

ADVISORY OPINION NO. 2009-08

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VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether it would violate the Ethics Act for two members of its board of directors to serve on a subcommittee which reviews proposals made to the Agency for loans and grants, when the two members may have a financial interest with some of the potential grantees.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a public agency that provides housing loans and grants to low-income individuals and organizations. The State Agency derives its funding from public sources, as well as contributions from private entities, including corporations and individuals.

The State Agency is overseen by an eleven-member Board of Directors, as well as an Executive Director and staff. In accordance with its enabling statute, the Governor appoints the members of the Board of Directors who represent an array of designated interests and industries throughout the State. By statutory design, a majority of the Board of Directors have ties to a particular industry that the State Agency may cooperate with in helping individuals find affordable housing.

In order to facilitate its work, the State Agency formed a subcommittee, known as the Proposal Review Committee, consisting of five members of the Board of Directors. The Chairperson of the Board of Directors appoints members to the Proposal Review Committee ("PRC") annually, but members may remain on the PRC each year until such time as the Chairperson makes new appointments.

The purpose of the PRC is to review all funding proposals submitted to the State Agency from various organizations throughout the state. The PRC is charged with selecting the most meritorious proposals and presenting those proposals to the full Board for approval. In essence, the selection and determination of which grant/ loan proposals the entire Board considers for approval rests with the members of the PRC.

At issue in this matter are two Board members appointed to the PRC, namely the designated banking industry representative and a designated non-profit organization representative.

Banking Industry Representative

The banking industry representative on the Board is a Community Development Specialist ("CDS") for a large regional bank that operates in West Virginia. As a COS, the representative serves as a liaison between the bank and community organizations that serve low and moderate communities and individuals. The bank sponsors grant applications to a federal home loan bank for affordable housing projects, for which the CDS provides technical assistance. The CDS does not, however, have any ultimate decision-making authority.

Additionally, in her capacity as a CDS, the representative is aware of low income housing tax credits that the bank purchases through tax credit syndicators. When a tax credit syndicator invests in a low income housing tax credit, the bank may purchase up to 49% of the investment and would have an indirect ownership stake in the project through the syndicator relationship. As the CDS, the representative may provide technical assistance for low income housing tax credit projects and refer projects to one of the tax credit syndicators for investment consideration. However, as the CDS, the representative does not make the overall investment decision or exert influence over a particular project selection by the tax syndicator.

Finally, as a CDS, the representative helps introduce a project, including projects for affordable housing developments, to the bank's loan officer. The CDS is not involved in the underwriting or approval of a loan. If the projects on which she assists are approved for a loan and the bank closes thereon, the bank reports this loan as a qualifying community development loan to the FDIC.

Non-Profit Organization Representative

The enabling statute of the State Agency requires appointment of representatives to the Board of Directors from local and statewide non-profit organizations which provide housing assistance to low or moderate income citizens.

One of the non-profit representatives has been appointed to the PRC. Specifically, the non-profit organization representative is the Executive Director of an umbrella organization for a network of 26 member organizations, many of which submit their grants and loans proposals to the State Agency.

Although the umbrella non-profit does not have decision-making authority over the member organizations' projects, it does provide partial funding for some projects for which member organizations have received partial funding from the State Agency.

Although the umbrella non-profit has also applied for and received funding from the State Agency in the past, the current Executive Director has adopted an internal policy prohibiting the umbrella organization from applying for funding from the State Agency.

The 26 member organizations may, however, continue to seek funding from the State Agency.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(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.

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) 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, however,* That nothing herein shall be construed to prohibit . . . a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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

U) *Limitations on Voting.*

(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.

(B) If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: *Provided*, That this limitation only applies if the total amount of the loan or loans exceeds fifteen thousand dollars.

(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.

(11) 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; 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.

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In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W.Va. Code§ 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service[.]" W.Va. Code§ 68-1-2(c).

The question presented in this matter is the application of the prohibitions of the Ethics Act to a legislatively-created governing board of part-time appointed community and industry leaders which possess these potentially inherent conflicts of interest.

