ADVISORY OPINION 2015-05

Issued on April 9, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A city council member asks whether she may privately lease space in a city-owned building which is managed by the city's building commission. She also asks whether the Ethics Act places any limitations on her future conduct as the chair of the city's finance committee.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that she and her business partner jointly signed a lease to rent space for a retail business in a city-owned building. The city building is managed by a city building commission. The three member commission's appointments were voted upon by a prior city council of which the Requester was not a member. The city building commission functions independently of city council as manager of the building. The city council is not involved in the city building commission's operations, including lease agreements.

The Requester sold her portion of the retail business to her business partner in November 2014. However, the Requester remains a party to the lease as its two-year term does not expire until May 2016.

The Requester further states that she has now been appointed as chair of the city's finance committee. As part of her new responsibilities in this role, she asked for and received a line item report of revenue and expenditures for the current fiscal year. During a meeting with the State Auditor, it was recommended that the city conduct an audit of some specific accounts. The city building commission was identified by the State Auditor as one of the accounts which should be included in the audit. The Requester requested and received a proposal from the State Auditor to conduct the audit. The Requester presented the proposal to the finance committee, and it was approved for submission to the council for vote.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b) provides:

> 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.

> 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.

Further, W.Va. Code§ 6B-2-5(d) states in relevant part:

> (1)... [N]o elected official may be a party to or have an interest in a contract which such official may have direct authority to enter into, or over which he or she may have control. ..
>
> (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 or her office or employment to influence a government decision affecting his or her financial or limited financial interest.

W.Va. Code§ 6B-2-5U)(1) states in relevant part:

> 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 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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> (II) 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.
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> (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.

ADVISORY OPINION

Requester's Private Lease with Building Commission

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public service. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 68-1-2(d). The Requester's private lease of property owned by the city and managed by its city building commission presents one such potential conflict.

The Ethics Act prohibits public servants from being a party to, or having a financial interest in, a public contract which their public position gives them authority to award or control. W.Va. Code§ 6B-2-5(d).

Respondent is an elected official as a member of a city council. Respondent is a party to, and therefore has a financial interest in, the private lease which she and her business partner entered into with the city building commission. However, in her public position as a member of city council, Requester did not have direct authority to enter into this contract (the lease) on behalf of the building commission. She did not have control over the contract. No member of city council had such authority or control, as such authority and control was vested in a separate entity, the city building commission. The city building commission had oversight of Respondent's lease in its entirety.

The Requester was not a member of city council when the city building commission was appointed, and no new members have been appointed since the current members were appointed.

The Commission finds that the Requester, as a city council member, does not have authority or control over the building commission's lease of the city building to the Respondent and her business partner.

Therefore the Requester's lease is permissible under the Ethics Act because she exercised no control over the lease when it was executed. The Requester may continue her lease agreement with the city building commission as long as she does not serve on the city building commission or participate in the appointment of members to serve on the city building commission. Further, the Requester should be cognizant of Ethics Act voting provisions in regard to voting on matters related to her lease.[1]

[1] The voting rules still apply and require the Requester's recusal from all city council and finance committee votes related to her lease with the building commission. See W.Va. Code § 6B-2-5U).

The Requester is further cautioned that if oversight and management of this lease ever reverts to city council, then as a member of city council, she would have authority and control over the lease. This change would give the Requester a prohibited interest in a public contract under W.Va. Code§ 6B-2-5(d), absent a contract exemption to allow it to renew the lease with the Requester under W.Va. Code§ 6B-2-5(d)(4). [2]

Requester's Role as Chair of Finance Committee

Under W.Va. Code§ 6B-2-5(b), 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.

The role of a municipal finance committee is primarily to provide financial oversight for the city. Typical tasks might include budgeting, financial planning, financial reporting, creation of internal controls and accountability policies. The finance committee reviews and reports on the financial condition of the city as a whole, including all of its operations. The finance committee's review tasks are conducted and reported to the city's governing body. When action is required, the finance committee must seek approval from the city's full governing body. The city's building commission, which controls Requester's lease, is subject to the finance committee's reporting functions as are all other city expenditures.

The Ethics Act does not require the Requester's recusal from voting as a member of the finance committee or city council, except in matters particularly affecting her lease with the building commission.

W.Va. Code§ 68-2-50)(1) states in relevant part:

> 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 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.

W.Va. Code§ 68-2-50)(11) provides:

> A public official may vote:

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[2] W.Va. Code§ 6B-2-5(d)(4)provides that where the provisions of subdivision (1) and (2) of (d) would result in the loss of 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 government body or agency may make written application to the Ethics Commission for an exemption from subdivision (1) and (2).

> (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.

In Advisory Opinion 2014-14, the Commission was asked about the application of the voting rules where a member of city council was also employed part-time by the city's police department. The Commission relied on the class voting exception in (A) above to find that the city council member may vote where he or she is affected as a member of, and to no greater extent than, five or more similarly situated persons or businesses. For example, it was permissible to deliberate and vote on matters affecting the overall municipal budget and to advocate for better working conditions for all municipal employees. Regardless of the number of employees, a city council member must recuse him or herself if a matter affects him or her uniquely.

Therefore, the Requester must only recuse herself from votes which relate to her private lease with the city building commission for the duration of its term. Requester may vote upon matters of general concern which do not affect her uniquely or when she is affected to no greater extent than a group of five or more similarly situated people or businesses.

This Advisory Opinion is based upon the facts proyided. If all material facts have not been provided, or if new facts arise, the Requester must contact the 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 § 6B-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.* Va. *Code § 6B-2-2, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.*

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman