Advisory Opinion 2017-22

Issued on September 7, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **State Agency** asks **(1)** whether a part-time appointed board member may serve and vote as a member of a board or subcommittee if his spouse receives a finder's fee from her clients whose applications for conservation easements are reviewed and approved by the board and subcommittee; (2) whether the board member must disclose his spouse's business relationship with applicants; and (3) whether the board member may vote on an application submitted by his son and daughter-in-law.

Facts Relied Upon by the Commission

The Requester's agency, in cooperation with the federal government, administers a conservation program. One focus of the program is the protection of land through the acquisition of conservation easements from property owners. Both federal and nonfederal funds are used.

The application process is governed by federal law and the rules of the Requester's agency. The state agency, in consultation with its federal counterpart, must have a board comprised of representatives from various industries, conservation groups and governmental entities. The board has various responsibilities, including voting on whether to approve or reject an application for a conservation easement.

The agency's board members are appointed by the head of the agency. There are currently 13 board members.

The board has a subcommittee which initially reviews, evaluates and prioritizes applications for the program. At times, it also makes recommendations on procedural rules and other matters. The subcommittee consists of five members, although at present there are two vacancies.

The subcommittee initially screens and prioritizes the conservation easement applications in order that state agency personnel may conduct a preliminary due diligence review. The purpose of the preliminary review process is to determine if the property meets the criteria for a conservation easement, *e.g.,* if the owner has a clear title and if any environmental problems exist.

After completing the due diligence review, applicants who meet the qualifications or have cured any defects have their applications referred back to the subcommittee. The subcommittee again prioritizes the applications, organizes them into proposed projects,

and then makes a recommendation to the board which votes to approve or reject the proposed projects. On average, the agency receives approximately 10 applications per year and approves up to three projects. One project may consist of a single application or multiple applications that the agency bundles together. If the board approves a project, the agency applies to the federal government for grant funding to purchase conservation easements from the property owner(s). If it receives the federal funding, the agency purchases the easements directly from the property owners. The agency may also apply for nonfederal funding to purchase conservation easements from property owners.

The spouse of a board and subcommittee member may have an oral or written agreement with some property owners to complete an application on their behalf. The Requester describes her compensation as a finder's fee whereby she will receive five percent of the purchase price if the agency approves the property owner's application as part of a project, and if the property owner accepts the agency's offer to participate in the program.

The Requester further states that the board member has a son and a daughter-in-law who have applied for a conservation easement. The son and daughter-in-law may have a finder's fee agreement with the board member's spouse. Hence, if the conservation easement request is granted to the board member's son and daughter-in-law, his spouse would profit from the transaction. The Requester does not state if the board member has any financial relationship with his adult son or his son's wife.

Provisions Relied Upon by the Commission

W. Va. Code§ 6B-1-3(f) provides, in relevant part:

> "Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

W. Va. Code§ 6B-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§ 68-2-S(d) reads, 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 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: ... Provided, however, That nothing herein shall be construed to ... prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.
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> (3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.
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> (4) Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code§ 68-2-SU) reads, 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:
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> (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.
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> (2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

W. Va. Code R. § 158-6-2 (2017) reads, in relevant part:

2.1. The performance of certain acts does not constitute a public official's or public employee's improper use of office for private gain if he or she performs:

2.1.a. usual and customary duties associated with the office or position,
2.1.b. services relating to the advancement of public policy goals, or
2.1.c. constituent services without compensation.

W. Va. Code R. § 158-8-5 (2009) reads, in relevant part:

5.1. For the purposes of W. Va. Code§ 6B-2-5(d), the Ethics Commission will consider a person "recused" if he or she (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.

5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract.

Advisory Opinion

Financial Interests of Spouse in Public Contract

The Ethics Act, at W. Va. Code§ 6B-2-5(d), generally prohibits public servants and their immediate family members, including spouses, from being a party to, or having a financial interest in, a public contract over which they have direct authority or control. *Id.* The Ethics Act, however, contains an exception which authorizes *part-time* [emphasis added]

appointed public officials to have a financial interest in a public contract if they do not participate in decisions affecting their interests. *Id.*

If the spouse of a board member receives finder's fees from property owners whose applications for conservation easements are approved by the board, then the board member has a financial interest in a public contract. Based upon the "part-time appointed" exception, however, the financial interest is permissible if the affected board member complies with the requirements in the Ethics Act designed to remove him from any involvement in matters uniquely affecting the financial interests of his spouse.

Rules Governing Service on the Board or Subcommittee; Disclosure of Interest

The Ethics Act does not generally prescribe who is eligible to serve on a public body or subcommittee. The Ethics Act does, however, impose limitations on the board member's participation in matters in which he has a financial interest. Specifically, the board member "may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his ... financial interest," including the financial interest of his spouse. W. Va. Code § 6B-2-5(d)(3). Further, he must comply with the voting restrictions in the Act which require his recusal. Due to these requirements in the Act, the Ethics Commission must determine to what extent, if any, the board member may be involved in board or subcommittee decisions affecting the award of conservation easements.

In Advisory Opinions 2009-08 and 2011-18, the Ethics Commission held that members of state boards, with unique financial interests in grants awarded by the boards on which they served, may not serve on subcommittees which initially reviewed grant applications. The grants administered by the state agency in Advisory Opinion 2009-08 were for housing for low-income individuals. In Advisory Opinion 2011-18, the state agency provided "funding for technological infrastructure projects for unserved and underserved areas of the State." There were no facts in those Opinions indicating that any of the board members or their spouses would receive a finder's fee or commission if a grant was awarded by the board on which they served.

In the present case, the board member serves on a subcommittee which reviews, evaluates and prioritizes applications from property owners. The Commission finds that any decisions made by the subcommittee relating to the prioritization of applications affects the financial interests of the board member and his spouse because, on average, the agency only receives 10 applications per year and approves only 3. Therefore, the Ethics Commission finds that based upon these facts, if the board member participates in subcommittee decisions involving ranking and reviewing grant applications, he is taking action on matters which affect his financial interests.

Accordingly, the Commission finds that although the Ethics Act does not prohibit his service on the subcommittee, the board member must recuse himself from all subcommittee matters involving the review or consideration of conservation easement applications. The Commission recognizes that in Advisory Opinions 2009-08 and 2011-18, it held that board members with certain financial interests

may not serve on committees which initially reviewed and ranked grant applications. Nevertheless, the Commission finds the better rule of law is that public officials with financial interests in the grants may serve on these committees or subcommittees but must recuse themselves from reviewing or ranking grant applications. If this requirement undermines the ability of the board member to effectively carry out his subcommittee duties, then the chairperson or committee may in its discretion determine whether he should remain on the subcommittee.

The Requester also asks if the board member is eligible to serve on the board. As addressed above, the Commission has no authority to make this determination. It is authorized to determine what action he must take to comply with the Ethics Act.

The board has many responsibilities, one of which is to consider the list of applicants compiled by the subcommittee. While it is possible that the recommendations of the subcommittee to the full committee/board regarding which conservation easements to purchase will not include properties for which the board member's spouse will receive a finder's fee; still, the application pool is so small that the rejection of one application may ultimately benefit one of his spouse's clients with whom she has a finder's fee agreement.

Based upon the foregoing, the Commission finds that although the Ethics Act does not prohibit his service on the board, the board member must recuse himself from voting on the approval or denial of any application for a conservation easement. Additionally, the Act and related Legislative Rule require him to disclose the financial interest of his spouse in the conservation easements. Full disclosure is required which "means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract."[1]

Financial Interests of Son and Daughter-In-Law

In Advisory Opinion 2013-52, the Commission held that the president of a county ambulance authority may vote on the purchase of property by the authority from his brother because the board member did not have a financial interest in the transaction and had no financial relationship with his brother. The Commission analyzed the plain language in the Ethics Act and held the board president "does not have 'an interest in the profits or benefits of the contract' and "may deliberate and vote" on the property purchase. The Commission noted in its holding that "the Ethics Act prohibits favoritism in the selection process by virtue of the familial relationship."

The Ethics Act does not *per* se require the board member to recuse himself from voting on an application for a conservation easement purchase from his adult son or daughter-in-law. However, recusal may be required if there is a financial relationship between the board member and his son or daughter-in-law. Further, the board member must recuse himself if his spouse receives a finder's fee.

[1] **W.** Va. Code R. § 158-8-5.2 (2009)

The Commission finds that if the board member's spouse has a finder's fee agreement with his or her son or daughter-in-law, he must recuse himself from consideration of that application. If his spouse does not have a finder's fee agreement, then the board member may seek additional advice from the Ethics Commission regarding whether he may vote on his son's or daughter-in-law's-application. In his request for advice, he must state if he has a financial relationship with either the son or daughter-in-law, including if he has an ownership interest in the property which is being considered for a conservation easement.

Last, the Commission notes: 'The Ethics Act sets a minimum standard of conduct. When the Legislature or a public agency impose stricter standards, then public officials and public employees must comply with the stricter standards." W. Va. Code R. § 158-6-10. The state agency should consult with the federal agency which oversees the program to determine if there are federal conflict of interest provisions governing board members or program participants.

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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