



TRANSMITTAL LETTER

The University of North Carolina
General Administration

Transmittal Number 45
May 23, 2006

Subject: 100.4. Review of Umstead Act Exceptions

300.2.14. Non-Salary and Deferred Compensation

This letter transmits one new policy and one amended policy:

100.4. Review of Umstead Act Exceptions. This policy was adopted by the Board of Governors on May 12, 2006. Please contact Leslie Winner, Vice President and General Counsel, at 919-962-4588 with any questions.

300.2.14. Non-Salary and Deferred Compensation. This policy was amended by the Board of Governors on May 12, 2006. Please contact Alan Mabe, Interim Senior Vice President for Academic Affairs, at 919-962-4589 with any questions.

REVIEW OF UMSTEAD ACT EXCEPTIONS

Introduction: The Umstead Act contains numerous exceptions for UNC to the Act's general prohibition of State agencies' selling goods or providing services to the public that are ordinarily and customarily provided by private enterprises. G.S. §66-58(a). Three of those exceptions, contained in G.S. §66-58(b)(8)m., n., and o., require that the Board of Governors establish a panel to determine whether the University is authorized to undertake questioned activities in competition with an existing or proposed nongovernmental entity. The purpose of this policy is to establish this panel and to establish procedures for it to use in making its determinations, as required by G.S. §66-58(i) and (j).

Definitions: The following definitions apply to this policy:

1. "An affected party" is a nongovernmental person or entity in the State that is in or proposes to be in the same, a similar, or competing business.
2. "The Exceptions" are the exceptions to the Umstead Act created by G.S. §66-58(b)(8)m., n., and o.
3. "The Panel" is the UNC Umstead Review Panel.
4. "The Registry" is the registry required by G.S. §66-58(j)(2) and established by Part II of this Policy.
5. "The Umstead Act" is N.C.G.S. §66-58.
6. The "University" means The University of North Carolina.
7. "Institution" or "Entity" means a constituent institution or entity of the University of North Carolina, or any component thereof.
8. "Day" mean calendar day unless otherwise noted.

I. Establishment of Panel.

There is hereby created a panel, to be known as the UNC Umstead Review Panel consisting of members appointed in accordance with G.S. §66-58(i).

- A. **Terms of Appointment:** Appointments to the panel shall be for a term of four years, though the initial appointments to the panel may be for terms shorter than four years in order to stagger the terms of appointment. A person appointed to the Panel shall serve until his successor is appointed.
- B. **Officers.** The Panel shall, by a majority vote of those members present, elect a chair and a vice chair, each to serve a two year term.

- C. **Staff to Panel:** The Vice President and General Counsel of The University of North Carolina shall provide staff to the Panel.
- D. **Expense Reimbursement:** Members of the Panel shall receive per diem compensation and travel expense reimbursement consistent with G.S. §138-5.

II. Establishment of Registry

The President, or the President's designee, shall create and maintain a registry in accordance with G.S. §66-58(j)(2) through which any member of the public may register to receive electronic notices of the meetings and hearings, agendas, and determinations of the Panel. In addition, the Panel's meeting and hearing notices, agendas, minutes and determinations shall be posted on The University web site.

III. Notice of new activities

G.S. §66-58(b)(8)o provides an exception for activities that enable the community in which the institution or the entity is located, or the people of the State, to utilize the institution or entity's facilities, equipment, or expertise. If a constituent institution or other University entity proposes to engage in a new type of activity that is justified by the exception to the Umstead Act that is contained in G.S. §66-58(b)(8)o., then the chancellor of the institution or director of the entity shall submit notice of the proposal to the Staff to the Panel so that electronic notice of the proposal may be given to the persons or entities who have been requested to be included in the Registry. The notice must include a description of the proposed activity, the proposed frequency of the activity, and the geographic area in which the activity is proposed to be available. Notice to the Registry must be given prior to the commencement of the activity.

IV. Quorum and Rules

A majority of the members of the Panel then in office shall constitute a quorum. The Panel shall use *Robert's Rules of Order* as its rules of parliamentary procedure unless law or policy require otherwise.

V. Jurisdiction of the Panel

- A. The Panel may make a determination under G.S. §66-58(b)(8)m. or n. as to whether a proposed or ongoing University activity is unauthorized competition.
- B. The Panel may make a determination under G.S. §66-58(b)(8)o. as to whether a proposed or ongoing University activity is unauthorized competition or is unfair competition.
- C. The Panel may not make determinations under any of the other exceptions to the Umstead Act. If the University claims that a proposed or ongoing activity is allowable under any other exception to the Umstead Act, the Panel is without jurisdiction to consider the activity.
- D. The Panel does not have the authority to overrule a prior determination of the Attorney General.

VI. Initiation of Proceedings

- A. Any person or nongovernmental entity in the State that is in or proposes to be in the same, a similar, or competing business is an affected party that may initiate a Panel proceeding by submitting a request to the Panel Staff that the Panel make a determination as to whether a specified activity of the University is justified by one of the Exceptions.
- B. A constituent institution or other University entity that proposes to engage in an activity may initiate a Panel proceeding by submitting a request to the Panel Staff that the Panel make a determination as to whether the activity is justified by one or more of the specified Exceptions.
- C. A request must include at least the following:
 - 1. The name, address, e-mail address (if any), and phone number of the affected party making the request.
 - 2. If an entity is making the request, the name, address, e-mail address (if any), and phone number of the contact person for the entity.
 - 3. A short and plain statement of the proposed or ongoing activity about which the affected party requests that the Panel make a determination and the name of the constituent institution or University entity engaged in or proposing to engage in the activity.
 - 4. If an affected party is making the request, a short and plain statement as to why the party claims the activity is not justified by one of the Exceptions and the nature and location of the same, similar or competing business in which the affected party engages or proposes to engage.
 - 5. If a University entity is making the request, a short and plain statement of why it claims that the activity is justified by a designated one or more of the Exceptions.
- D. A request is deemed filed with the Panel when it is received by the Panel Staff at the University Office of the President.
- E. Within seven days after receiving the request, the Panel Staff shall give electronic notice of all requests to initiate proceedings to the persons who have requested to be included on the Registry and to the chancellors of all the constituent institutions. In addition, the Panel Staff shall provide a copy of the request to the chancellor or director of the affected University entity within seven days of receiving the request.

VII. Attempt to Resolve

If a matter is initiated by an affected party, the chancellor, the chancellor's designee, the director of the affected University Entity, or the director's designee shall contact the party initiating the request within 15 days after the request is filed and shall confer in an attempt to reach a resolution by agreement. The chancellor or director shall notify the Panel Staff in writing, with a copy to the party that initiated the matter, that this conference has been held and shall indicate whether the matter has been resolved. If the matter was not resolved, the party making the request and the effected University entity

may resume their efforts to resolve the matter at any time and shall notify the Panel Staff if the matter is resolved.

VIII. The Panel's Proceedings

- A. If the matter has not been resolved within 15 days after the request is filed, the Panel shall schedule a hearing on the request. This hearing shall be held within 45 days after a request is filed at a time and place to be determined by the Chair of the Panel. This time may be extended by agreement of both the requesting party and the affected University Entity or by Order of the Chair for extenuating circumstances.
- B. If a request is made concerning a proposed activity, the affected University Entity shall not initiate the activity until the Panel makes its determination unless the request is withdrawn.
- C. The Panel Staff shall give electronic notice of the Panel's hearing to consider a request to the members of the public that have requested to be on the Registry, to the affected party making the request, and to the affected University Entity at least seven days prior to the Panel's hearing to consider the request. The notice must include the date, time and location of the Panel's hearing, and must specify the activity that is the subject matter of the hearing.
- D. At the hearing, the party making the request, the affected University Entity, and any other affected person or entity that has notified the Panel Staff in advance of the hearing may state its position and present documents and witnesses to support its position. The Chair of the Panel shall preside over and conduct the hearing and shall rule on all matters of procedure, including the admission of evidence. In the absence of the Chair the Vice Chair shall serve as Chair for the purposes of the Hearing. The Hearing will be conducted informally and without adherence to the rules of evidence required in judicial proceedings. The Chair may exclude irrelevant, immaterial or unduly repetitious or unreliable evidence.
- E. The Panel is not required to make a recording of the hearing but any party may do so at its own expense.
- F. Upon completion of the hearing, the members of the Panel who were present at the hearing will deliberate and will make a written determination as to whether the matter falls within the Panel's jurisdiction and, if so, whether the specified activity is justified by one of the Exceptions. These deliberations may be by teleconference or other means of simultaneous communication as long as the requirements of North Carolina's Open Meetings Law are observed. The determination will be made based on the evidence and arguments presented at the hearing and shall state the basis for the determination.
- G. The written determination of the Panel will be made within 15 days after the close of the hearing and will be transmitted to the persons and entities that participated in the hearing and, electronically, to the persons and entities who have requested to be included in the Registry.

IX. Effect of Determination

- A. The University will be bound by the Panel's determination that a proposed or ongoing activity is not justified by one of the Exceptions.
- B. Pursuant to G.S. §66-58(k), the University and its employees may rely on a determination made by the Panel that an activity is justified by one of the Exceptions.
- C. Once the Panel has determined a matter, neither the party requesting the initial determination, nor any party on the Registry at the time the Registry was notified of the proceeding, may request another Panel determination on the same matter unless the party shows that there has been a material change in circumstances.

