ADVISORY OPINION NO. 2010-09

Issued On June 3, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A member of a County Rescue Service, Inc. (CRS) asks whether the CRS is a public entity whose members and/or employees are subject to the provisions of the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The County Rescue Service, Inc. (CRS) was incorporated as a non-profit private organization in 1969.[1] Pursuant to the Articles of Incorporation, the original seven board members were appointed by the County Court (now County Commission); thereafter, only three of the seven are appointed by the County Commission from the active members, and the remaining board members are elected by the active members in good standing.

According to its Articles of Incorporation, CRS does not exercise any executive or legislative power. Instead, its role is to "render immediate temporary aid and ambulance service to the sick and injured; to provide transportation for them when needed", and to otherwise act in furtherance of those two goals.

The Emergency Ambulance Service Act of 1975 requires all county commissions to provide ambulance services for their citizens. W. Va. Code§ 7-15-4 reads:

> The county commission may provide the service directly through its agents, servants and employees; or through private enterprise; or by its designees; or by contracting with individuals, groups, associations, corporations or otherwise; or it may cause such services to be provided by an authority, as provided for in this article; and any municipality or county, or both, or any two or more municipalities within any county or contiguous counties, or any two or more contiguous counties, or any combination thereof, may create an authority. Such authority shall be created upon the adoption, by the governing body of each participating government, acting individually, of an appropriate ordinance or order. Each authority shall constitute a public corporation ....

The County recently adopted a Special Emergency Ambulance Service Fee Ordinance, establishing an ambulance fee and recognizing the CRS and a Municipal Volunteer Fire Department as Emergency Medical Services (EMS) Agencies. Pursuant to the

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[1] According to the Secretary of State's Office, the State Tax Department recently revoked the CRC's charter. That fact, however, is immaterial to our analysis and the ultimate outcome herein.

Ordinance, each EMS Agency must submit its annual budget to the County Commission for formal approval of use of collected fees. The Ordinance further provides:

> The ... County Commission shall review and approve EMS Agencies' Budgets during the general county budget process. The EMS Agencies shall submit an annual financial report of expenditures to the ... County Commission by August 1st of each year.

Section Two, Page 3.

The County Commission and CRS have a written contract, outlining the County Commission's obligation to render funds and for CRS to provide certain services.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code §6B-2-5. Ethical standards for elected and appointed officials and public employees.

> (a) *Persons subject to section.* -- The provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.

The Ethics Act defines "Public Employee" as: "any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards." W. Va. Code§ 6B-1-3U).

The Ethics Act defines a "Public Official" as: "any person who is elected or appointed to any state, county or municipal office or position...." W.Va. Code§ 6B-1-3(k).

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The Ethics Act applies only to public servants, not employees or officials of private corporations, regardless of the service the corporation provides. The Ethics Act defines a public employee as any "any full-time or part-time employee of any state, county or municipal **governmental body or any political subdivision thereof,** including county school boards." (emphasis supplied) Similarly, public officials include only those persons elected or appointed to a state, county or municipal office or position.

CRS has eight full-time and 20 part-time employees. They are paid by CRS, not the County. CRS is responsible for Workers' Compensation coverage and Social Security contributions for its employees, and all the other obligations associated with an employer. Its contract with the County Commission expressly recognizes that portions of the funds shall be used to pay personnel expenses.

CRS is not a corporation created by state or local authority to carry out a governmental function. It exists independent of state authorization. It was formed as a private entity years before the Emergency Ambulance Service Act was enacted. It is undisputed, however, that the Corporation receives most of its funds from the County. Yet, it is registered with the federal and state governments as a private non-profit corporation.

The Ethics Commission has had many occasions to decide whether a non-profit corporation is subject to the Ethics Act, since the Act does not specifically refer to non-profit corporations.

For example, in AO 90-44, the Commission found that a private Water Association was a private entity; therefore its members were not subject to the Ethics Act. Although subject to state utility regulation and a substantial beneficiary of federal funds, the Association was incorporated as a non-profit private corporation, upon which the IRS conferred tax-exempt status.

Similarly, in AO 90-80, the Commission considered the situation of a private, non-profit hospital where the ownership and operation of the hospital had been transferred from a City to the corporation. Even though City Council appointed all the members of the corporation's board of directors, the Commission wrote:

> Although the members of the Board of Directors may be, in the broadest sense of the word, "public officials" due only to the fact that they are "appointed", the provisions of the Act are not applicable because they do not serve in a state, city, or municipal government nor take official action as required by the provisions of the Act. The Hospital is a private, non-profit corporation, and not a political subdivision.

In AO 2001-13, the Commission ruled that a non-profit Corporation that advocated for the rights of persons with disabilities, was designated by the Governor as the agency responsible for administering a particular federal program for the State, and was primarily funded by federal grants was not a public entity. Therefore, its personnel were not subject to the Ethics Act. See *also* AO 2001-22. (Non-profit Corporation providing services to benefit the poor and disadvantaged, receiving federal funding to operate a Senior Citizens Center, and being reimbursed for certain services provided under the federal Medicaid program not a public entity. Likewise, its personnel were not subject to the Ethics Act.)

And, in AO 2003-11, the Commission ruled that a non-profit Corporation that promotes the beneficial use of forest resources and receives State funding to conduct its activities is not a public entity; similarly, its personnel were not subject to the Ethics Act.

The Ethics Act, unlike the Open Meetings Act (OMA), applies only to individuals, not entities. The OMA defines a "public agency" as "any administrative unit of state, county, or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or

any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power."

The Ethics Commission, through its Committee on Open Governmental Meetings, issues OMA Advisory Opinions. In OMA AO 2008-07, the Committee held that a Convention and Visitors Bureau (CVB) was not subject to the Open Meetings Act. The Committee reviewed whether a CVB was a "public corporation"; if so, it was subject to the Open Meetings Act.

Noting that the term "public corporation" does not appear to be defined anywhere within the West Virginia Code, including the OMA, the Open Meetings Committee looked to its earlier advisory opinions and to the definitions found in Black's Law Dictionary. In OMA AO 99-13, the Committee determined that a public corporation is a corporation created by state or local authority to carry out a governmental function. Notably, the Legislature did not designate CVBs as public corporations. The Committee concluded that a CVB is not a public corporation, and therefore not subject to the OMA.

In OMA AOs 2008-07 and 99-13, and in the previously referenced opinions that analyzed whether the Ethics Act applies to non-profit organizations, the Ethics Commission never tackled the definition of political subdivision. In light of the foregoing analysis and to provide further guidance, the Commission hereby finds that a public corporation is a political subdivision, for purposes of the Ethics Act.

Under the Freedom of Information Act-over which the Ethics Commission has no jurisdiction-governing body includes "any other body which is created by state or local authority or which is primarily funded by the state or local authority." W. Va. Code§ 29B-1-2. The Ethics Act, however, does not look at an organization's receipt of state or local funds as a factor in determining whether the organization is a public corporation.

The Ethics Commission is concerned, however, that as more government functions are privatized that those performing those functions are not covered by the Ethics Act; the Commission recognizes that government oversight and transparency in operations are necessary to maintain public confidence in the integrity of the government process.

The receipt of federal, state, and/or local funding subjects a non-profit corporation to government oversight unrelated to the Ethics Act. "In exchange for the grant of corporate status, the state usually expects certain forms of compliance by the organization, such as adherence to rules of operation, an initial filing fee, annual reports, and annual fees." Hopkins, Bruce R. *The Law of Tax-Exempt Organizations.* John Wiley & Sons, at www.Answers.com (accessed on March 24, 2010).

In West Virginia, non-profit organizations are authorized, *inter alia,* to transact any lawful activity that will aid governmental policy. W. Va. Code§ 31E-3-302(14). Further, W. Va. Code§ 31E-8-860 prohibits certain transactions between a corporation and any entity in which a director or officer has a financial interest. This provision governs the

applicable conflict of interest standard. W. Va. Code§ 31E-7-1 *et seq.* concerns membership, meeting, and voting requirements.

Finally, the IRS maintains a formal process for citizens or others to complain about the activities of non-profit organizations. The IRS investigates complaints alleging, *inter a/ia,* failure to comply with various legal requirements for non-profits. Additionally, the IRS imposes numerous requirements on non-profit organizations with federal tax exempt status. For example, they must file annual reports demonstrating that they continue to operate for the stated exempt purposes. The following list sets forth further obligations for non-profit organizations:

Filing Requirements:

Annual Information Returns
Unrelated Business Income Tax Return
Employment Tax Returns
Political Organization Income Tax Return
Reporting Requirements for a Political Organization
Donee Information Return
Information Provided to Donors
Report of Cash Received
Public Inspection of Exemption Applications, Annual Returns, and Political Organization Reporting Forms

Required Disclosures:

Solicitation of Nondeductible Contributions
Sales of Information or Services Available Free From Government
Dues Used for Lobbying or Political Activities

Thus, the Commission recognizes that even those non-profits which exist primarily to perform governmental functions are still accountable to the government and the public.

Therefore, for the foregoing reasons, the Commission finds that CRS is not a public entity; therefore its personnel and board members are not subject to the provisions of the Ethics Act.

Nothing in the Ethics Act prohibits the County Commission, however, from conditioning its funding upon the CRS' agreement to comply with the provisions of the Ethics Act. Other laws may govern whether the County Commission may impose this requirement. The County Commission is encouraged to consult with its attorney should it elect to pursue this option. In the alternative or in addition to contracting with the CRS[2], the County Commission may elect to create an authority, which, pursuant to W. Va. Code§ 7-15-4 would be a public corporation subject to the Ethics Act.

[2] The Attorney General advised the Monongalia County Commission that it has the right to contract emergency ambulance service to a private non-profit corporation even though it had already created an authority to provide such service. The opinion reasoned: "... providing such service by an authority is but one of the options available to the county commission as a means of providing such service." 59 W. Va. Op. Atty. Gen. 190 (June 3, 1982)

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked or the law is changed.

/s/ R. Kemp Morton, Chairman
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