

ADVISORY OPINION NO. 2004-17

Issued On October 7, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Members of a State Board** seek guidance on participating in adjudicating charges involving other persons who practice their profession.

FACTS RELIED UPON BY THE COMMISSION

The State Board was established to regulate a particular profession. Persons appointed to this Board must have engaged in their profession for at least ten years. The Board has authority to investigate complaints filed against licensees by any person and to take appropriate disciplinary action against a licensee for violating certain statutory standards. The Board also has specific authority to investigate a licensee on its own motion or upon a complaint filed by a Board Member.

After the Board received Complaint No. 1 against a licensee, Board Member A personally participated in the investigation. In the course of that investigation, he visited a particular location where he observed matters that may be relevant to adjudicating Complaint No. 1.

While Complaint No. 1 was pending, Board Member B recalled a previous situation where one of his professional clients had been adversely affected by the conduct of the licensee named in Complaint No. 1. As permitted by the State Board's rules, Board Member B filed Complaint No. 2 against the licensee. The licensee's attorney has questioned whether either of these Board Members can further participate in the determination of probable cause to proceed to a hearing on these complaints, or in the ultimate adjudication of the complaints.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV 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...serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official...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.

WV Code § 6B-2-5(j) *Limitations on participation in licensing and rate-making proceedings.* -- No public official or employee may participate within the scope of his or her duties as a public official or employee ... in any license or rate-making proceeding that directly affects the license or rates of

any person, partnership, trust, business trust, corporation or association in which the public official or employee or his or her immediate family owns or controls more than ten percent.

Legislative Rules - 158-9-2.1 A public official or public employee may not vote on or decide a matter ... when he or she has any pecuniary interest either directly or indirectly in the matter ... [but may, if their interest]... in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

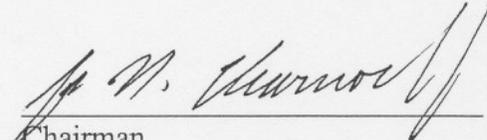
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Ordinarily, public servants should not vote on matters which have become personal to them. The Commission's Legislative Rules say that matters become personal to a public servant " ... when he or she has any pecuniary interest either directly or indirectly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

The State Board at issue has adopted procedural rules which specifically authorize members of the Board to file written complaints against a licensee based on matters within the personal knowledge of the Board Member, matters of public record that constitute grounds for disciplinary action, or upon information received through investigative activities undertaken in response to written or verbal complaints. The rules specifically provide that a Board Member who files a written complaint **may not** participate in final deliberations, or vote on the final disposition of a complaint, unless it is clear that the complaint has been filed as a matter of form, the Board Member has not prejudged the case, that only unproven allegations are intended in the complaint, and the Board member filing the complaint has reached no conclusion based on the mere assertion of a charge.

Applying the general rules on voting in the Ethics Act, as clarified by the Commission's Legislative Rule, while taking into consideration the more specific rules contained in the State Board's Procedural Rule, the Commission concludes that Board Member A, who has obtained information pertinent to either Complaint while acting in the scope of his authority and duties as an appointed Board Member, does not have a "personal interest" in these matters such as to preclude him from voting on probable cause to proceed or upon the final adjudication of either complaint.

However, Board Member B, who initiated Complaint No. 2 against a licensee based upon one or more incidents involving one of his professional clients, is personally involved in a manner which precludes him from voting on whether there is probable cause to pursue either complaint against this licensee, as well as from participating in the ultimate adjudication of these matters, in the event probable cause is found by the remaining Board Members.


Chairman