ADVISORY OPINION NO. 2014-10

Issued on March 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Clerk** asks if the Ethics Act permits a Member of City Council to vote on a ward boundary adjustment that would place her residence in a neighboring ward, and if the Member of City Council who currently represents that ward may vote on that same adjustment.

FACTS RELIED UPON BY THE COMMISSION

The Requester explains that the City's Ward and Boundary Commission is tasked by the City Charter to review ward boundaries in even numbered years. By charter, the Ward and Boundary Commission must adjust those boundaries in order to have each ward contain "as nearly as practicable the same number of qualified voters." The City Council then votes to approve or disapprove those changes.

This year, the review revealed that some boundary adjustments are now necessary. A side effect of the change involves moving one councilperson (Councilperson A) into a different ward already served by another councilperson (Councilperson B). Accordingly, those council members would have to compete against each other if they plan on seeking re-election. While the boundary approval vote is expected to be sometime in March, the next election is not until April 2015. Finally, the Requester states that Council members make at least $250 per meeting, and there are approximately two meetings per month.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) states, 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 ... 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-2-5U) states, 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.

* * *

(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.

* * *

(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.

ANALYSIS

The Requester asks, first, if it is a conflict of interest for a Member of City Council to vote to accept or reject a proposed boundary adjustment that would move that member into a different voting district. Also, the Requester asks if it is a conflict of interest for a member of City Council to vote to accept or reject a boundary adjustment that would move another member into her voting district.

W. Va. Code§ 68-2-50)(1) states in part that "public officials ... may not vote on a matter ... [i]n which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest." W. Va. Code§ 6B-2-5U)(ll)(A) creates an exception, however, if that official is merely affected as a member of a profession, occupation or class of persons of five or more.

The Commission has long held that public officials have a financial interest in their elected positions. Here, the council members are paid approximately $250 per meeting. For example, in Advisory Opinion 2010-08, the Commission held that public officials could not vote to extend their current office terms an additional year to align future voting, independent of any other legal issues, because they would gain an additional year of compensation. Similarly, in Advisory Opinion 2012-37, the Commission explained that private gain would accrue to "whomever the Council selects to fill the vacancy [on City Council]," but that the prohibition against private gain would only be

implicated in that situation if a public official would use his or her position unfairly to benefit herself or another.

That interpretation of W. Va. Code§ 6B-2-5(b) comports with the prohibition in W. Va. Code§ 6B-2-5U)(1), *supra,* to prevent elected officials from abusing their positions to benefit themselves while in office. Here, though, the situation is unique. The parties would not be voting to benefit their current positions. They would instead be voting on an issue that may modify their voting districts in the future.

In Advisory Opinion 2010-08, while the Commission barred public officials from increasing their terms of office, the Commission also implied that council members could vote to increase the term limits of the next elected governing body without violating the Ethics Act. While the distinction between raising one's own term limits, and raising those of the succeeding governing body, is not explained in that opinion, it should be relatively clear - government officials have no direct interest, financial or otherwise, in the terms of future elected officials for purposes of the Ethics Act.

The Commission espoused a similar viewpoint in Advisory Opinion 2011-21. That opinion dealt with whether a City could adopt an ordinance to compensate the Mayor for performing additional job duties. There, the Commission stated that it would be appropriate to do so for reasons that are not germane to the instant case. Importantly, though, it noted that while it would be appropriate to do so, the change could only be effective for future officeholders, not the current one.

Regardless, it is tempting to conclude that Councilperson A has a conflict of interest because she would want to stay in her current district for re-election purposes, and Councilperson B similarly has a conflict of interest because she would gain a strong opponent in her own district. Here, though, the Council is not voting to approve changes that will affect the status of its current members. The Council is voting to approve changes that will affect its current status. Under the Ethics Act, Councilperson A and Councilperson B have no more significant financial interest in redistricting for a future election than any other resident who will be eligible for office in 2015.

Likewise, the Ethics Act here does not draw a meaningful distinction between a Council member who is planning to run for re-election or not. While a particularly desirable section of the City might shift from one district to another, or shift the population in more or less desirable ways, hypothetical gains or losses generated by population shifts are not the type of private gain contemplated by W. Va. Code § 6B-2-5(b) or any other part of the Ethics Act. Therefore, both council members in question may vote on the Ward and Boundary Commission's recommendations.

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should 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 § 68-1-1, *et. seq.* 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/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson