ADVISORY OPINION NO. 2014-08

Issued on March 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Appointed Member of a County Solid Waste Authority** asks whether it is permissible under the Ethics Act for him to sue the County Solid Waste Authority and whether a conflict of interest would exist as a result thereof.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an appointed Member of a County Solid Waste Authority (Authority). He owns a waste hauling business that has an exclusive tariff from the Public Service Commission to haul waste in certain parts of the county. He states that the Authority owns And operates the county landfill.

According to the Requester, in 2010, the Authority adopted a curbside pick-up service for recyclable and non-recyclable waste. He states that the Authority's decision to do so violates state law which prohibits the Authority from picking up waste in those areas encompassed by certificates of convenience and necessity issued by the Public Service Commission. The Requester further states that the implementation of that decision has resulted in the loss of customers and revenues for his private business.

The Requester's proposed lawsuit seeks temporary and permanent injunctive relief, as well as fees and costs. The Requester inquires whether he, in his private capacity, may bring a civil action against the Authority on whose board he serves. He further asks whether a conflict of interest exists therein.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads 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.

W. Va. Code§ 6B-2-5(e) reads:

> No present of former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-2-5U) reads 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 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.
>
> (II) A public official may vote:
>
> > (A) If the public official, his or her spouse, immediate family members or relative 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.

ADVISORY OPINION

In two recent companion opinions, the Ethics Commission addressed a situation wherein newly appointed members of a local board of health were also members of an organization that had filed suit against that board before their respective appointments thereto. The litigation was ongoing at the time of their appointments and during their service on the board. See Advisory Opinion 2011-15 and Advisory Opinion 2011-16. The Commission did not address whether the board members were permitted to file suit, evidently due to the fact that the action was filed before their appointment to the board. Instead, the Commission gave guidance to the members on use of office for private gain, confidentiality, and voting. For example, in Advisory Opinion 2011-15, the Commission wrote:

> The Commission finds that, in his capacity as a Board of Health Member, the Requester may not be involved in matters relating to a lawsuit which was filed by a fraternal organization while the Requester was president. The Board of Health has the right to defend the lawsuit as it sees fit. For purposes of determining litigation strategy, it is entitled to engage in full and frank discussions with its attorney.

> It is essential that these attorney-client communications remain confidential. While there is no allegation that the Requester would reveal this confidential information to the organization, the limitations in the Ethics Act are intended to safeguard against the potential for abuse. Moreover, as the president of the organization at the time the lawsuit was filed, he has a vested interest in the outcome of the litigation. While he may no longer serve as president of the organization, it would be inconsistent with the spirit and intent of the Ethics Act, and relevant provisions therein, for the Requester to be involved in decisions or privy to information thereto relating to the Board's defense of the lawsuit.
>
> Hence, the Commission finds that the voting provisions in the Ethics Act, when read in conjunction with the private gain provisions, require the Requester to recuse himself from being involved in deliberations or votes relating to the lawsuit. Pursuant to W. Va. Code§ 6B-2-5U)(3), in order for recusal to be proper, it is necessary for the Board Member to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his interests, and recusing Himself from discussing or voting on the issues. Additionally the minutes of the meeting must reflect the basis for the recusal and that the board member left the room during all consideration, discussion and vote on the item under consideration.

In Advisory Opinion 2011-16, the Commission noted that the situation was unique because there the board member had no direct interest in the lawsuit. Nevertheless, the Commission found that the lawsuit was an adversarial proceeding "and that the Board Members have a fiduciary responsibility to defend the lawsuit in a manner determined to be in the best interest of the Board."

Here, however, the Requester has a direct financial interest in the proposed litigation. Not only is it an adversarial proceeding, he is an adversarial party to the Authority. Notwithstanding this unique situation, nothing in the Ethics Act prohibits the Requester from bringing a civil action against the Authority to vindicate his purported rights.

Limitations apply. The Requester may not use his public position to benefit his company's interest in any way. Further, he is proscribed from using confidential information obtained as a consequence of his public position to further his personal interests.

Based on the voting provision of the Ethics Act, as earlier quoted from Advisory Opinion 2011-15, the Requester must recuse himself completely regarding the lawsuit. Specifically, the Commission finds that the voting provisions in the Ethics Act, when read in conjunction with the private gain provisions, require the Requester to recuse himself from being involved in deliberations or votes relating to the lawsuit, including, but not limited to, litigation strategy and matters relating to settlement negotiations, if any. Pursuant to W. Va. Code § 6B-2-5U)(3), in order for recusal to be proper, it is necessary for the Requester to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his interests, and recusing himself

from discussing or voting on the issue. Additionally, the meeting minutes must reflect the basis for the recusal and that the board member left the room during all consideration, discussion and vote on the item under consideration.

This recusal requirement also prohibits the Requester from informally communicating with his fellow Authority members to influence their votes on matters related to the lawsuit. Further, the Requester is proscribed from any discussion, deliberation, or decision-making regarding waste hauling or picking up waste in the area encompassed by certificates of convenience and necessity issued to him by the Public Service Commission. He may not participate in any discussion, deliberation, or decision-making regarding whether the Authority has complied with state law concerning waste hauling cited in his lawsuit.

Finally, since he has a direct financial interest therein, the Requester is prohibited from participating in the Authority's development of a comprehensive litter and solid waste control plan therein, unless at least four other similarly situated businesses are also affected thereby. The Ethics Act permits public servants to vote on matters in which they have a financial interest so long as the public official, his or her spouse, immediate family members or Relatives or similarly situated business with which they are associated and 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 consists of five or more persons or businesses. W. Va. Code§ 6B-2-5U)(ll)(A).

The Commission recognizes that the limitations imposed herein may substantially interfere with the Requester's ability to perform his public duties. In Advisory Opinion 2013-60, the Commission considered the dual service of an appointed member of a state licensing board of professionals and her private employment in that same industry. The Commission stated: "A Board Member who-fairly or not-is perceived to have a conflict of interest between her public and private roles does not engender the 'trust and confidence' that the public position requires." Here, however, the Authority's primary focus is not to license or regulate. The Authority does not investigate members of a particular industry for compliance with regulations and standards. Therefore, although a conflict of interest clearly exists when a Member of a governing body sues that body, under the Ethics Act, there is not a critical need for the public to have a special trust and confidence in appointed members of the Authority. Therefore, the Ethics Act does not require that the Requester choose between maintaining his position on the Authority and his litigation against it.

Nevertheless, as the Commission noted in Advisory Opinion 2013-03, various public agencies exercise appointment power over county solid waste authorities. The advice provided in that opinion is equally applicable to the situation herein:

> If the appointing authorities believe it constitutes an inherent conflict for one or more of the SWA members to serve due to their personal financial interests or relationships, then they may exercise their appointment power and choose not to re-appoint that person. W. Va. Code§ 22C-4-3. The Commission makes no finding as to whether the members in question should or should not serve; however, if the appointing authorities believe the SWA is not serving the interest

of the public due to one or more conflicts which have arisen, then they may address this problem through their control over the make-up of the Board.

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-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson