

ADVISORY OPINION NO. 2004-06

Issued On May 6, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Board** seeks guidance on whether a financial interest in a business held by one or more Trustees may be considered *de minimis* so as to permit voting on whether to pursue proposed legal action against that business.

FACTS RELIED UPON BY THE COMMISSION

The Board is responsible for the investment of certain State funds. On occasion the Board must consider possible shareholder litigation against publicly traded corporations in which the Board has equity or debt investments.

The Board previously obtained guidance concerning whether Trustees are required to recuse themselves from voting on matters in which they hold an indirect financial interest based on their investment in one or more mutual funds. The Board now asks for guidance on voting where a Trustee holds stock in a publicly-traded company.

The Board has provided specific examples where litigation might arise against Company A in which a Trustee holds 4,128 shares valued at \$127,431 and representing .0094 of that company's total outstanding shares. Likewise, a Trustee owns 125 shares of Company B's 997,938,775 outstanding shares with a market value of \$5636.25. Further, a Trustee owns 50 shares of Company C's 286,611,414 outstanding shares with a market value of \$1425.00

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV Code 6B-2-5(b) *Use of public office for private gain*, provides in part that ... A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

WV Legislative Rules, 158 C.S.R. 9 (1992):

2.1 A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2 For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety.

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The Ethics Commission's Legislative rules on voting say that public servants may not vote on matters which have become personal to them. These rules say that matters become personal to a public servant ". . . when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety."

Accordingly, in an earlier Advisory Opinion, 2003-12, this Commission determined that the Board's Trustees must recuse themselves from official action in regard to corporations in which they have a direct financial interest. This includes direct ownership of both debt and equity interests.

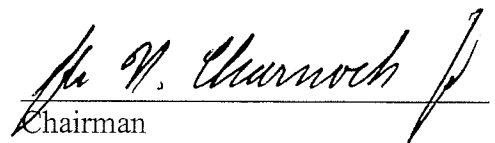
In that same Advisory Opinion, the Commission further noted:

Situations may arise in which the direct ownership of a single share, or even several shares, of stock would be *de minimis* and would not require the owner's recusal. Such situations must be dealt with by the Commission on a case-by-case basis and specific facts must be presented for a determination.

The Board now seeks a rule of thumb that will permit Trustees to gauge when their pecuniary interest in a company's stock is so small that they will not be disqualified from voting on pursuing legal action against that same company.

In the context of acting upon the matters described in this opinion, a Trustee's interest will be considered *de minimis* when the aggregate market value of securities in a publicly-traded company held by the Trustee, the Trustee's spouse, and the Trustee's minor children, does not exceed \$15,000. Thus, in the examples provided the Trustee could vote on whether to pursue legal action against Companies B and C, but would have to be recused from voting on whether to pursue such action against Company A.

This decision is based on the particular circumstances presented in this request and may not be relied upon to establish whether a financial interest is *de minimis* in some other context. The Commission will continue to address such questions on a case-by-case basis.


Chairman