ADVISORY OPINION NO. 2014-14

Issued on April 3, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipality** asks about the application of the Ethics Act's voting provisions to a Council Member who is employed part-time by the municipal police department.

FACTS RELIED UPON BY THE COMMISSION

The municipality employs a council member as a dispatcher in its police department. The municipality is organized as a Mayor-Council Plan of government. Under this plan the mayor and council shall be the governing body and administrative authority. W.Va. Code §8-3A-1(2)(a)(c). Therefore, the council members and the mayor share the authority, power and control over city affairs, including creating budgets and giving raises to employees of the police department and other municipal departments.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-S(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-2-5(d)(1) provides, in part:

> ... [N]o 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, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body. (Emphasis added.)

W. Va. Code§ 6B-2-SU) 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

Generally, the Ethics Act permits public officials to be employed by any governing body, including their own. W. Va. Code§ 6B-2-5(d)(1). Indeed, the Commission has consistently held that a council member may be employed by a municipality most recently in Advisory Opinion 2012-01. Therefore, the Ethics Act permits a city council member to be employed by the same city. Of course, a municipality may not show favoritism or special treatment in making employment decisions concerning the affected council member. Further, there are voting limitations. The Requester asks whether the council member may vote on matters involving the police department and other departments.

The overriding purpose of the rules on voting is to ensure that a public official does not vote on a matter in which he or she has a financial interest. As for voting on police department matters, there can be no doubt that public servants have a financial interest in their public employment. *See* Advisory Opinion 2012-01.

W. Va. Code§ 6B-2-5U)(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.

In Advisory Opinion 2010-13, the Ethics Commission considered whether a Member of a County Board of Education (BOE) whose wife was employed as an auditor by the BOE may participate in the discussions and/or vote on matters affecting his wife's employment, including the BOE's annual budget. The Commission held:

> Next, the Commission turns to the Ethics Act's prohibition against use of public position for private gain. Clearly, the Requester needs to exercise caution in his public position in order to avoid even the appearance of impropriety. While the Requester may generally advocate for better working conditions for all BOE employees-including increased compensation and benefits-he may not specifically do so on behalf of his wife and/or on behalf of the auditors as a group. He may not lobby his colleagues in an attempt to influence their votes on matters affecting the terms and conditions of his wife's employment and/or the terms and conditions of the auditors' employment. The Requester may not use his position as a member of the BOE to obtain, increase or promote the interests of his spouse as a BOE employee.

In Advisory Opinion 2010-13, *supra,* the Ethics Commission stated:

> Thus, the Commission hereby finds that the Requester may continue to participate in the discussion and vote on the overall budget. In the event that there is a line item in the budget concerning his spouse's compensation and/or the compensation of the auditors and if the BOE specifically addresses any such line item, then he must recuse himself from participating in the discussion and decision-making process by fully disclosing his disqualifying interest, physically removing himself from the room during the period, and recusing himself from voting on the issue. W. Va. Code§ 6B-2-50)(3). *See also* AO 2009-08. Once the BOE concludes its discussion and deliberation (including voting, if required) on any such line item, then the Requester may return to the room and participate in the discussion, deliberation and vote on the budget in its entirety.

Therefore, here, the Commission imposes similar voting restrictions upon the affected council member. When considering the limitations in W. Va. Code§ 6B-2-5U)(ll)(A), the Commission is mindful of the statutory exception which permits voting by an official merely affected as a member of a profession, occupation or class of persons of five or more. With this exception in mind, the Commission holds that the affected council member may generally advocate for better working conditions, including raises, for all municipal employees so long as there are more five or more municipal employees. He may deliberate and vote on matters affecting the overall municipal budget.

He may **not** advocate on behalf of employees within the police department, or deliberate and vote on matters specific to the police department unless there are more five or more police department employees. Likewise, he may not lobby his colleagues in an attempt to influence their votes on matters affecting the police department unless

there are more five or more police department employees. Regardless of the number of employees, he must fully recuse himself if a matter affects him uniquely, e.g. a promotion or discipline. For recusal to be proper, he must 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 voting on the issue.

He may, however, vote on issues directly concerning other departments. Such matters may include, but not be limited to, the budgets and line items of other departments. The fact that changes to the budgets of other municipal departments indirectly affect the police department is not lost on the Commission. Often, departments compete against each other for available funds. The Commission holds, however, that the effect is too indirect to prohibit the affected council member from voting on matters outside the police department. To hold otherwise would defeat the purpose of the employment exception in W. Va. Code§ 6B-2-5(d)(1). Barring a council member from voting on any issue that would affect a department's financial matters is *de facto* barring that person from participating as a council member, and therefore, the affected council member would have to choose between his service on the governing body and his employment, which is contrary to the intent and plain language of W. Va. Code§ 6B-2-5(d)(1).

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 § 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 public servants and other persons unless and until it is amended or revoked, or the law is changed.

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