ADVISORY OPINION NO. 2014-05

Issued on March 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Business Manager for a County School System** asks whether the County Board of Education 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 is also a member of the Boosters.

FACTS RELIED UPON BY THE COMMISSION

In 2005, the Athletic Boosters, a private non-profit charitable organization, purchased a scoreboard for the high school football field and had it installed. The Boosters obtained a loan for the purchase and have been making payments thereon ever since. The County Board of Education (BOE) is considering purchasing the scoreboard from the Boosters for the balance of the debt.

A member of the BOE is also a member of the Boosters; he is hereinafter referred to as the common member. He receives no compensation for his service to the Boosters and does not have a financial relationship with the Boosters. Further, he is not a party to the loan.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-1-3 provides, in relevant part:

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> (b) "Business" means any entity through which business **for-profit** is conducted including a corporation, partnership, proprietorship, franchise, association, organization or self-employed individual. (emphasis supplied)

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W. Va. Code§ 6B-2-5(d)(1) provides, in part, that no elected official or business with which he or she is associated may be a party to or have an interest in a contract which such 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.

W. Va. Code§ 6B-2-5(d)(3) provides that where the provision of subdivision (1) would result in excessive cost, undue hardship, or other substantial interference with the

operation of a county school board, it may make written application to the Ethics Commission for an exemption therefrom.

W. Va. Code § 6B-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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> > (D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.
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> (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.

W. Va. Code§ 61-10-15(a) states, in part, that it shall be unlawful for any member of a county board of education 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 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, prohibit school board members from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. Public contracts include the proposed transaction between the BOE and the Boosters.

The Ethics Act

Pursuant to W. Va. Code§ 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. A limited interest is an amount not to exceed one thousand dollars in the gross revenues in a public contract or contracts per calendar year.

The Boosters' interest in the contract exceeds $1,000. Since the subject BOE member himself, however, does **not** have a financial interest in the Boosters' contracts, this prohibition does not apply to the situation presented herein.

West Virginia Code § 61-10-15

W. Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against school officials or employees who are pecuniarily interested, **either directly or indirectly,** in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision Is guilty of a misdemeanor and may be removed from public office.

The West Virginia Supreme Court, in analyzing this code provision has stated, "The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself." Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209, 210 (W. Va. 1988). The Commission recognizes that BOE members are subject to this code provision since they have voice, influence or control over the BOE's contracts.

Thus, the Commission must determine whether the common member has a pecuniary interest, either directly or indirectly, in the contracts between the entities.

As the Commission concluded in Advisory Opinion 2010-04, 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.

Notwithstanding this conclusion, the Commission's analysis does not end here, as there are other statutory provisions to consider.

Voting

The Ethics Act sets forth specific rules regarding when elected and appointed public servants may vote. Although the overriding purpose of the voting provision is to ensure that public officials do not vote on a matter in which they have a financial interest, it contains other prohibitions.

W. Va. Code § 6B-2-50) provides that:

> (1) Public officials... may not vote on a matter:
>
> (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 ...

In Advisory Opinion 2011-12, the Commission determined that the foregoing provisions do not apply to non-profit organizations because they are not encompassed in the Ethics Act's definition of business. W. Va. Code§ 6B-1-3(b). Thus, the Commission holds that the common member is **not** required to recuse himself on any matters related to any contract or other transaction between the governing body and the Boosters.

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. V

a. 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/ Father Douglas Sutton,
Acting Chairperson, WV Ethics Commission