

# Vermont State Ethics Commission

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## Advisory Opinion No. 4-2023

(Revised Opinion)

May 1, 2024

### SUMMARY

A public servant who is employed at a hospital and sits on a state board that reviews and approves budgets for individual hospitals within a health care network does not have a conflict of interest if they participate in budget deliberations where the budget is presented by their hospital's network; the budget under deliberation is not that of the hospital at which they are employed; and their compensation is not affected by the outcome of the budget deliberations in a way that is greater or less than similarly situated hospital employees.

Where a close family member of the board member is an employee of the parent hospital network and the family member's compensation is not affected by the outcome of the budget deliberations in a way that is greater or less than similarly situated hospital network employees, a conflict of interest does not exist.

Where the public servant and the public servant's family member are eligible for incentive-based compensation, and the potential for additional compensation is not affected by the outcome of the budget deliberations in a way that is greater or less than similarly situated hospital employees, a conflict of interest does not exist.

### ISSUE

*Whether a conflict of interest, or the appearance of a conflict of interest, exists under the State Code of Ethics when a State of Vermont public servant is asked to participate in a matter where the outcome will affect the financial interests of the parent entity of his employer and where a close family member works for that parent entity.*

*Whether, if a conflict or the appearance of one exists, there is nonetheless "good cause" for the public servant to participate in the matter notwithstanding the conflict or appearance of one.*

## **BACKGROUND and FACTS<sup>1</sup>**

The Requester is a physician at the Central Vermont Medical Center hospital (CVMC), a member of the University of the Vermont Health Network (UVMHN), which is operated by UVMHN Inc. In this role, he is employed by the UVMHN Medical Group, Inc. (UVMHN Medical Group), the governing organization for physicians who provide clinical services to UVMHN's member hospitals. The Requester also serves as an appointed member of the Green Mountain Care Board (GMCB), an independent state board charged with the annual review and approval of Vermont hospital budgets.<sup>2</sup>

Pursuant to its statutory mandate, GMCB must review the proposed budgets for three UVMHN, Inc. member hospitals: The University of Vermont Medical Center (UVMHC), CVMC, and Porter Hospital. The budgets are considered independently, but UVMHN, Inc. participates in the presentation of all three budgets to the GMCB. The Board uses publicly available written criteria in its budgetary review and deliberations. The Requester states that the GMCB will review each hospital's submitted budget and approve or establish a net patient revenue (NPR) and a commercial rate increase from the prior year for each hospital for FY25. The NPR is the amount of revenue a hospital generates from patient care and makes up the majority of a hospital's revenue, and commercial rate increases are the limit for price increases that hospitals may charge to commercial insurers. The GMCB may also require hospitals to reduce operating expenses commensurate with a change to NPR.

In describing his employment the requester attests that he does not hold an administrative or managerial position with UVMHN Inc.; he does not have a fiduciary relationship or duty of loyalty that would interfere with impartiality in budget deliberations; he is a salaried employee and is also eligible for incentive compensation; he is paid the same as other similarly situated physicians at CVMC; and his compensation and compensation adjustments, including incentive compensation, are set by a standardized plan, the UVMHNMG Physician Compensation Plan, established by the UVMHN Medical Group board of directors on an annual basis.

The Requester's spouse holds a .25 physician role at CVMC and a .75 health informatics role at the UVMHC Emergency Department. In the health informatics role, she largely does work for the Information Technology Department of UVMHN. In both roles her employer is the UVM Medical Group (UVMMG). She does not hold an administrative or managerial role with any organization. The Requester attests that his spouse's work as a physician and in the health informatics role are compensated in the same manner as described above.

The Requester attests that he intends to recuse himself from deliberations regarding CVMC's budget. He has asked the Ethics Commission for an Advisory Opinion on whether, he or his spouse's employment by either CVMC or UVMHN creates a conflict of interest, or the appearance of one, when it comes to his participation in GMCB deliberations on the Porter Hospital and UVMHC budgets. If so, the Requester asks whether he has "good cause to proceed" with the matter under 3 V.S.A. § 1203(c).

## **ANALYSIS**

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<sup>1</sup> All facts in this section are derived from the Requester's "Request for Advisory Opinion," dated July 21, 2023, and from the Requester's "Supplemental Responses to Commission questions," dated July 25, 2023.

