ADVISORY OPINION 2015-08

Issued on May 7, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The Chairman of the Board of a Public Service District asks whether he has a duty or the authority to prevent the Board from retaining an attorney with a conflict of interest and what obligations he has under the Ethics Act when he believes other Board members have conflicts of interest.

FACTS RELIED UPON BY THE COMMISSION

The Chairman of the three-member Board of a Public Service District seeks guidance from the Ethics Commission on his obligation to prevent the Board from retaining an attorney who he believes has a conflict of interest under the West Virginia Rules of Professional Conduct. He further seeks guidance on his obligations under the Ethics Act when he believes other board members have conflicts of interest.

The Requester asks whether he has an affirmative duty to act so as to prevent or correct a violation of the Act by (1) revealing circumstances that may disqualify a member from participating in a matter before the body; (2) preventing or delaying the matter until the disqualification issue is resolved, or (3) taking action to revoke or invalidate a decision in which the disqualified member participated, particularly where the disqualified member was the deciding vote.

The Requester explains that the Board retained an attorney to represent it in negotiating an agreement to use a city's sewer lines and pumps. The Requester believes that the attorney has a conflict of interest which may not be waived under the West Virginia Rules of Professional Conduct. The Requester anticipates that the Board will consider retaining the same attorney for negotiations regarding another agreement.

The Requester further believes that the other two board members have conflicts of interest under the Ethics Act which prohibit them from participating in matters that the Requester anticipates will come before the Board. One board member formerly had a professional relationship with the Board's attorney. The Requester believes that the other board member has a prohibited financial interest in a matter which could benefit his land development company.

CODE PROVISION 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. 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.

ADVISORY OPINION

The Commission has previously addressed some of the questions raised by the Requester. In Advisory Opinion 1997-30, a city recorder asked whether she would violate the Ethics Act if she followed the direction of the town council and wrote checks paying for services from a council member's business when she knew this was a violation of the Ethics Act. The Commission stated:

> The requester is aware of the Ethics Act's prohibition against having a private interest in a public contract ... If the requester pays the bills as approved, this would result in the Council member receiving public funds he or she would not have a legal right to receive. The Commission finds that under these facts, if the requester pays the bills from a Council member as approved by Council, ... she would be guilty of using her office for the private gain of another in violation of WV Code 6B-2-5(b)(1).
>
> The Commission notes that the other Council members who vote to approve purchasing the goods and services from another Council member ... may also be in violation of the ban against use of public office for the private gain of another.

More recently, in Advisory Opinion 2013-43, a Solid Waste Authority asked if it had any obligation when a member of the Authority has a purported conflict of interest but refuses to recuse himself. The other members of the Authority in that situation were advised by the Authority's attorney that the member should recuse himself from participating in a particular matter due to his conflict of interest. The other Authority Board members were aware of the attorney's opinion that there was a conflict of interest.

The Commission, in Advisory Opinion 2013-43, held that since the other members of the Authority did nothing to assist with the conflicted member's violations, they did not violate the Act by continuing the meeting. The Commission stated, "The rationale behind this decision is similar to a classic tort law concept - namely, that while a person may be held liable for committing a negligent act, the same person may not be held liable for failing to take any action while another commits one."

Having reviewed the previous Advisory Opinions, the Commission clarifies that the Ethics Act does not require an official to determine whether another member's actions would violate the Ethics Act. The Ethics Act does not place such a burden upon a public official. Rather, the Act prohibits him from knowingly and intentionally using his office for the private gain of another

Therefore, the Commission holds that the Ethics Act does not, *per se,* require the Requester to disclose information to the Board which causes him to believe that a conflict exists which would prohibit another member from legally voting under the Ethics Act.

Likewise, the Ethics Act does not, *per se,* require the Requester to delay a proceeding until the disqualification issue is resolved or take other action to remedy a Board action wherein a conflicted member was the deciding vote. The Requester may not, however, take or withhold any action with the intent to improperly benefit the conflicted member or another person as opposed to benefitting the PSD.

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 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