Advisory Opinion 2017-09

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **Cabinet Secretary** asks whether his private business interests implicate the West Virginia Governmental Ethics Act.

Facts Relied Upon By the Commission

The Requester states that he retired from a health care consulting firm that he founded. The Requester sold all of his Class A stock in the firm to the firm's remaining partners. The Requester is no longer a voting member of the firm and receives no salary from the firm. The Requester has retained, however, 20 percent of non-voting Class B stock in the firm. The Requester states that he would only derive economic gain from the non-voting Class B stock if the firm were ever sold.[1]

The Requester additionally states that he is the sole member of a limited liability company that owns the building leased by the health care consulting firm.

Provisions Relied Upon By the Commission

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

> (1) 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.

W.Va. Code§ 68-2-5(d) provides, in relevant part:

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in

[1] While the Ethics Commission relies only upon the facts provided by the Requester, the Commission nonetheless notes that the Requester is still listed on the West Virginia Secretary of State's website as President and Director of the health care consulting firm.

the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control ....

158 CSR 8-4 provides, in relevant part:

> Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W.Va. Code § 6B-2-S(f) provides, in relevant part:

> No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation.

W.Va. Code§ 6B-2-S(g) provides, in relevant part:

> (1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of one year after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:
>
> (A) A contested case involving an administrative sanction, action or refusal to act;
> (B) To support or oppose a proposed rule;
> (C) To support or contest the issuance or denial of a license or permit;
> (D) A rate-making proceeding; and
> (E) To influence the expenditure of public funds.

W.Va. Code § 6B-2-SU) provides, in relevant part:

> (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

Advisory Opinion

The Ethics Act contains provIsIons designed to prevent public officials and public employees from exercising the powers of their office or employment "to benefit narrow economic or political interests at the expense of the public at large **"** W.Va. Code§ 6B-1-2(a). These interests include the interests of businesses with which public officials and employees are associated. The Ethics Act not only prohibits public officials from intentionally using their public office to benefit private business interests, it also outright prohibits public officials' involvement in certain public matters when it comes to personal business interests. *See, e.g.,* W.Va. Code§§ 6B-2-5(b); 6B-2-5(d); 6B-2-5(f); 6B-2-5(g); and 6B-2-5U).

For example, the Ethics Act prohibits an appointed public official or business with which the public official is associated from having a financial interest in any public contract, purchase or sale over which the public official has control. W.Va. Code§ 6B-2-5(d)(1). The Requester states he owns 20 percent of non-voting class B stock in a health care consulting firm. This ownership interest is enough to qualify the firm as a business with which the Requester is associated for purposes of W.Va. Code§ 6B-2-5(d). 158 CSR 8-4 ("Public officials or public employees or members of their immediate family are considered to be 'associated' with a business if they or their immediate family member are a director, officer or *holder of stock which constitutes five percent or more of the total outstanding stocks of any class.") (emphasis added).* There are no facts indicating that the health care consulting firm is seeking or has any public contracts with the governmental entity in which Requester serves.

The Ethics Act, at W.Va. Code§ 6B-2-5(g), also prohibits a public official from appearing in a representative capacity before the governmental entity in which he or she serves regarding certain matters, e.g. administrative sanctions or actions, proposed regulations, the issuance of a license or permit, rate-making proceedings, or the expenditure of public funds. In Advisory Opinion 97-17, a public official was the president and majority shareholder of a civil engineering company. The Ethics Commission held that W.Va. Code § 6B-2-5(g) prohibited employees of the company from representing the company at meetings before the public body in which the public official served. Advisory Opinion 97-17. The Commission reasoned that the public official's "substantial stock ownership in the [c]ompany makes it impossible to divorce the influence of his identification with the [c]ompany as a majority stockholder from such meetings." *Id.; see also* Advisory Opinion 2005-22 ("[T]he requester is barred for one year following his retirement from appearing

in a representative capacity before the Cabinet Secretary or the Secretary's staff in regard to those matters controlled by the restrictions in (g)."). Nonetheless, in the instant situation, there are no facts indicating that either the Requester or the health care consulting firm represents or will represent clients before the governmental entity in which Requester serves.

Other limitations apply as well. The Requester may not use his public position for the private gain of either the health care consulting firm or the limited liability company. W.Va. Code § 6B-2-5(b). Further, the Requester may not knowingly and improperly disclose any confidential information acquired in the course of his official duties, or use such information to further his personal interests or the interests of another person, including the interests of the health care consulting firm and the limited liability company. W.Va. Code § 68-2-5(e).

The Ethics Commission has analyzed the facts presented in light of the provisions of the Ethics Act. The Commission has determined that there is no provision which *per se* prohibits the Requester from owning 20 percent of non-voting Class B stock in a health care consulting firm or from being the sole member of a limited liability company that owns the building leased by the health care consulting firm. While the Requester remains subject to the Ethics Act, the Ethics Commission cannot speculate as to what future acts the Requester could take in his official capacity which might violate the Ethics Act. While not exhaustive, the Commission took this opportunity to offer some guidance regarding the intersection of private business interests and the Ethics Act.

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, at ***W*** *Va. Code §§ 68-1-1 through 68-3-11, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe, Chairperson
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