STATEMENT OF GERALD L. BALILES, FORMER GOVERNOR OF VIRGINIA, FORMER ATTORNEY GENERAL OF VIRGINIA

The Attorney General's recent opinion to presidents, rectors and visitors of Virginia's public colleges and universities has, unfortunately, created something of a political "firestorm" in the Commonwealth and generated unflattering impressions across the country about Virginia's treatment of all of its citizens.

The opinion correctly states as, a matter of law, that only the General Assembly can create "legislatively protected classes" for purposes of nondiscrimination, and he cites, somewhat conveniently, a 1982 opinion that I authored as Attorney General regarding whether a local government could enlarge upon the statutorily created list of persons affected by the law for a "local government" in Northern Virginia.[1]

Under the long established "Dillon Rule," Virginia's local governments possess "only those powers which are granted expressly by statute, or which exist by necessary implication, and any doubt as to the existence of a power must be resolved against the existence of a power." *Tabler v. Board of Supervisors of Fairfax County*, 221 VA. 200,269 S.E. 2nd 358 (1980): *Commonwealth v. Arlington County Board*, 217 VA., 558, 232, S.E. 2nd 30 (1977). (Much of the legislature's time, by the way, is consumed with myriad requests by local governments seeking to undertake some new or different activity, although many of these legislative requests are clarifying in nature and relatively noncontroversial.)

The Attorney General's opinion, in my judgment, erroneously attempts to place colleges and universities into the same category as "local governments," and therefore, subject to the Dillon Rule's requirement of operating only within specific enumerated grants of power from the General Assembly.

For years – decades, even –public colleges and universities have operated pursuant to their "own charters." In the Educational Institutions title of the Virginia *Code*, the specific statutes creating the Commonwealth's public colleges and universities, and amended over the years, including recent restructuring legislation, grant very broad powers to presidents and boards of visitors to "make all needful rules and regulations" concerning their operations and to "generally direct the affairs of their institutions." Thus, unless the General Assembly affirmatively revokes such powers, Virginia's public colleges and universities may continue to engage in adopting rules and regulations necessary to their operations, including standards of conduct.

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[1] The 1982 opinion was based upon a 1980 Virginia Supreme Court decision, *Tabler v. Board of Supervisors of Fairfax County*, 221 VA., 269, S.E. 2nd 358 (1980); *Commonwealth v. Arlington County Board*, 217 VA., 232, 558, S.E. 2nd 30 (1977), as well as prior rulings of Attorneys General serving before 1982. The 1982 opinion addressed the validity of certain amendments to Fairfax County's specific authority to address discriminatory practices in housing, employment, access to and use of public accommodations, the availability of credit or credit-related services, the provision of educational services and retaliatory actions against those asserting their rights under local law. The opinion held that the County, under its specifically delegated authority from the General Assembly, could create a Human Rights Commission, give it investigatory and related powers but could not enlarge upon the definitions or declare particular acts to be unlawful or provide separate penalties from those specified and delegated to Fairfax County by the General Assembly.

Thus, the current Attorney General's opinion did not involve the pending factual question regarding colleges and universities as implied in the opinion.

Therefore, whether a college or university, acting through its president and board of visitors, chooses to specify codes of conduct, including honor systems and nondiscriminatory policies, such decisions would be made within the general powers of a college or university's "statutory charter."

Indeed, the Governor has just announced the code of conduct for his own administration that clearly states that any discriminatory conduct is impermissible and prohibited, thus continuing the protection, in different terms, but with similar effect, as his two most recent predecessors, against discrimination for those employed in the executive branch of government.

Gerald L. Baliles

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