<sup>2</sup> 18 V.S.A. §§ 9375 (b) (7); 9456

When asked to consider whether a conflict of interest or the appearance of one exists under the State Code of Ethics, each case must be analyzed on its own merits in conjunction with the applicable provisions of the State Code of Ethics. In this case, we consider (1) whether a conflict of interest or the appearance of one exists, and, if so, (2) what course of action the Requester should take to comply with the Code's conflict of interest provisions.<sup>3</sup>

## **I. Conflict of Interest or Appearance of Conflict of Interest**

### **§ 1203(a)(1). CONFLICT OF INTEREST; APPEARANCE OF CONFLICT OF INTEREST**

*("In the public servant's official capacity, the public servant shall avoid any conflict of interest or the appearance of a conflict of interest. The appearance of a conflict shall be determined from the perspective of a reasonable individual with knowledge of the relevant facts.")*

The Code of Ethics (3 V.S.A. § 1203(a)(1)) states that all public servants must avoid any conflict of interest or the appearance of a conflict of interest. A conflict of interest is defined as "a direct or indirect interest of a public servant or such an interest, known to the public servant, of a member of the public servant's immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant's public body, or that is in conflict with the proper discharge of the public servant's duties."

#### **A. Central Vermont Medical Center Budget Deliberations**

The Requester, a physician at CVMC, states that he will recuse himself from deliberations regarding CVMC's budget. This recusal, if effectively implemented, will ensure that there will be no conflict of interest, or the appearance of one, with respect to the GMCB's consideration of CVMC's budget. Therefore, the Ethics Commission does not need to perform an analysis with respect to any direct or indirect interest he or his spouse might have regarding the outcome of CVMC budget deliberations.

#### **B. UVMHC and Porter Hospital Budget Deliberations**

With respect to the GMCB's consideration of the UVMHC and Porter Hospital budgets, the Commission finds that the Requester has no personal interest in either hospital that would create a conflict or the appearance of one. Neither he nor his spouse work directly for UVMHC or Porter Hospital, and it is unlikely that a "reasonable individual with knowledge of the relevant facts" would see the situation as a conflict of interest as far as the two individual hospitals are concerned.

However, UVMHC Inc. is the parent corporation of the requester's employers, UVM Medical Group and CVMC. Therefore, it could be argued that, to the extent GMCB's decisions regarding individual hospital budgets impact UVMHC and UVM Medical Group's revenue and compensation models, the Requester has an indirect personal financial interest in the outcome of budget deliberations for any UVMHC hospital. It might also be argued that UVMHC could somehow intervene in the processes of UVMHC Medical Group Inc. to influence the Requester's actions regarding GMCB budget decisions.

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<sup>3</sup> The Commission notes that, in addition to the Code of Ethics, the Requester is also subject to the additional conflict of interest rules that are imposed by statute on GMCB members. 18 V.S.A. § 9374 (c). This Advisory Opinion does not opine on the applicability of these GMCB-specific rules to the Requester's factual scenario.

Nonetheless, even if such hypothetical influence might be exerted, the Requester attests that he is a salaried employee whose “compensation is the same as other similarly situated emergency department physicians at CVMC.” The board of directors for his employer passes an annual compensation plan that relies on “fair market value” in adjusting compensation. In addition to the “fair market” compensation, the Requester is also eligible for incentive compensation. According to the Requester:

Under the Compensation Plan, my spouse and I could be eligible for bonus compensation based on the achievement of goals set by the president of UVMHN Medical Group and the presidents and chief financial officers of each UVMHN hospital. Incentive compensation is awarded based on a division or department’s contribution to the achievement of a goal, not in response to an individual physician’s performance.<sup>4</sup>

The Requester attests that Department Chairs have some discretion regarding the methodology used to set incentive compensation. However, the Ethics Commission notes that, per the UVMHNMG Physician Compensation Plan, the methodology must be uniformly applied to all physicians in the Network Department; communicated in writing in advance of the fiscal year in which it will apply; and reviewed and approved each year by the UVMHN Medical Group Finance Committee.

Based on the above, and without any facts to suggest the contrary, there is no evidence that the Requester has any “interest” related to his compensation that could be affected by his participation in the GMCB’s consideration of the UVMHC or Porter Hospital budgets<sup>5</sup> that is greater than that of other individuals generally affected by the outcome of budget deliberations. The Ethics Commission therefore finds the Requester has no actual conflict of interest as it relates to participation in deliberations regarding the UVMHC and Porter Hospital budgets.

There is still the issue as to whether a conflict of interest exists with respect to the Requester’s spouse. Here, the Requester’s spouse is subject to the same compensation plan applicable to the Requester and neither her compensation nor her potential incentive compensation could meaningfully be impacted by any decision made by the Requester in his GMCB role in a way that is greater than that of other individuals generally affected by the outcome of budget deliberations. Therefore, like the Requester, the Requester’s spouse’s situation does not present an actual conflict of interest.

Even without the existence of an actual conflict of interest, the Requester’s situation could nonetheless present an appearance of a conflict of interest. Whether the appearance of a conflict of interest exists, “shall be determined from the perspective of a reasonable individual with knowledge of the relevant facts.”<sup>6</sup> For the reasons set forth below, the Ethics Commission finds that, even if the appearance of a

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<sup>4</sup> Documentation submitted by the Requester states that division or department bonus determinations are related to internal goals and are subject to written guidelines. These written guidelines provide objective criteria unrelated to any GMCB actions or decisions.

<sup>5</sup> The Commission is mindful that representatives of UVMHN, Inc. will participate in the presentation of the UVMHC and Porter Hospital budgets to the GMCB. The Commission is also aware that UVMHN Inc. submits a narrative for its hospitals in a [single document](#) that includes its summary of the CVMC budget proposal along with the proposals for UVMHC and Porter Hospital proposals. For these reasons, the Commission cautions that, if the Requester chooses to participate in the UVMHC and Porter Hospital decisions, he must ensure that he is able to hold true to his recusal for the CVMC matter if it should at any point become entangled in the discussion of the UVMHC and Porter Hospital budgets.

<sup>6</sup> 3 V.S.A. § 1203 (a) (1).

conflict of interest exists, it would be speculative in nature and the Requester has good cause to proceed.

## **II. Course of Action**

When confronted by a conflict of interest or the appearance of one Section 1203(b)(4) requires a public servant to recuse oneself from the matter by making a public statement regarding the conflict of interest. Alternatively, if the public servant decides there is good cause to proceed with the matter, they prepare a written statement regarding the nature of the conflict and file it according to the procedures established by the public servant's relevant home agency or department.

### **A. Central Vermont Medical Center (CVMC) Budget Deliberations**

The Requester has stated his intention to recuse himself from budget deliberations involving his direct employer CVMC. If the GMCB has established conflict of interest recusal procedures, the Requester should follow those procedures. If the GMCB does not have such procedures in place, the Requester is encouraged to announce his recusal publicly and for the record at any relevant GMCB meeting concerning the CVMC budget. It is important to note that § 1203(b)(4) requires a recusal to be full and complete. This means that, once recused, the Requester should not act or participate in any way to influence GMCB decision-making as it relates to CVMC budget deliberations.

### **B. UVMHC and Porter Hospital Budget Deliberations**

In his request for Advisory Opinion, the Requester has asked whether, if a conflict or the appearance of one exists, he has "good cause" to proceed with participation the UVMHC and Porter Hospital budget deliberations. Under the Code of Ethics, "good cause" to proceed may exist when, (1) the identified conflict or potential conflict is de minimis in nature; (2) the conflict is amorphous, intangible, or otherwise speculative; or (3) the public servant cannot legally or practically delegate the matter.

The Requester does not have an actual conflict of interest in regard to his own, or his spouse's compensation. However, the Requester has self-identified the possible appearance of a conflict due to his employment with a subsidiary of UVMHC Inc. While the Commission has found that a reasonable person would not determine that an actual conflict or the appearance of one exists, this supposes the reasonable person had knowledge of the relevant facts. Therefore, the Requester is encouraged to file a conflict of interest disclosure statement that follows the instructions set forth in Code Section 1203 (b) (4), subparagraphs (A) through (E) in order to publicly disclose the relevant facts, and explain why a reasonable person would not believe that his current situation does not reflect a conflict of interest, and that he therefore is not barred from proceeding with the matter.<sup>7</sup>

#### **1. Good Cause to Proceed: The Interest is "De Minimis" or Speculative in Nature**

The Requester has asked whether, even if the appearance of a conflict of interest exists, he nonetheless has good cause to proceed because the interest is "de minimis" or speculative in nature.

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<sup>7</sup> If the GMCB does not have its own conflict of interest disclosure form, the Requester may use the one provided by the [Ethics Commission](#) and file it in accordance with GMCB procedures.

An interest is speculative in nature where it is contingent on the possible occurrence of other events beyond the interested person's control or influence. For example, the size and amount of an employee's potential future interest in a union trust is too speculative to include in calculating his lost wages due to injury. *Morrison-Knudsen v. Office of Workers' Compensation Programs*, 461 U.S. 624, 627 (1983) (relied on in *Lydy v. Trustaff*, 194 Vt. 165 (2013)).

Here, the Requester has demonstrated that his (and his spouse's) compensation plan is based on multiple contingent decisions and occurrences, none of which can be proximately tied to any vote or action that the Requester could make in his role as a board member. Therefore, any perceived conflict would be speculative.

## **2. Good Cause to Proceed: The Public Servant Cannot Legally or Practically Delegate the Matter**

The Requester has also asked whether, if there is a conflict of interest, he has good cause to proceed because he cannot legally or practically delegate the matter.

The Commission finds "good cause" due to the speculative nature of any appearance of conflict and need not fully respond to the Requester's other arguments. However, the Commission takes the opportunity to clarify the law for the Requester – and the public - with respect to his "non-delegable" argument.

The "good cause" exception for non-delegable actions is most properly applied to situations where the public servant is required to take a non-delegable action due to a legal requirement, or where the public servant's recusal would directly prevent an agency from exercising a statutory function. For example, if a statute grants authority to a single individual to take particular actions, but such actions are non-delegable by law, the public servant is the only person who can legally take such actions.

This "good cause" exception is often referred to as the "rule of necessity," and is common under the ethics frameworks in other states. With respect to members of state boards and commissions, the rule has been recognized only sparingly, and usually when a board or commission member's recusal would deprive the board or commission of the ability to act at all on a decision that the board or commission is required by statute to make.<sup>8</sup> Here, the Requester's recusal would not deprive the GMCB of the opportunity to make a decision. Rather, his recusal would only potentially make it more difficult for the GMCB to reach consensus.

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<sup>8</sup> See, e.g., MA Ethics Advisory No. 2005-05 ("The rule of necessity may be used **only when it is legally necessary** for an elected board to act – for example, when a statute requires an action to be taken, or sets a deadline for action to be taken. The rule of necessity may **not** be used when a board merely has discretion to act or wants to act. The rule of necessity may be used **only** as a last resort. Invoking the rule of necessity does not require all previously disqualified members to participate; it merely permits their participation.") (emphasis in original); *Lexin v. Superior Court*, 47 Cal.4th 1050, 1072 (2010) ("The rule of necessity permits a government body to act to carry out its essential functions if no other entity is competent to do so, but it requires all conflicted members to refrain from any participation. If a quorum is no longer available, the minimum necessary number of conflicted members may participate, with drawing lots or some other impartial method employed to select them.") (citations omitted); RI Ethics Advisory Opinion No. 2018-45 ("The Ethics Commission has recognized and permitted a Rule of Necessity exception in matters where recusals inhibit governmental process, such as where the majority of public body members must recuse themselves and a resulting failure of a quorum renders the entity unable to act.").

The facts here are comparable to situations that are regularly faced by hundreds of public servants who serve on state boards and commissions. If any one of these public servants recuses themselves from participation in a matter, it may become slightly more difficult for the board or commission to reach a majority or consensus. But the board or commission is not prevented from taking action – either legally or practically. If the Commission were to find “good cause” for the Requester to proceed under this theory, it would effectively give permission to any conflicted board or commission member to take action in any matter where they have an interest. This would create a large “loophole” in the Code of Ethics. In sum, the “good cause” exception for non-delegable duties does not apply to the Requester’s situation.

### **CONCLUSION**

Based on the facts received from the Requester, the Commission finds that the Requester does not have an actual conflict of conflict of interest that would prevent his participation in consideration of the UVMHC and Porter Hospital budgets. In addition, to the extent that the Requester’s situation presents an appearance of a conflict, such appearance of conflict would be speculative in nature, and thus not prohibited by the Code of Ethics.

### **Disclaimer**

This Advisory Opinion is strictly limited to the facts stated herein and relates only to the application of the State of Vermont Code of Ethics. Under the Code of Ethics, Advisory Opinions are based on the representations made by, or on behalf of, a State of Vermont public servant and are not adversarial or investigative proceedings. The Ethics Commission offers no opinion on the effect any other statute, regulation, ordinance, constitutional provision, charter provision, or canon of professional ethics, other than the ones referenced above, may have on this situation.

### **Code Citations**

§ 1203

### **Related Advisory Opinions**

AO\_3\_2023

AO\_4\_2023

### **Keywords**

Conflict of Interest

Appearance of Conflict of Interest

Good cause

Rule of Necessity