

ADVISORY OPINION NO. 97-14

Issued on June 5, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

Municipal Building Commission Member

OPINION SOUGHT

- 1.) Is it a violation of the Ethics Act if a member of a Municipal Building Commission is simultaneously an officer or director of a non-profit Foundation which is a lessee of the Municipal Building Commission?
- 2.) Would good faith reliance on an Ethics Commission advisory opinion provide immunity from liability under any conflict of interest provisions adopted pursuant to WV Code 8-5-19?
- 3.) Would a part-time appointed public official's recusal from a vote on a public contract under WV Code 6B-2-5(d) provide protection from liability under any municipal charter provision adopted pursuant to WV Code 8-5-19?

FACTS RELIED UPON BY THE COMMISSION

A Municipal Building Commission has a three-person governing Board whose members are appointed by Town Council and serve without compensation. The Commission does not have the authority to hear contested cases or issue regulations. It plans to construct a community center and then lease the property and management of the facility to a non-profit Foundation. One of the Building Commission's Board members may also serve as an officer or director of that non-profit Foundation. Officers and directors of the Foundation are also unpaid.

The Member is concerned to establish whether simultaneous service on both the Building Commission Board and the Foundation Board would be consistent with the provisions of the Ethics Act.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes

personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code 6B-2-3 states in pertinent part that... A person subject to the provisions of this chapter may rely upon the published guidelines or an advisory opinion of the Commission, and any person acting in good faith reliance on any such guideline or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of the code and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.

West Virginia Code 6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to.... prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code 6B-2-5(g)(1) provides, in pertinent part, that

(1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations appear, in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed regulation;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds.

ADVISORY OPINION

1.) No provision of the Ethics Act would prohibit a member of the Municipal Building Commission from simultaneously serving as an officer or director of a non-profit Foundation which would lease and manage the community center.

West Virginia Code 6B-2-5(g) does prohibit public officials from appearing in a representative capacity before the agency they serve while in office and for six months after leaving. However, this provision only applies to governmental entities that can hear contested cases or issue regulations. The Building Commission does not have such authority. If, however, the Building Commission should obtain the authority to hear contested cases or issue regulations, then the member holding dual positions is urged to seek additional guidance from the Ethics Commission. In such a case WV Code 6B-2-5(g) could prevent that person holding both positions from advocating a position favorable to the non-profit Foundation before the Municipal Building Commission.

2.) The Ethics Act gives the Commission the authority to issue advisory opinions which evaluate conduct only as it relates to the provisions of the Ethics Act and WV Code 61-10-15. The Commission's authority does not extend to interpreting any other provision of the WV Code or any provision of a municipal charter or ordinance. Governmental entities are free to impose stricter standards upon their public servants than are found in the Ethics Act.

Therefore no advisory opinion from the Ethics Commission may be used to claim immunity from potential liability under any other state statute or any municipal ordinance or charter provision enacted pursuant to the authority granted by WV Code 8-5-19.

3.) Since members of the Municipal Building Commission are part-time appointed public officials, they may avoid the Ethics Act's prohibitions against being a party to or having a financial interest in a public contract provided they recuse themselves from any vote or discussion of such a contract.

However, as noted above, governmental entities are free to impose stricter standards than those found in the Ethics Act. Consequently, the Ethics Commission lacks the authority to rule that a recusal from a discussion or vote on a contract would also protect the Building Commission members from liability under any municipal charter provision adopted pursuant to WV Code 8-5-19 if such charter provision imposes standards exceeding those found in the Ethics Act.


Chairman