whenever the executive order merely is administrative in nature, as opposed to legislative.[10]

Having outlined the nature and scope of executive orders, it is necessary to examine what parameters have been established by the General Assembly with regard to the policies of the executive branch. The General Assembly has granted the Governor authority to formulate the policies of the executive branch, unless the Constitution or laws provide otherwise.[11] Section 2.2-103(B) designates the Governor as the Chief Personnel Officer of the Commonwealth and provides the Governor with specific enumerated powers relating to state personnel administration. Further, § 2.2-103(A) provides that:

> Except as otherwise provided by the [Virginia] Constitution or law, the Governor shall have the authority and responsibility for the formulation and administration of the policies of the executive branch, including resolution of policy and administrative conflicts between and among agencies.

No statute, however, specifically confers on the Governor the authority to issue an executive order establishing the Commonwealth's nondiscrimination policy in state employment. Establishing a nondiscrimination policy is not among the enumerated powers and duties granted by the General Assembly to the Governor as Chief Personnel Officer.[12]

A brief review of the history regarding this executive order is relevant to your inquiry. Governor Linwood Holton issued Executive Order No. 29, effective January 1, 1973, which prohibited discrimination in employment matters:

> It shall be the policy of the Commonwealth of Virginia to maintain and promote equal employment opportunity. Appointments and tenure are based upon merit and fitness without regard to sex, age, race, religion, national origin, political affiliation, or other non-merit, job-related factors.[13]

Governor Holton was the first Governor to issue such an executive order. The 1972 Session of the General Assembly enacted the Virginia Fair Housing Law,[14] which established that the Commonwealth had a policy to provide fair housing without regard to "race, color, religion or national origin."[15] Governor Holton's

executive order was based on the policy of nondiscrimination established by the General Assembly. Governor Holton's successors have followed his example and issued similar executive orders.[16] These prior executive orders primarily focused upon prohibiting discrimination based on the classes in Governor Holton's initial order plus disability and skin color. Of critical importance to note here is that the basis for the protection of these classes was not a policy initiative of the Governor, but rather the articulated protection from discrimination for classes already established by the General Assembly.[17] The addition of sexual orientation to the Commonwealth's nondiscrimination policy recognizes a class for which the General Assembly has not provided protection in state law.[18] In fact, as will be stated more completely later in this Opinion,[19] the General Assembly repeatedly has declined to extend protection to this class.

In 1975, the General Assembly enacted the Fair Employment Contracting Act,[20] which establishes the Commonwealth's prohibition against employment discrimination. Section 2.2-4200(A) of the current Act, which is virtually the same as that enacted in 1975,[21] provides:

> It is declared to be the policy of the Commonwealth to eliminate all discrimination on account of race, color, religion, sex, or national origin from the employment practices of the Commonwealth, its agencies, and government contractors.

As previously stated, the Governor's authority to set the policies of the executive branch is limited. The General Assembly has articulated the nondiscrimination policy for employment practices of "the Commonwealth, its agencies, and government contractors."[22] The Governor, therefore, lacks the statutory or inherent authority to expand the nondiscrimination policy[23] by executive order to include sexual orientation.[24]

There exists no emergency situation which would be the basis for the Governor to issue such an order. This leaves only the issue of whether the executive order is purely administrative in nature, as opposed to legislative. The test established to determine whether an act is legislative or administrative has been established by the Virginia Supreme Court:

> It has been said that those which relate to subjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative. *Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power*.[25]

The Court has also stated that "each case must be settled on the facts of that particular case."[26] Additionally, the Court has recognized that the """best indications of public policy are to be found in the enactments of the Legislature."""[27] The General Assembly is afforded wide discretion when determining what policies are in the best interest of the public.[28] Therefore, I must apply the facts of this case to determine whether Governor Warner's revision to Executive Order No. 1 and Executive Order No. 1 issued by Governor Kaine[29] constitute a legislative or administrative act.

The plain language of Governor Warner's Executive Order No. 1 provides that it is to be of a permanent character because it "shall remain in full force and effect until amended or rescinded by further executive order."[30]

When Governor Warner issued Executive Order No. 1, he, like his predecessors, listed the classes of citizens protected from discrimination in the Commonwealth's hiring policy. Each of the classes listed in the order were protected from discrimination by statutes passed by the General Assembly.[31] In the revised order, the Governor names a class not recognized in the Virginia Constitution or by statute. As previously discussed, the Governor has the inherent authority as chief executive to issue an executive order that ensures that "the laws be faithfully executed."[32] Therefore, the Governor has the authority to issue Executive Order No. 1 to the extent that it ensures that "the laws be faithfully executed."[33]

The General Assembly has enacted several statutes that address discrimination in various contexts. For example, the General Assembly has enacted the Fair Employment Contracting Act which establishes the Commonwealth's prohibition against discrimination and is discussed above. In addition, the Virginia Human Rights Act[34] protects individuals from discrimination in many contexts, but omits sexual orientation. Section 2.2-3900 of the Human Rights Act provides:

> B. It is the policy of the Commonwealth to:
>
> 1. Safeguard all individuals within the Commonwealth from unlawful discrimination because of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability, in places of public accommodation, including educational institutions and in real estate transactions; in employment; preserve the public safety, health and general welfare; and further the interests, rights and privileges of individuals within the Commonwealth.

The General Assembly repeatedly has exercised its policy and law making authority to afford classes of individuals protection from discrimination, but it has never expanded that protection to include sexual orientation.[35] Therefore, the Governor lacks the statutory or inherent authority to issue an executive order delineating sexual orientation as a protected class because he is not "tak[ing] care that the laws be faithfully executed."[36] Rather he is attempting to alter the public policy declared by the General Assembly pursuant to its constitutionally derived legislative authority.

Since 1997, the General Assembly has on 17 occasions considered bills adding sexual orientation to various nondiscrimination statutes.[37] The General Assembly repeatedly has rejected these proposals and has declined to change the Commonwealth's public policy by adding sexual orientation to its statutes barring discrimination in a variety of contexts, including employment.[38] In fact, the General Assembly earlier this month again declined to adopt this public policy during the current legislative session.[39] In spite of the General Assembly's clear declaration of public policy, Governor Warner circumvented the legislative process by amending Executive Order No. 1 to include sexual orientation as did Governor Kaine by reissuing Executive Order No.1. This amendment to the nondiscrimination policy alters the public policy of the Commonwealth, which is a legislative function the authority for which rests solely with the General Assembly and not with the Governor.

Conclusion

Accordingly, it is my opinion that while Executive Order No. 1[40] is permissible to the extent the Governor is ensuring that the laws are faithfully being executed, the addition of sexual orientation as a protected employment class within state government was intended to, and in fact did, alter the public policy of the Commonwealth. It is further my opinion that changing the public policy of the Commonwealth is within the purview of the General Assembly; therefore, that portion of Executive Order No. 1 is beyond the scope of executive authority and, therefore, unconstitutional.

[1]Your inquiry was in response to Executive Order No. 1 issued by Governor Mark R. Warner on January 12, 2002, revised December 16, 2005. *See* Exec. Order No. 1, 18:11 Va. Reg. Regs. 1431 (Feb. 11, 2002), revised 22:10 Va. Reg. Regs. 1701 (Jan. 23, 2006). The Honorable Timothy M. Kaine was inaugurated as the Commonwealth's 70th Governor on January 14, 2006. On January 14, 2006, Governor Kaine issued Executive Order No. 1, which contains the same language regarding nondiscrimination based on sexual orientation. *See* Exec. Order No. 1, *available at* http://www.governor.virginia.gov/Initiatives/ExecutiveOrders/pdf/EO_1.pdf (last visited Jan. 25, 2006).

[2]*See id.*

[3]*See* Exec. Order No. 1, 18:11 Va. Reg. Regs. 1431 (Feb. 11, 2002), revised 22:10 Va. Reg. Regs. 1701 (Jan. 23, 2006).

