Advisory Opinion 2017-14

Issued on May 4, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commissioner** asks whether he may vote on matters concerning county contractors who are also his private customers.

Facts Relied Upon by the Commission

The Requester is the same Requester as in Advisory Opinions 2017-02, 2017-10 and 2017-11. The Requester's company manufactures and purchases for resale construction materials. In Advisory Opinion 2017-02, the Requester asked whether he may submit bids to contractors to provide construction materials and supplies that would be used for county projects. In that Opinion, the Ethics Commission held that W. Va. Code§ 61-10-15 prohibits the Requester's company from submitting bids for contract materials to county contractors because this would cause the Requester to have a prohibited indirect financial interest as a subcontractor of the county.

In Advisory Opinion 2017-10, however, the Commission held that the Requester may sell materials and supplies to those same contractors to be used on non-county projects. In such situations, the Commission explained, the Requester would not be a subcontractor of the county. The Commission held, therefore, the Requester's financial interest in the sale of materials to contractors for non-county projects would not be dependent on whether the contractor was awarded county projects; therefore, the Requester would not have even an indirect prohibited financial interest.[1]

The Requester in the instant situation asks whether he may vote on matters that may pertain to any contract, change order or schedule of work related to his customers.

Provisions Relied Upon by the Commission

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

> (1) Public officials ... 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

[1] In Advisory Opinion 2017-11, as a corollary to Advisory Opinion 2017-10, the Commission held that the Requester must take reasonable precautions to ensure that his business's products are not sold to county contractors or subcontractors to use for county construction projects.

> 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. (emphasis added).

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The Ethics Act prohibits a public official, such as a county commissioner, from voting on a matter in which he or she or their businesses have a financial interest. In 2017-10, the Commission determined that the Requester did not have a financial interest in county contracts with his private customers for supplies used on non-county projects.

Therefore, because the Requester does not have a prohibited financial interest in such county contracts, the Ethics Act does not prohibit the Requester from voting on county matters concerning his private customers, including any county contract, change order or scheduling of a contractor's work.

This conclusion is consistent with the Commission's prior Advisory Opinions 2005-12 and 2012-07 concerning when public servants may vote on public matters concerning their private customers.

In Advisory Opinion 2012-07, a mayor who was also a salesperson made direct sales[2] of a specific line of products to members of the public, some of whom, he anticipated, would appear before him and the city council on city matters, such as zoning requests and appeals from municipal rulings. The Mayor asked whether he must recuse himself from such matters if they would arise. The Commission held that although the Mayor must recuse himself from voting on matters concerning his current customers, "[t]he guidance provided herein should not be construed to apply to transactions for goods or services purchased through a commercial establishment which offers the same goods for sale to the general public." Here, the Requester's business is a commercial establishment at a fixed retail location that sells its products to the general public. Therefore, under the guidance in Advisory Opinion 2012-07, the Requester here is not prohibited from voting on matters concerning county contractors who are also the Requester's private customers for non-county projects.

In Advisory Opinion 2005-12, a county planning commIssIoner who also owned a business which sold products to individuals, contractors and developers asked whether he may vote on approving subdivision requests made by these developers when, following such approval, the developers and contractors may seek bids from or purchase products from the Requester's business to be used for the subdivision development. The

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[2]According to the Direct Selling Association, direct selling differs from broader retail by providing "an avenue where entrepreneurial-minded Americans can work independently to build a business with low start-up and overhead costs." *About Us, Direct Selling Retail Channel,* http://www.dsa.org/about/channel (last visited May 3, 2017).

Commission held that although the Requester may not vote on matters where he is currently supplying the developer or contractor for a particular subdivision, "the Requester is not prohibited from voting on matters when approval may or may not lead to business with the developer or contractor working for the developer, an individual home builder, or contractor working for a home builder." The same reasoning applies here because the Requester would not be a subcontractor of the county. Therefore, the Requester may vote on these matters.

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 §§ 68-1-1 through 68-3-11 and W. Va. Code§ 61-10-15 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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