



COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Harry B. Blevins
Member, Senate of Virginia
P.O. Box 16207
Chesapeake, Virginia 23328

Dear Senator Blevins:

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 what sources are acceptable for a contractor to certify that his employees have not committed an act prohibited by § 22.1-296.1(C).

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; however, § 22.1-296.1 does not require the contractor to be responsible for such certification on behalf of his employees. Instead, § 22.1-296.1(C) directs school boards to require the contractor and any relevant employees to make the certification. The school board may require the contractor to collect and turn over certifications for his employees, but the contractor's certification runs only to his personal status. The employees who will have "direct contact with students" must provide their own certification

Therefore, it is my opinion that a contractor is not directly obligated to provide the certification for his employees.³ As a practical matter, however, the contractor would not be awarded a contract unless the relevant employees provide their certification.

Question Two

You state that since § 22.1-296.1(C) requires certification information prior to each contract, you ask what would constitute a reasonable time between the issuance of a contract and any subsequent background checks.

The 2006 amendment to § 22.1-296.1⁴ directs a local school board to require the certification information "[p]rior to awarding a contract for the provision of services." This is a one-time requirement. Nothing in the statute compels a contractor to conduct a background check on either a one-time or recurring basis. Accordingly, it is my opinion that as long as the local school board requires the certification prior to the award of a covered contract, the mandate of the statute has been met.

I note, however, that the contractor and his employees who have made the certification are the only persons authorized to have direct contact with students. Over the term of the contract, a contractor

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

³Since I conclude that a contractor is not obligated to provide certification on behalf of his employees, I need not address your inquiries concerning sources that are acceptable to identify felony convictions or the frequency for which a contractor should conduct a background check on his employees. Additionally, I also need not address whether government agencies are responsible for the credibility of sources to identify felony convictions. I note, however, that § 22.1-296.1(C) provides that "[s]chool boards *shall not be liable* for materially false statements regarding the certifications required by this subsection." (Emphasis added.) Thus, the local school board is not liable for the accuracy of any certification information submitted by a contractor or his employees.

⁴See *supra* note 2 and accompanying text.

may determine there is a need for additional employees to have direct contact with students. In such circumstances, it is my opinion that certifications from any such additional employees will be required prior to any direct contact with students.

Question Three

You next inquire concerning the definition of services in § 22.1-296.1(C) as it applies to 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." (Emphasis added.) Section 22.1-296.1(C), however, does not define the term "services." The conduct of local school boards in contract matters is governed by the Virginia Public Procurement Act.⁵ 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."⁶

Accordingly, 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).

Question Four

You next ask for a definition of contractor as it relates to the certification information that an employee has not been convicted of a felony.

As is the case with "services," the term "contractor" is not defined in § 22.1-296.1. Unlike "services" however, "contractor" is not defined in the Procurement Act. The Procurement Act provides, in part, that "[a]ll public contracts with nongovernmental contractors for the purchase or lease of goods, or for the purchase of services, insurance, or construction, shall be awarded after [compliance with the Act.]"⁷ A prior opinion of the Attorney General has concluded that the private business firms with which the public bodies deal are, of course, "nongovernmental contractors."⁸ The certification information requirement of § 22.1-296.1(C) is not limited to "nongovernmental contractors." By its terms the statute applies simply to "contractors."

Therefore, I conclude that any natural or non-natural person with whom the school board proposes to enter into a contract is a "contractor" within the meaning of § 22.1-296.1.

⁵See 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).

⁶VA. CODE ANN. § 2.2-4301 (Supp. 2006).

⁷Section 2.2-4303(A) (Supp. 2006).

⁸1984-1985 Op. Va. Att'y Gen. 435, 435.

Question Five

You next inquire regarding the meaning of the phrase “direct contact with students” and how local school divisions should define regular school hours.

When the proposed contract is for the provision of services, the inquiry becomes 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.”

For example, a contract for the purchase of 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 for the provision of vending machine services 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 being in the presence of students during regular school hours or during school-sponsored activities. A service contract requiring the sale of beverages during sporting events would also be subject to the certification requirement; a contract that restricted service of vending machines to times outside regular school hours and school-sponsored activities would not be subject to § 22.1-296.1(C).

Neither § 22.1-296.1 nor any other provision of law defines “regular school hours.” Further, I am not aware of any case law defining the term. At a minimum, the term must refer to the time between the opening and closing of schools set by local school boards pursuant to regulations of the Board of Education.⁹ Accordingly, it is my opinion that direct contact with students occurs when the contractor or his employees are required to be in the presence of students during school hours or during school-sponsored activities. It further is my opinion that “regular school hours” means the hours established by the respective local school board.

Question Six

You next inquire what procedure a governing body would use to report a person that makes a materially false statement concerning the offenses listed in § 22.1-296.1(C).

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.¹⁰

⁹ 8 VA. ADMIN. CODE § 20-490-30 (2002).

¹⁰ 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.

Personnel from the school system as well as law enforcement authorities or the appropriate office of the Commonwealth's attorney are likely candidates to report a conviction to the licensing agency. Section 22.1-296.1 does not preclude others 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 anyone having knowledge of a materially false certification may report the information to the local school board, to local law enforcement authorities or the appropriate Commonwealth's attorney for prosecution and, if applicable, to the respective licensing agency.

Question Seven

You next inquire what specific crimes would be considered crimes of moral turpitude.¹¹

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.”¹²

The Virginia Supreme Court has held that crimes involving dishonesty, including petty larceny¹³ and making a false statement to obtain unemployment benefits,¹⁴ 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,¹⁵ assault and battery,¹⁶ gambling,¹⁷ transportation of untaxed liquor,¹⁸ and indecent exposure¹⁹ 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.²⁰ However, crimes involving dishonesty do involve moral turpitude.

¹¹You also ask what test a contract must use to determine whether an employee has committed a crime of moral turpitude and whether there is a reporting agency to research such information. Since I conclude that a contractor is not obligated to make such a certification on behalf of his employees, I need not address these inquiries. *See supra* note 3 and accompanying text.

¹²*Tasker 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).

¹³*Bell v. Commonwealth*, 167 Va. 526, 538, 189 S.E. 441, 447 (1937).

¹⁴*C. & O. Ry. Co. v. Hanes*, 196 Va. 806, 813, 86 S.E.2d 122, 126 (1955).

¹⁵*Pike v. Eubank*, 197 Va. 692, 700, 90 S.E.2d 821, 827 (1956).

¹⁶*Burford v. Commonwealth*, 179 Va. 752, 766, 20 S.E.2d 509, 514 (1942).

¹⁷*Parr*, 198 Va. at 725, 96 S.E.2d at 164.

¹⁸*Burford*, 179 Va. at 765, 20 S.E.2d at 514.

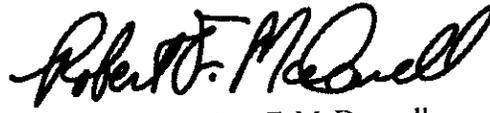
¹⁹*Chrisman v. Commonwealth*, 3 Va. App. 89, 100, 348 S.E.2d 399, 405 (1986).

²⁰*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).

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Thank you for letting me be of service to you.

Sincerely,

A handwritten signature in black ink that reads "Robert F. McDonnell". The signature is written in a cursive, flowing style with a large, prominent initial "R".

Robert F. McDonnell

6:060; 1:941/06-077