[4]Lewis v. Whittle, 77 Va. 415, 420 (1883).

[5]Va. Const. art. V, § 7.

[6]*See* Op. Va. Att'y Gen.: 1983-1984 at 180; 1945-1946 at 144.

[7]*See* Va. Const. art. III, § 1; art. IV, § 1; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) (noting that the President's power must be found in some provision of the Constitution of United States).

[8]*Compare* Boyd v. Commonwealth, 216 Va. 16, 215 S.E.2d 915 (1975) (upholding executive order that changed speed limit established by legislative enactment as fuel shortage was "disaster" within meaning of emergency services and disaster legislation), *with* Jackson v. Hodges, 176 Va. 89, 10 S.E.2d 566 (1940) (holding that Governor had no authority to increase salary of Secretary of Commonwealth since General Assembly had not provided such authority when imposing additional duties on Secretary); *see also* Op. Va. Att'y Gen.: 1990 at 1, 3; 1983-1984, supra note 6, at 182; 1977-1978 at 5, 7.

[9]*See* 1990 Op. Va. Att'y Gen., *supra* note 8, at 3.

[10]*Id*.

[11]*See* Va. Code Ann. § 2.2-103(A) (2005).

[12]*See* § 2.2-103(B).

[13]*See* Exec. Order No. 29 (Dec. 27, 1972).

[14]*See* 1972 Va. Acts ch. 591, at 733, 733-36 (adding Chapter 5 of Title 36, §§ 36-86 through 36-96).

[15]*See id.* at 733 (quoting § 36-97(a)). I note that Governor Holton's executive order made reference to sex, age, and political affiliation that were not set out in the Virginia Fair Housing Law. Federal law imposed upon the Commonwealth at the time may be relevant to the classes enumerated by Governor Holton. I need not opine, however, on the impact of federal law and reliance thereon for an executive order as it is not relevant to the current inquiry. In addition, the classifications recognized as protected by Governor Holton now have been embraced by the General Assembly for many years. *See infra* note 31.

[16]*See* Exec. Order No. 1 (Feb. 5, 1974) [Governor Godwin]; Exec. Order No. 1 (Jan. 31, 1978) [Governor Dalton]; Exec. Order No. 1 (Jan. 16, 1982) [Governor Robb]; Exec. Order No. 1, 2:9 Va. Reg. Regs. 1018 (Feb. 3, 1986) [Governor Baliles]; Exec. Order No. 1, 6:12 Va. Reg. Regs. 1814 (Mar. 12, 1990) [Governor Wilder]; Exec. Order No. 2, 10:10 Va. Reg. Regs. 2764-65 (Feb. 7, 1994) [Governor Allen]; Exec. Order No. 2, 14:13 Va. Reg. Regs. 2002 (Mar. 16, 1998) [Governor Gilmore]. [Editor's note: Prior to Governor Baliles' administration, executive orders were not published in *The Virginia Register of Regulations*.]

[17]*See* 1975 Va. Acts ch. 626, at 1297, 1297-98 (adding Chapter 25 to Title 2.1, §§ 2.1-374 through 2.1-376); 1972 Va. Acts, *supra* note 14.

[18]In addition to the lack of statutory authority to treat sexual orientation as a protected class, the Virginia Supreme Court has not recognized it as a protected class.

[19]*See infra* text accompanying notes 37-38.

[20]*See* 1975 Va. Acts, *supra* note 17. The current Employment Act is codified at §§ 2.2-4200 through 2.2-4201.

[21]*Compare* § 2.2-4200(A) (2005) *with* 1975 Va. Acts, *supra* note 17, at 1297 (adding § 2.1-374).

[22]*See* § 2.2-4200.

[23]*See* §§ 2.2-103(A), 2.2-4200(A). Moreover, the Governor's authority to set policy is limited to the executive branch. *See* § 2.2-103(A). Executive Order No. 1 attempts to regulate "all facets of state government." *See* Exec. Order No. 1, 18:11 Va. Reg. Regs. 1431 (Feb. 11, 2002), revised 22:10 Va. Reg. Regs. 1701 (Jan. 23, 2006). The term, "all facets," would include the legislative and judicial branches of state government. To the extent the Executive Order is appropriate, it can only apply to the executive branch.

[24]Governors have included political affiliation as a protected class since Governor Holton issued Executive Order No. 29 in 1972. While not included as a protected class in the Fair Employment Contracting Act, discrimination in employment

matters based on political affiliation is prohibited by § 2.2-3004(A). Governor Dalton was the first Governor to include disability in the nondiscrimination policy when he issued Executive Order No. 1 on January 31, 1978. Disability is not listed as a protected class in the Fair Employment Contracting Act, but such discrimination is prohibited by § 51.5-41.

[25]Whitehead v. H & C Dev. Corp., 204 Va. 144, 150, 129 S.E.2d 691, 695 (1963) (emphasis added).

[26]*Id.*

[27]City of Charlottesville v. DeHaan, 228 Va. 578, 583, 323 S.E.2d 131, 133 (1984) (quoting City of Danville v. Hatcher, 101 Va. 523, 532, 44 S.E. 723, 726 (1903) (quoting State v. Clarke, 54 Mo. 17, 36, 1873 Mo. LEXIS 1, *33 (1873))); *see also* 1985-1986 Op. Va. Att'y Gen. 36, 38.

[28]1985-1986 Op. Va. Att'y Gen., *supra* note 27, at 38.

[29]*See supra* note 1.

[30]*See* Exec. Order No. 1, 18:11 Va. Reg. Regs. 1431 (Feb. 11, 2002), revised 22:10 Va. Reg. Regs. 1701 (Jan. 23, 2006). I note that this executive order was rescinded by Governor Kaine on January 14, 2006. *See* Exec. Order No. 1, *available at* http://www.governor.virginia.gov/Initiatives/ExecutiveOrders/pdf/EO_1.pdf (last visited Jan. 25, 2006).

[31]*See* §§ 2.2-2639, 2.2-3004, 2.2-3900, 2.2-3901, 2.2-3902, 2.2-4200, 2.2-4310, 2.2-4311 (2005); Va. Code Ann. §§ 15.2-853, 15.2-854, 15.2-965 (2003); §§ 15.2-1507, 15.2-1604 (Supp. 2005); Va. Code Ann. § 22.1-212.6 (Supp. 2005); § 22.1-306 (2003), Va. Code Ann. § 23-38.110 (Supp. 2005); §§ 23-50.16:24, 23-50.16:36 (2003); § 23-77.4 (Supp. 2005); § 23-91.23:1 (2003); Va. Code Ann. §§ 36-96.3, 36-96.4 (2005), Va. Code Ann. §§ 38.2-508.2, 38.2-2115, 38.2-2213 (2002); Va. Code Ann. § 59.1-21.21:1 (Supp. 2005); Va. Code Ann. § 62.1-129.1 (2001).

[32]*See* Va. Const. art. V, § 7; *see also* Op. Va. Att'y Gen.: 1990, *supra* note 8, at 1; 1945-1946, *supra* note 6, at 144.

[33]*Id.*

[34]*See* §§ 2.2-3900 to 2.2-3902 (2005).

[35]*See supra* note 31.

[36]Va. Const. art. V, § 7.

[37]*See* 2006 S.B. 700; 2005 H.B. 2894; 2005 H.B. 2116; 2004 H.B. 880; 2003 H.B. 2557; 2003 H.B. 2475; 2003 H.B. 2420; 2002 H.B. 1015; 2002 H.B. 750; 2002 S.B. 383; 2001 S.B. 815; 2001 S.B. 662; 2000 S.B. 662; 1999 H.B. 2718; 1999 S.B. 1185; 1999 S.B. 1121; 1997 S.B. 1079.

[38]*Id.*

[39]*See* 2006 S.B. 700, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=sb700 Senate Bill 700 was defeated in committee on February 8, 2006. *See id*. (status).

[40]*See supra* note 1.

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