ADVISORY OPINION NO. 2014-25

Issued on November 13, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The board chairperson of a county **Economic Development Authority** asks if he may also serve as the board chairperson of a county **Public Service District** in the same county.[1]

FACTS RELIED UPON BY THE COMMISSION

County Public Service Districts and county Economic Development Authorities are public corporations created by county commissions and authorized by W. Va. Code §§ 16-13A-2 and 7-12-1.

A Public Service District (PSD) is created to provide water, storm water and sewer services at a reasonable cost to persons who may not otherwise be able to obtain these services. W. Va. Code § 16-13A-1. An Economic Development Authority (EDA) is created to promote, develop and advance the business prosperity and economic welfare within a county. W. Va. Code§ 7-12-2.

The powers of a PSD and of an EDA are vested in and exercised by separate boards whose members are appointed by county commissions. W. Va. Code§§ 16-13A-3 and 7-12-3. Neither entity has the power to control the other or the county commission.

The compensation for members of a PSD board is fixed by statute based upon the number of customers the PSD serves. For example, West Virginia Code§ 16-13A-4 provides:

> (b) Salaries of the board members are:
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> > (1) For districts with fewer than six hundred customers, up to $100 per attendance at regular monthly meetings and $75 per attendance at additional special meetings, total salary not to exceed $2,000 per annum ....

However, W. Va. Code §7-12-5(a) provides, "No member of the [economic development] authority shall receive any compensation, whether in formal salary, per diem allowance or otherwise, in connection with his or her services as such member. Each member shall, however, be entitled to reimbursement by the authority for any

[1] Advisory Opinion 2014-24 rests largely on the same facts as are presented herein. The distinction here is that the Requester is not an employee of either of the boards on which he serves.

necessary expenditures in connection with the performance of his or her general duties as such member."

The EDA and the PSD are not parties to any contracts together. The Executive Director of the EDA states that approximately one-half of the EDA budget comes from the county commission. While the PSD may receive some funding from the county commission, it is primarily funded by the customers it serves.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads, in relevant part:

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

> (1) Public officials... may not vote on a matter:
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> > (A) In which they... or a business with which they... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... 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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W. Va. Code§ 61-10-15(a) states, in part:

> It is unlawful for any member of a ... county or district board ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, ... he or she may have any voice, influence or control.

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Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, taken together prohibit county board members from having an interest in public contracts under their voice, influence, authority or control. Here, however, the EDA and the PSD do not have a contractual relationship. The only connection between the EDA and the PSD is that they were created by and may receive funds from the same county commission.

If the entities would enter into a contractual relationship in the future or request funding from the county commission, the Requester would not have a direct or indirect financial interest in the government contracts of the EDA or the PSD. The EDA board members are uncompensated. The compensation for PSD board members is fixed by statute and, therefore, is not subject to change by the financial status of the PSD.

Most recently, in Advisory Opinion 2014-05, a BOE asked whether it may purchase a scoreboard from the Athletic Boosters, a private non-profit charitable organization, when one of the members of the County Board of Education was also a member of the Boosters. The Commission found that the "BOE member himself ... does not have a financial interest in the Boosters' contracts."

Further, the financial interests of a governmental body may not be imputed to its uncompensated board members. In Advisory Opinion 2014-02, the Commission relied upon Advisory Opinion 2010-04, wherein it held that "the non-profit's financial interest in the contract may **not** be imputed to the common member by virtue of his position as a member of the non-profit board, in the absence of evidence that the common member receives any financial benefit himself by virtue of the transaction between the two entities. As a result of the foregoing analysis, the Commission hereby finds that W. Va. Code§ 61-10-15 does not prohibit the subject contract."

In Advisory Opinion 2011-12, an attorney for a town asked if the town's elected officials may vote to appropriate funds to a non-profit organization on which they and/or their family members serve as board members and/or officers. The Commission concluded in 2011-12 that "a non-profit's financial interest in the contract may not be imputed to the common member by virtue of his position as a member of the non-profit board in the absence of evidence that the common member receives any financial benefit himself by virtue of the transaction between the two entities."

Likewise, if the EDA and the PSD enter into a contractual relationship in the future or

seek funding from a common source, e.g., the county commission, the Requester may vote on such a contract for the same reasons: He does not have a financial interest in the funding or other contracts, and the financial interests of the PSD and EDA may not be imputed to him because he is an uncompensated board member of the EDA and a member of a the PSD board whose salary is fixed by statute.

In conclusion, the Commission holds that the Requester may serve as the chairperson of the boards for both the EDA and PSD under the Ethics Act and W. Va. Code § 61-10-15. Further, the Requester may vote on any matters related to funding requests made to the county commission or any contract or other transaction between the EDA and 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 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 W.* Va. *Code§ 61-10-15, 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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman