



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA • James Nobles, Legislative Auditor

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October 10, 2013

Representative Peggy Scott
201 State Office Building
St. Paul, Minnesota 55155

Dear Representative Scott:

In a letter dated August 27, 2013, you requested that the Office of the Legislative Auditor (OLA) examine whether Tina Smith, the Governor's Chief of Staff, has a conflict of interest serving as chair of the Medical Destination Center Corporation (MDCC). You expressed concern that when Ms. Smith is lobbied either as Chief of Staff or MDCC Chair about matters that affect MDCC, her responsibility to represent the Governor and her responsibility to represent MDCC will create a conflict. In your letter, you said:

If the MDCC seeks additional aid, policy changes, or opposes policy pursued by legislators or the governor, Ms. Smith is in a precarious spot. She is in a position to be lobbied by the local partners and the Legislature in both capacities, possibly for competing interests.

In support of your concern, you referenced the model conflict of interest policy for nonprofit organizations established by the Minnesota Office of the Attorney General. Your letter noted the following:

...the [Attorney General's] model policy describes "areas in which conflict may arise" as including "relations of directors, officers, and management employees with...agencies, organizations, and associations which affect the operations of [nonprofits]." Further, the policy describes the "nature of conflicting interest" as including "holding office, serving on the board, participating in management or being employed...with any third party dealing with [the nonprofit]. Replace nonprofit with MDCC or the Governor's office and it is clear that Ms. Smith's roles place her within the Attorney General's definition of a conflict of interest.

CONCLUSION

Based on the state law that mandated the composition of the Medical Destination Center Corporation (MDCC) Board, Ms. Smith, the Governor's Chief of Staff, does not have a conflict serving as MDCC Board Chair.

ANALYSIS

Organizations—both nonprofit and for profit—often impose on their board members and executive officers what is commonly referred to as a “duty of loyalty.” The objective is to ensure that a board member or executive officer acts in the best interest of the organization. This is generally accomplished by prohibiting board members and executive officers from holding another position or having an “outside” relationship or affiliation that might influence a board member or executive officer to not act in the best interest of the organization.

To illustrate how the “duty of loyalty” concept can be applied, I think it is helpful to recall the concern raised about Steven Sviggum serving as both a University of Minnesota Regent and as the Executive Assistant to the Minnesota Senate Republican Caucus. In that case, the University’s General Counsel and an outside attorney hired by the University concluded that, under the Regents’ Code of Ethics, an irresolvable conflict of interest was created by Regent Sviggum being employed by the Minnesota Senate Republican Caucus. They concluded that Regent Sviggum could not—as required by the Regents’ Code of Ethics—give the University ultimate loyalty if the University’s budget requests, policy positions, or autonomy were to come into conflict with positions taken by the Senate Republican Caucus. The outside attorney hired by the University said:

...I consider the exercise of Regent Sviggum’s duty of loyalty to the Board of Regents and simultaneously to the Senate Majority [Republican] Caucus to be continually in conflict, a conflict which because of its systemic continuing nature cannot be resolved by disclosure, recusal or a management plan.

The Sviggum case and the Attorney General’s model policy illustrate that there is a basis for your concern about the Governor’s Chief of Staff serving as chair (or even as a member) of the MDCC board.

However, in reaching a conclusion in response to your request, I had to take the following into consideration: First, the conflict of interest laws applicable to Ms. Smith as the Governor’s Chief of Staff and as a member of the MDCC board focus on prohibiting unauthorized financial benefits.¹ Second, the Legislature enacted legislation mandating that MDCC will be governed by a board composed of members representing—and, presumably, loyal to—other organizations.

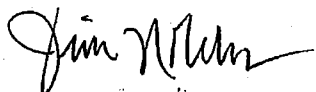
¹ As the Governor’s Chief of Staff, Ms. Smith is subject to *Minnesota Statutes* 2013, 10A.07, which applies to public officials generally, that prohibits an official from using his or her public office to “substantially affect the official’s financial interests.” Ms. Smith is also subject to *Minnesota Statutes* 2013, 43A.38, which is the Code of Conduct for Employees in the Executive Branch. Again, the code’s primary focus is on prohibiting state employees from using their position to obtain unauthorized “benefits, privileges, exemptions or advantages for the employee or the employee’s immediate family or organization with which the employee is associated....” As a member of the MDCC Board, Ms. Smith is subject to *Minnesota Statutes* 2013, 469.41.12, which says that a member of the MDCC Board (except for the member appointed by the medical business entity) may not be a director, officer, or employee of the medical business entity. It also provides as follows: “A member must not participate in or vote on a decision of the corporation relating to any project authorized by or under consideration by the corporation in which the member has either a direct or indirect financial interest. No member may serve as a lobbyist, as defined under section 10A.01, subdivision 21.”

Specifically, the board must have members representing the State of Minnesota, City of Rochester, Olmsted County, and Mayo Clinic. To represent the state's interests, the law required the Governor to appoint four members to the board. While the Governor could have appointed four people without any affiliation to his office, he chose to fill one position with his Chief of Staff. In doing so, he ensured that the board would have at least one person explicitly on the board to represent his position on decisions made by MDCC. In selecting Ms. Smith to chair the board, the board itself appeared comfortable with the Governor's decision. The Minnesota Senate will have an opportunity to decide whether it is comfortable with the Governor's decision when it votes to either confirm or not confirm Ms. Smith's appointment to the board.

You are undoubtedly correct that in either her position as Chief of Staff or MDCC board member and chair, Ms. Smith will likely be lobbied about matters affecting MDCC by people with differing perspectives, interests, and points of view. That will probably also be true of the other board members. As the board attempts to resolve differences, I presume individual board members will speak for the entities they were appointed to represent, which means Ms. Smith will represent the Governor's positions. In that respect, Ms. Smith will not have a "loyalty conflict;" her sole loyalty will be to the Governor.

Finally, I would note that it is not uncommon for Governors to appoint members of their administrations to other positions created by state law. For example, Governor Pawlenty appointed Dan McElroy, the Governor's Senior Advisor on Government Innovation (and former Chief of Staff) to the Board of Trustees of the Minnesota State Colleges and Universities system. More recently, Governor Dayton appointed his Commissioner of Human Services, Lucinda Jesson, to the MNSure Board. I think it is understood that these appointees (and there are other examples that could be cited) are expected to represent the Governor's point of view on issues that come before the board to which they have been appointed.

Sincerely,



Jim Nobles
Legislative Auditor

cc: Tina Smith, Chief of Staff, Governor Mark Dayton