

## **Advisory Opinion 2019-15**

**Issued on August 1, 2019, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **Town Council Member** asks whether she may vote to approve payroll at future Town Council meetings when an incumbent mayor previously had cast a tie-breaking vote on a motion to approve the second reading of an ordinance that increased the mayor's salary for the next term of office.

### **Facts Relied Upon by the Commission**

Beginning in December 2018, the Town Council considered pay changes for town officials in a series of council meetings. These changes were to take effect in July 2019, when officials' new terms of office began. The town's regular election for mayor, recorder and council members took place on June 11, 2019.

During a December 2018 meeting, the Town Council unanimously approved a reduction of pay for council members from \$80 to \$40 per meeting and also a reduction of the salary of the town recorder from \$8,000 to \$4,000 annually.

In a March 2019 meeting, the Town Council unanimously approved its budget for fiscal year 2020. The new budget reflected an increase of \$5,000 in the salary of the mayor and the decrease in the salary of the recorder. The budget did not, however, reflect a change in council members' pay. The minutes do not reflect that the mayor recused from this vote. During this same meeting, the Town Council considered a motion to accept the first reading of an ordinance<sup>1</sup> that addressed the compensation for the mayor, recorder and council members. Under that ordinance, the mayor would receive a \$5,000 salary increase, the recorder would receive a \$4,000 salary decrease and council members would receive no change in their pay. The motion passed 4-1, and the mayor did not participate in the vote.

A motion to accept the second reading of the ordinance was considered by Town Council in an April 2019 meeting. The motion died for lack of a second.

In a subsequent meeting in April 2019, the Town Council unanimously approved a motion to direct the town's attorney to draft a change to the ordinance reflecting that the pay of

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<sup>1</sup>W. Va. Code Ann. § 8-5-12 provides:

Notwithstanding any charter provision to the contrary, the governing body of every municipality shall by ordinance fix or cause to be fixed the salary or compensation of every municipal officer and employee: Provided, That the salary of any officer shall not be increased or diminished during his term.

town officials will be at the discretion of the current governing body. The mayor did not participate in this vote. It does not appear that an ordinance with this content was ever considered by council.

In a May 2019 meeting, the Town Council again considered a motion to approve a first reading of the ordinance regarding town officials' pay. The ordinance again provided for the increase in the mayor's salary, the decrease in the recorder's salary and no change to council pay. One council member made a motion to amend the ordinance to reflect that the mayor's salary would not be increased. The motion failed. Another motion was made to approve the first reading of the ordinance with an amendment to reduce council pay to \$40 per meeting. This motion was approved 3-2. The mayor did not participate in this vote.

The Town Council approved the second reading of the ordinance in a subsequent May 2019 meeting. The motion was approved by a vote of 3-2. The recorder and a council member were absent for this meeting, and the mayor therefore served as the tie-breaking vote.

During a June 2019 Town Council meeting, the ordinance was again placed on the agenda for the council's consideration to avoid any appearance of impropriety in the previous vote concerning the ordinance. The Town Council ratified its prior approval of the second reading of the ordinance by a vote of 4-1. The mayor did not vote.

The Requester asks whether it is a violation of the Ethics Act for an incumbent mayor to cast a tie-breaking vote on a motion that will grant the mayor's position a salary increase when the incumbent mayor was unopposed in seeking re-election. If this is a violation, the Requester asks whether there is a legitimate way for her to approve the payment of bills at each Town Council meeting. The Requester states that the Town's bills include payroll.

### **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b) states, in relevant part:

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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

## Advisory Opinion

It is well established that an individual may not seek an Advisory Opinion regarding the propriety of another person's conduct. "In order to have standing with the [Ethics] Commission to seek an [A]dvisory [O]pinion the requester must be asking about his or her own action(s)." Advisory Opinion 91-26. "The Legislature established a different mechanism for people who want to question the propriety of someone else's conduct." Advisory Opinion 2003-16. "The Legislature empowered the Ethics Commission to investigate and resolve written sworn complaints that someone subject to the Ethics Act is guilty of a material violation of the provisions of the Act." *Id.* This Advisory Opinion may therefore address only the propriety of the Requester's conduct in voting to approve payroll at future Town Council meetings.

The Ethics Commission has previously addressed requests from public officials regarding their own obligations as it relates to the conduct of another public official. In Advisory Opinion 1997-30, a town recorder asked whether she could write checks paying for services performed by a business owned by a council member. The Ethics Commission held that the recorder would be guilty of using her office for the private gain of another if she paid the bills. *Id.* The Ethics Commission reasoned that if the recorder paid the bills as approved by council, it would result in the council member receiving public funds he or she would not have a legal right to receive due to the Ethics Act's prohibition on having financial interests in public contracts at W. Va. Code § 6B-2-5(d)(1).

In Advisory Opinion 2013-43, members of a county solid waste authority asked what their obligations were when an authority member had a purported conflict of interest and refused to recuse himself. The Ethics Commission first distinguished Advisory Opinion 97-30 and reasoned that the nature of the recorder's involvement with the alleged violations in that Opinion was different. In order to violate the Ethics Act, the recorder had to take an affirmative step to assist with the ethics violation by paying the bills. The Ethics Commission found that the members of the solid waste authority did nothing to assist with the alleged violations and that the members would not violate the Ethics Act by continuing a meeting after one member had refused to recuse himself.

Finally, in Advisory Opinion 2015-08, the chairman of a public service district asked what obligations he had when he believed other board members had conflicts of interest. The chairman believed that one board member had a professional relationship with an attorney the board was considering retaining and that another board member had a prohibited financial interest in a matter which could benefit that member's land development company.

The Ethics Commission held therein that "the Ethics Act does not require an official to determine whether another member's actions would violate the Ethics Act," and that "the Ethics Act does not, *per se*, require the [chairman] to . . . take other action to remedy a [b]oard action wherein a conflicted member was the deciding vote." The Opinion did caution that the chairman "may not . . . take or withhold any action with the intent to

improperly benefit the conflicted member or another person as opposed to benefitting the PSD.”

**In line with precedent, the Ethics Commission finds that the Ethics Act does not require the Council member to determine whether another official’s actions violate the Ethics Act. Furthermore, under these facts there is nothing to suggest that the Requester is taking an affirmative step with the intent to improperly benefit a public official by voting to approve payroll at future meetings. The Town Council approved the changes in officials’ pay for the next term of office at multiple meetings and approved the budget. The Ethics Commission holds that the Requester may vote to approve payroll at future council meetings without violating the Ethics Act.**

The Commission notes that this Opinion only addresses the conduct of the Requester and does not purport to address the conduct of any other individual.

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11 and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission