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## Coates' Canons Blog: Boards of Health and Conflicts of Interest

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The Tarheel County Health Department is planning to open a clinic to provide basic dental services for county residents who are uninsured. The health director would like to contract with a dentist to provide these services at the health department two days per month. Dr. Asher Zahn, the dentist member of the Tarheel County Board of Health, would like to be considered for the contract. But would it be a conflict of interest for the health director to contract with a board of health member to provide these services?

A North Carolina statute (**G.S. 14-234**) prohibits a public officer who makes or administers a contract on behalf of a public agency from deriving a direct benefit from the contract. It also prohibits a public officer who will derive a direct benefit from a contract he or she does *not* make or administer from attempting to influence those who *do* make or administer the contract. There are a couple of exceptions to these general prohibitions.

Assuming Dr. Zahn would be paid for his services, he would derive a direct benefit from a contract with the Tarheel County Health Department to provide dental services. This makes the answer to the question of whether there is a conflict straightforward, yes? Well, maybe not.

The application of the conflict of interest law to this fact pattern is not quite as simple as it appears, because traditional boards of health in North Carolina don't have the authority to enter contracts. (Public health authority boards have contracting authority, but there are only two counties in North Carolina that operate as public health authorities—Hertford and Cabarrus.) Instead, it is the health director who may enter contracts on behalf of the health department, and the health director's authority is subject to the authority of the county commissioners (**G.S. 130A-41**). So, it is primarily the health director (often in conjunction with the county manager) who makes contracts on behalf of the health department. Therefore, it is possible that Dr. Zahn has no role in making or administering the contract for dental services. That is a question that would have to be considered in light of local practices and the statutory descriptions of what constitutes making or administering contracts (**found in subsection (a1) of G.S. 14-234**). For example, some boards of health may be involved in choosing contractors or overseeing their performance, or in developing the terms of contracts. In such cases, the board is involved in making and/or administering contracts and board members should not derive direct benefits from them (unless an exception applies). On the other hand, some boards of health are not involved in any of these activities.

Suppose the Tarheel County Board of Health is in that second category – it is never in any way involved in making or administering health department contracts. Does that give the health director the green light to contract with Dr. Zahn? No, it doesn't. If Dr. Zahn gets the contract, he will derive a direct benefit from it. Even though he is not involved in making or administering the contract, remember that the statute also prohibits a public official from attempting to influence others who make or administer a contract from which the official derives a direct benefit. I think this is a particularly troublesome point for health departments, because boards hire and fire the health director, who is involved with making and administering contracts. It's easy to imagine the potential for influence in that kind of situation—but that still may not be the final answer to whether a contract with Dr. Zahn poses a legal conflict of interest. The statute prohibits actual attempts to influence those making or administering contracts, not putting oneself in a position where the potential for influence exists. The potential for influence certainly seems like an important factor to consider before deciding to enter the contract, however, and it may point health directors or their attorneys toward a decision to avoid the contract.

Suppose after considering these issues, it looks like it would be a conflict of interest to contract with Dr. Zahn. Are there any statutory exceptions that would still allow the contract to proceed? There is one that may apply: the "small jurisdiction" exception. For purposes of G.S. 14-234, a "small jurisdiction" is a county that doesn't have any incorporated municipalities with a population of more than 15,000 according to the most recent federal census. If Tarheel County meets this definition, the health director could contract with a board of health member who is a health care provider, even if the contract



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ordinarily would be prohibited. However, such a contract would be subject to all of the following special requirements:

- It must not exceed \$20,000 in a 12-month period (the maximum amount is \$40,000 for many contracts, but the lesser amount applies to “medically related” services and I am assuming dental services would be considered “medically related”).
- The contract must be approved by resolution in a regular, open governing board meeting.
- The board of health member entering the contract must not participate in any way in the meeting in which the contract is approved.
- The contract must be declared in the county’s annual audit.
- Information about the contract must be included in a list of contracts with public officials that the governing board posts in a conspicuous place and updates every three months.

What if Tarheel County does not qualify for the small jurisdiction exception but Dr. Zahn is the only dentist available to do the work? That’s a very plausible scenario in North Carolina, which has a shortage of dentists, especially in rural areas. In such cases, it’s worth considering all the angles carefully, and one of the angles to consider is whether the contract is in fact prohibited by the statute—hence this post. These types of contracts often just don’t *feel* right, and there may be legitimate concerns about how they appear to the public, but they may not actually be prohibited under state law. Whether to proceed in those circumstances is a judgment call for health directors and their attorneys.

## Links

- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_14/GS\\_14-234.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_14/GS_14-234.html)
- [www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_130A/GS\\_130A-41.html](http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-41.html)