ADVISORY OPINION NO. 2010-23

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of a County Board of Education** asks whether public resources, including personnel, may be used to promote the passage of an excess levy.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected member of a County Board of Education. As with many school boards throughout West Virginia, his County from time to time hosts special elections for school bonds and excess levies to support the county school system. In the most recent levy, a majority of the funds raised will be used to supplement the salaries of school employees, and to fund fringe benefits for them and their dependents.

According to the Requester, in a recent levy election, the Superintendent directed principals to encourage attendance at a community rally the school board was hosting to promote the passage of the excess levy. Specifically, the Requester states that employees were offered the opportunity to leave work one hour early, with pay, in exchange for attending the rally. It is unclear whether the opportunity was available to all employees, hourly and salaried alike.[1]

Although Ethics Advisory Opinions only apply to prospective conduct, the Requester generally asks whether public resources, including personnel, may be used to promote the passage of an excess levy. He further asks: "Specifically, is it proper for a school board or a county superintendent to offer school employees who attend a rally to publicly support the levy to leave an hour early from work, with pay, in exchange for attending that rally?"

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads:

> 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

[1] One could argue that since salaried employees are not compensated by the hour, an early release does not necessarily result in an expense to the government. The Commission notes, however, that even when salaried public employees are away from their work site during their regular publicly compensated work hours, they must use accrued leave time, e.g. sick, annual or personal days.

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.

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 6B-1-2(d).

At first blush, this situation appears to be unique, since the potential conflict exists between two competing public services; indeed the Act excepts from its prohibitions the advancement of public policy. But here the majority of the funds raised through the excess levy inure to the personal benefit of school employees, whose increased compensation and benefits depend upon the electorate's support of the levy.

Thus, the Commission must determine whether the expenditure of public funds, including personnel, to promote the passage of the levy constitutes the prohibited use of public office for private gain.

Here, the majority of the funds raised through the passage of an excess levy will go to school employees and their dependents. Thus, they have a personal interest in the levy's passage.[2] Further, appearing at a pro-levy rally does not constitute the "performance of usual and customary duties associated with the ... position" permitted by the Ethics Act. Authorizing time off with pay effectively compensates individuals to advocate for the passage of a ballot measure that directly benefits them. This is one of the types of actions the Ethics Act's prohibition against the use of office for private gain seeks to prevent.[3]

As a result, the Commission finds that public resources, including personnel, may not be used to promote the passage of an excess levy wherein school personnel are the primary beneficiaries. Thus, neither the Superintendent nor the county board may grant paid time off to school employees in exchange for attending a rally in support of the levy, or otherwise provide a financial incentive to school employees to support the levy.[4]

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[2] The Ethics Commission takes administrative notice that the passage of the excess levy provides a public benefit by improving public education.

See *also* AO 2009-02 wherein the Ethics Commission stated: "Since the Legislature has not authorized Counties to spend public monies on wellness programs for County elected officials, we find that it would violate W. Va. Code§ 6B-2-5(b)(1) for the County to extend the benefits of its wellness program to its elected officials."

[4] Public servants are permitted to volunteer on their own time, using their own resources, to advocate on behalf of the passage (or defeat) of an excess levy, bond or other ballot measure.

The Commission notes that, given the lack of clear guidance, it imputes no ill motive to the County Superintendent. Further, nothing in this opinion should be construed to prevent the County Superintendent, as the appointed voice of the County BOE, from advocating for passage of any excess levy. Indeed, this activity constitutes the "performance of usual and customary duties associated with the ... position" permitted by the Ethics Act.

Although the facts fall within the parameters of the Ethics Act's prohibition against the use of public office for private gain due to the direct connection between the passage of the levy and financial gain to school employees, that connection in other elections is not so obvious. For example, a levy may have as its sole purpose authorizing the construction of a new school, or there could be a municipal election for a more general ballot measure. One cannot definitively identify private beneficiaries of a favorable outcome on any such election.[5]

Thus, the broader question presented is whether public resources may be used to promote such a levy without violating the Ethics Act. In the absence of a direct financial benefit to school employees, then it is more difficult to establish the existence of private gain. As a result, this issue falls outside the purview of the Ethics Act. Instead, other laws and policy determinations govern this matter. The Ethics Commission has limited jurisdiction: to interpret the Ethics Act. Should the Requester desire a more definitive ruling on his more general question regarding the use of public resources to promote a levy, the Commission recommends that he consult with the West Virginia State Auditor's Office, the State Department of Education, the West Virginia's Secretary of State's Office, the Office of the Attorney General, and/or the Legislature.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak
Jonathan E. Turak, Acting Chairperson

[5] Yet a partisan election for a levy or bond will always have at least two sides: for and against.