Advisory Opinion 2017-18

Issued on September 7, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **Cabinet Secretary** asks whether his former ownership interest in or current lease agreement with a private business with regulatory matters before his department implicates the West Virginia Governmental Ethics Act.

Facts Relied Upon by the Commission

Thirty years ago, the Requester founded a health care consulting firm. In 2016 he began to divest himself from the business and sold his Class A voting stock in the business. Further, he ceased drawing a salary from or having a role in the operation of the business. His remaining ownership interest was that he retained 20 percent of non-voting Class B stock in the business.

The Requester is also the sole member of a limited liability company ("LLC") which owns a building leased by the business. The LLC has owned the building for approximately 20 years and the healthcare business has been headquartered in it since that time.

The Requester formed the LLC to purchase the building and was initially the sole member of it. Over time, he gave an ownership interest in the LLC/building to two other partners in the healthcare business. The LLC rented the building to the healthcare business. As part of the Requester's retirement buyout in 2016, his business partners relinquished their ownership interest in the LLC.

In Advisory Opinion 2017-09, the Requester sought guidance on whether his ownership of non-voting Class B stock shares in or lease agreement with the healthcare business implicated the West Virginia Governmental Ethics Act ("Ethics Act"). After the issuance of Advisory Opinion 2017-09, he sold his non-voting Class B stock shares in the business to the remaining partners to avoid the appearance of any conflict.

The Requester's remaining financial relationship with the business is the lease agreement. Once the Requester resumed his role as sole member of the LLC, the LLC entered a new lease agreement with the healthcare business. The lease agreement between the business and the LLC became effective on July 1, 2016. The initial term of the lease was for one year. Pursuant to the lease, after the expiration of the initial term, the lease will "automatically be extended for successive additional periods of one year each [at the same rent] ... unless the Lessee provides written notice to the Lessor of its intent not to renew ...." The initial one-year term has expired and the parties to the lease have continued the lease under the terms of the agreement. There has been no rent increase.

The Requester, as a Cabinet Secretary, is statutorily charged with overseeing the day-to-day administration of a department and divisions within the department. The health care consulting firm, on behalf of its clients, lobbies the Department, the Department's divisions and the Legislature. The health care consulting firm also appears on behalf of clients before divisions in the Department on licensing, permit and other matters affecting their clients.

Provisions Relied Upon by the Commission

W. Va. Code§ 68-2-5(b)(1) provides 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.

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

> Employment by regulated persons and vendors. -- (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who: (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor....
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> (3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.(A) The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption, but shall decide each application on a case-by-case basis;(B) A person adversely affected by the restriction on the purchase of personal property may make such purchase after seeking and obtaining approval

from the commission or in good faith reliance upon an official guideline promulgated by the commission, written advisory opinions issued by the commission, or a legislative rule.(C) The commission may establish exceptions to the personal property purchase restrictions through the adoption of guidelines, advisory opinions or legislative rule.

W. Va. Code R. § 158-3-2, Purchase, Sale or Lease of Personal Property, reads, in relevant part:

> 3.2. The Executive Director or the Ethics Commission shall grant an exemption to purchase personal property upon a finding that:
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> 3.2.a. The negotiations for the proposed transaction were conducted at arm's length and there is no favoritism or appearance of favoritism;
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> 3.2.b. If the potential seller or purchaser currently has a regulatory matter pending before the public official or employee, or a public contract over which the public official or employee exercises control, the official or employee's supervisor will review any decisions made by the official or employee for a six month period following the transaction to ensure there is no favoritism or the appearance of favoritism in regard to the seller or purchaser and that the supervisor's agency is willing and able, based upon existing staffing, to implement this safeguard; and,
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> 3.2.c. There are no public policy reasons to deny the request.

Advisory Opinion

Prior Stock Ownership

The Ethics Act prohibits public officials from intentionally using their public office to benefit private business interests. W. Va. Code§§ 6B-2-5(b). Further, the Ethics Act bans the involvement of public officials in certain matters which affect their private business interests. *See* W. Va. Code §§ 6B-2-5(d), 6B-2-5(f), 6B-2-5(g), 6B-2-5(h) and 6B-2-SU). However, absent an ongoing financial relationship, the limitations in the Act do not ban a public official's involvement in matters affecting a business in which he or she had a *prior* ownership interest.

The Commission finds that the Requester's former ownership interest in the healthcare consulting firm does not require him to remove himself from matters involving the health care consulting firm or its clients.

Lease of the Building

Additional analysis of the Ethics Act is necessary as the Requester is the sole owner of a limited liability company which leases a building to the healthcare business. Hence, the lease constitutes an ongoing business relationship between the Requester and a private business with regulatory matters before the agency he oversees.

The Ethics Act restricts certain financial relationships between full-time public servants and private persons, including businesses. One restriction prohibits a full-time public servant from seeking to lease real property "to or from any person who: (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working." W. Va. Code§ 6B-2-5(h).

In Advisory Opinion 2013-51, the Ethics Commission addressed the restrictions in the Ethics Act on county assessor employees leasing or purchasing property to citizens in the county in which they worked. The Commission held that W. Va. Code§ 6B-2-5(h) "prohibits full-time public servants from seeking to purchase, sell or lease real or personal property to or from any person who is, or has been within the preceding twelve months, subject to their regulatory authority or the regulatory authority of a subordinate."

In Advisory Opinion 2015-10, the Commission held that a municipal code enforcement officer may not acquire a vacant building in the city where he served when he had an ongoing duty to conduct inspections and enforce the building code unless he sought and received an exemption. The Commission stated the reasons for the restrictions in this provision in the Ethics Act are as follows:

> [T]o protect the reputation of public bodies and public servants from the appearance of impropriety and to protect the public from being coerced into buying or selling property to avoid a public official from taking adverse action against him or her, *i.e.,* threating fines against a property owner if the property is not sold to the public official.

The instant situation differs from the circumstances in the cited Advisory Opinions as the lease predates the Requester's appointment to his public position. The restrictions in W. Va. Code § 6B-2-5(h) apply only to circumstances where a full-time public servant *seeks* [emphasis added] to lease property to a regulated person.[1] The Ethics Commission finds the restrictions in this Code section do not apply to this lease agreement as the Requester is not seeking to enter a lease with a regulated person; instead, it is a pre-existing lease which is being continued under its original terms.

[1] In Advisory Opinion 2012-48, the Ethics Commission held that a person could not serve as the executive director of an agency consisting of fewer than five employees while renting a home from a board member who was also subject to the agency's regulatory authority. In its Opinion, the Commission did not analyze the application of W. Va. Code § 6B-2-5(h) to a pre-existing lease.

Accordingly, the Ethics Commission finds that the Ethics Act does not prohibit the Requester from continuing to lease the building to the healthcare consulting firm. The Requester may not use his public office to unlawfully benefit the healthcare consulting firm. If he wants to make a material change to the terms of the lease, *e.g.,* rent increase, the Requester must seek a Property Exemption from the Ethics Commission before the parties modify the lease agreement.

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§§ 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 Jaw is changed.*

/s/ Robert J. Wolfe, Chairperson
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