NON-SALARY AND DEFERRED COMPENSATION

A. Non-salary compensation.

1. Irrespective of the campus' status regarding management flexibility in personnel, all constituent institutions and the General Administration shall have a policy concerning the granting of non-salary compensation for all personnel exempt from the State Personnel Act except for the chancellor and the president. The policy shall either provide specified non-salary compensation to a defined category of employees uniformly or shall require approval by the board of trustees or Board of Governors upon recommendation by the chancellor or president, respectively, regarding non-salary compensation granted to an individual employee before non-salary compensation is provided.

Each policy that provides specified non-salary compensation to a defined category of employees shall set out what types of non-salary compensation the campus or General Administration will provide, and the criteria for awarding such compensation. The awarding of non-salary compensation may be based on any reason or reasons considered relevant to attracting or retaining a faculty and staff of the highest possible quality. Decisions concerning non-salary compensation shall not be based in whole or in part upon discriminatory factors of the employee's race, color, national origin, sex, age, religion, creed, disability, or veteran status.

2. The funding source for non-salary compensation shall not be State funds, and non-salary compensation may be provided directly by an associated foundation if permitted by policy. An exception permitting non-salary compensation to be funded from State funds may be approved by a board of trustees or the Board of Governors only when permitted by the Office of State Budget and Management. Any club membership for an employee or the granting of special campus services or benefits must be job related, and the club must have a policy prohibiting discrimination against groups protected by federal and North Carolina law. Non-salary compensation shall be appropriately reported to federal and state tax agencies.

The hiring approval process may include payment of moving expenses in accordance with authority from the Office of State Budget and Management. The decision of whether to include payment of moving expenses in an employment offer may be delegated no lower than the Provost/Vice Chancellor level or Vice President level.

3. Provision of housing, when occupancy of the housing is required as a part of the job, reimbursement of professional- or work-related travel, and the provision of equipment to perform the work of the position, even if used at home, including computers, cellular phones, personal data assistants (PDA), pagers and similar work related items, are permissible and are not considered "non-salary compensation" as used in this Policy.

B. Delayed or Deferred Salary/Compensation

The State of North Carolina and the University of North Carolina offer employees options for deferred compensation and insurance. Unless expressly approved by the Board of Governors, constituent institutions and the General Administration may not provide any other employer-paid options for deferred compensation or other delayed compensation to its employees.

For purposes of this policy, delayed and deferred salary or compensation shall be broadly defined to include, but are not limited to, any employer payment or contribution paid 1) directly to an employee, 2) to the employee's account or plan, or 3) to a person acting in a capacity similar to a trustee for the employee, which is paid later than the regular or next subsequent payment cycle, except for an error that is promptly corrected upon discovery. Delayed and deferred salary/compensation also includes traditional 457 deferred compensation plans, any retirement plans or accounts, annuities, and life insurance accumulating any cash value. Delayed and deferred compensation also include both tax qualified and non-qualified plans, and any other similar form of payment, whether tax sheltered or not.

This policy does not prohibit a campus from making any permitted employer contribution to the Optional Retirement Program or the Teachers' and State Employees' Retirement System.

C. Non-salary or deferred compensation of Chancellors and President

Other than a State provided car or a car of comparable value, a chancellor's or the president's residence as provided for in Policy 300.1.5, work related club memberships, reimbursement of moving expenses upon initial employment as a chancellor or president, and benefits uniformly provided to all employees exempt from the State Personnel Act, only the Board of Governors may approve non-salary or deferred compensation for a chancellor or the president. The funding source for non-salary compensation for a chancellor or the president, other than that specified in this paragraph, shall not be State funds, but an exception may be approved by the Board of Governors. Club memberships may never be paid using State funds.

D. Employees exempt from this policy

Members of faculty medical practice plans, such as physicians, dentists, and veterinarians, are exempt from this policy. Athletic directors and head coaches remain subject to Policy 1100.3 and its guideline, and are exempt from this policy.

E. Review and Approval

Campus policies on non-salary and delayed/deferred salary/compensation must be submitted as a part of the campus request for management flexibility to appoint and fix compensation. Campuses already granted management flexibility in personnel shall submit their policies to the General Administration for review. Subsequent changes to the policies must be submitted for review by the General Administration prior to submission to the campus Board of Trustees for approval. In some cases, policies with extensive revisions will be reconsidered by the Committee on Personnel and Tenure of the Board of Governors.