January 28, 2010

The Honorable Robert McDonnell
Governor of Virginia
P.O. Box 1475
Richmond, Virginia 23218

Governor McDonnell:

This letter is in response to your request for advice regarding a proposed regulation to amend 1VAC 55-20-320(E) to include "Other Qualified Adults" under the health care benefits plan for state employees administered by the Department of Human Resource Management ("DHRM").

The proposed regulation suffers from numerous procedural and substantive defects. In a January 11, 2010 letter to then Counselor to the Governor, Mark E. Rubin, this Office identified several deficiencies in the proposed regulation that render it void. This Office continues to stand by the position stated in that letter, a copy of which is attached for your review.

As indicated in the letter, the proposed regulation suffers from a number of defects, including but not limited to:

- This Office has not certified the regulation as being within the authority of DHRM;

- The Executive Order under which the proposed regulation is proceeding, Executive Order 107 (2009), is void because it does not comply with Va. Code § 2.2-4013. The Executive Order establishing for the review of proposed regulations fails to provide for "review by the Attorney General to ensure statutory authority for the proposed regulations," as required by § 2.2-4013; and

- Given prior opinions of this Office, decisions of the Virginia Supreme Court on related issues, and the plain meaning of the statutory text, Va. Code § 2.2-2818 simply does not authorize DHRM to offer insurance coverage to the category of persons covered by the proposed regulation's definition of "Other Qualified Adults."

In short, for the procedural and substantive reasons outlined above, this Office has not and will not certify that the proposed regulation is within the statutory authority of DHRM.

It is my recommendation that the proposed regulation be withdrawn by DHRM pursuant to Va. Code § 2.2-4016. Further, Executive Order 107 (2009) is not in conformity with Virginia law, and therefore, it is my recommendation that you use your executive authority to rescind Executive Order 107 (2009).

If you have any questions or require additional advice on this issue, please do not hesitate to contact me.

Very truly yours,

Kenneth T. Cuccinelli, II

KTC/lsg

cc: Martin Kent

ATTORNEY CLIENT PRIVILEGED COMMUNICATION

January 11, 2010

Mark E. Rubin, Esquire
Counselor to the Governor
Office of the Governor
Patrick Henry Building
1111 East Broad Street
Richmond, Virginia 23219

Re: Health Insurance Benefits

Dear Mr. Rubin:

I thank you for your letter of December 30. While I understand the reasons for the administration's efforts to expand the health care plan for state employees ("the State Plan") to include "Other Qualified Adults," I cannot agree that the law can be read to support that interpretation. As counsel to the Department of Human Resource Management ("DHRM"), it is my responsibility to ensure that it has the statutory authority to promulgate the amendment that would effect this extended coverage. My informal opinion that DHRM does not have that authority is based upon more than a dated dictionary definition of "family." I am responding to your letter because I believe the Governor is acting beyond the scope of his authority and must be advised of legal consequences of the course he has chosen.

The 1999 Attorney General's opinion (1999 Op. Att'y Gen. 31) cited in my advice to DHRM involved the definition of the term "family" for purposes of service of process under Va. Code § 8.01-296(2). The requestor asked whether civil process upon in-laws residing in the party's "usual place of abode" would be sufficient. The opinion concluded that *because there was no definition of "family" in the statute*, the term should be narrowly construed to reflect the traditional view, including only husband, wife and their children.

While it is true that in some contexts the term "family" is interpreted more broadly than this traditional definition, in those instances the General Assembly has provided an expanded definition to reflect its intent that it be so. That "family" has been given different definitions by statute, depending on the context, reflects – rather than contradicts – the well-established principle applied by the 1999 opinion that, unless otherwise defined, the term should be construed according to the traditional understanding of the term. If your view were correct – that "family" should be broadly construed to encompass residents of a household – there would be no reason to include different definitions in separate parts of the Code to include such individuals; indeed, such definitions would be superfluous.[1]

There are two principles of statutory construction that lead to the conclusion reflected in my opinion letter. The first is that while opinions of the Attorney General are not binding, they are "entitled to due consideration," particularly with the passage of time without legislative action to reverse or revise them. *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004). There has been no legislation to reverse or alter the 1999 opinion. One must therefore assume that the legislature intended the traditional and narrow meaning of the term "family" where there is no different statutory definition.[2]

The second principle is equally well-established as a tenet of statutory construction: that the interpretation of law by an agency responsible for administering it is entitled to deference. Under Va. Code § 2.2-2218, it is DHRM's responsibility to establish and administer the State Plan. As I noted in my opinion to Sara Wilson, DHRM's interpretation of the term "family" in that statute is no more expansive than "dependents" under the Local Choice Plan, so that eligibility for coverage is the same under both plans. That agency interpretation has been consistent and long standing, and, as in the case of the Attorney General's 1999 opinion, it has not been modified or reversed by the General Assembly.[3] Accordingly, that interpretation is presumably correct. *Tazewell County School Board v. Brown*, 267 Va. 150, 163-04, 591 S.E.2d 671, 678 (2004); *Commonwealth v. American Radiator & Standard Sanitary Corp.*, 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960).

I understand that you do not believe that my advice should be permitted to, in effect, veto the Governor's proposed amendment to the State Plan. Accordingly, Executive Order 107

---

[1] No statutory language should be interpreted in such a way as to render it superfluous.

[2] The Attorney General's 2007 opinion cited in your letter is not relevant to our question. In that opinion (2007 Op. Att'y Gen. 95), the Attorney General advised that the University of Virginia could permit unrelated adults living in the same household of an employee or student to use University recreational facilities. This advice was premised upon the broad authority of the Board of Visitors to manage University property "as they may deem expedient." Interpretation of statutory terms such as "dependents" and "family" limiting eligibility for the benefit was not involved.

[3] I understand that the proposal to expand health care coverage to "Other Qualified Adults" comes from the Governor's Office, not from a change in interpretation of law or regulation by DHRM.

(2009) has been issued to delete the authority of this Office to certify an agency's legal authority to promulgate a proposed regulation. It is my view that this elimination of this Office's review of agency authority is contrary to law.

Virginia Code § 2.2-4013(A) requires the Governor to develop procedures for regulatory review by executive order. The statute requires that the executive order "shall include (i) review by the Attorney General to ensure statutory authority for the proposed regulations…." Consistent with this requirement, Executive Order 36 (2006) required review by the Attorney General's Office and its issuance of a memorandum certifying agency authority before a regulation can be approved. I can find nothing in the law which permits eliminating that certification review from the order. The Governor can execute public policy, but he cannot use that authority to act in a manner contrary to laws enacted by the General Assembly as a statement of public policy.

Because the Governor does not have the legal authority to circumvent what appears to be a mandatory certification of agency authority by this Office, I believe that any regulation enacted pursuant to the Executive Order 107 (2009) without the certification review by this Office would be void. *Singh v. Mooney*, 261 Va. 48, 549 S.E.2d 549 (2001), and *Glazebrook v. Board of Supervisors*, 266 Va. 550, 587 S.E.2d 589 (2003). In *Glazebrook*, the Court ruled that a zoning ordinance was void *ab initio* because it had been adopted without satisfying the statutory requirement relating to public notice, and thus the Board of Supervisors had acted without authority. The *Singh* decision involved a challenge to a court order, the resolution of which depended upon whether the order was deemed void or merely voidable. The Court characterized a void order as one for which the court was without authority and therefore lacked jurisdiction to issue, such as an order entered after judgment had become final under Rule 1:1 of the Rules of Court.

I regret that I cannot concur with your view of the law in regard to this matter. Of course, my opinion is not an official opinion of the Attorney General, but only the view of an individual Assistant Attorney General, assuming the facts as described in this letter. I share this view so that the Governor might be fully apprised of the potential legal infirmities in the course of action he has undertaken.

Sincerely yours,

Guy W. Horsley, Jr.
Special Assistant Attorney General