While the Commission declines to issue an overreaching, bright-line rule applicable to every legislatively-created board, the issue raised in this matter does touch upon issues facing many of the funding boards throughout this State. Thus, while this opinion shall address only the narrow issues presented in the context of this particular State Agency, the Commission would be remiss if it did not caution other funding boards to examine their own internal decision-making and deliberative committees.

Private Gain

Although the Ethics Act prohibits the use of office for private gain, it anticipates that the performance of usual and customary duties on behalf of constituents does not ordinarily constitute private gain. W. Va. Code § 6B-2-5(b). The issue here is whether the subcommittee's duties satisfy this statutory exemption.

Although the two PRC members represent a minority of the members of the five member subcommittee, they are involved in the selection of which proposals to recommend to the larger board for consideration. As the Requester recognizes, the number of proposals received is large and growing, while the money to fund the proposals is limited. Thus, the members of PRC are charged with the task of ranking and evaluating which proposals are meritorious and worthy of the full Board's consideration. At this level, all applicants are competing for a limited pool of available funds.

As a result of the foregoing, the Commission finds that in this capacity the subcommittee members' power exceeds the performance of usual and customary duties for constituents due to the nature of the financial relationship between the Requesters, their employers, and potential grant recipients. The Commission further notes that recusal from consideration of their constituents' applications would not resolve the conflict, since it is a competitive process. Their decision on each application has a direct impact on their constituents' applications. As a result, their continued membership on and participation in the **subcommittee** violates the Ethics Act.

The inquiry concerning the limitations, if any, on the members' participation on the full Board must still be addressed.

Interests in Public Contracts

Under the Ethics Act, an appointed public official, or business with which he or she is associated, **may not** 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. W.Va. Code § 6B-2-5(d). The Ethics Act does

provide an exception for part-time appointed public officials.

[T]hat nothing herein shall be construed to prohibit . a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W.Va. Code § 6B-2-5(d).

Therefore, while it may be permissible under the Ethics Act for a business or organization with which an appointed part-time official is employed to seek a public contract, the part-time official may have no participation in the review and evaluation of the contract. Further, the public official is required to recuse him or herself from deciding or evaluating the contract.

Initially, the Commission finds that the two PRC members are each part-time appointed public officials. The Commission further finds that the actions and decisions of the members of the PRC constitute review, evaluation, and decision-making within the context of W.Va. Code§ 6B-2-5(d).

However, in this matter, the Commission must first determine the threshold question of whether these two members have an interest in a contract with the State Agency. This is often a fact-driven determination that is addressed on a case-by-case basis. According to the Requester, neither of the members has a direct financial interest in the constituents' grant/loan applications. Indeed, the bank's clients and the non-profits' members may be characterized as customers.

Based upon the limited facts and the unknown nature of future contracts with the State Agency, we are unable to make a finding as to whether the two members "have an interest in the profits or benefits of a contract". in light of our prior finding under W.Va. Code § 6B-2-5(b) prohibiting the two member's service on the subcommittee, it is unnecessary for the Commission to pursue further inquiry or render a determination at this time under W.Va. Code§ 6B-2-5(d).

Voting

Although the Ethics Act prohibits the two members from serving on the PRC, it does not prohibit them from serving on the full Board of Directors. The next issue the Commission must resolve is whether these members may evaluate and approve funding requests that the PRC recommends to the full board. The significant difference between the PRC and the full board is that the PRC makes determinations among all the proposals presented, and recommends only a limited amount of proposals to the

Board for approval. Thus, as full board members, it is possible for the representatives to recuse themselves from voting or discussing their constituents' proposals, but allow participation on non-constituents' proposals.

In that respect, the Commission would note its comments from A.O. 2006-06, in which the Commission discussed potential conflicts of members of the Legislature voting on funding for organizations with which they are associated:

The Commission elects to take this opportunity to provide guidance on voting in these circumstances to public officials who are either elected or appointed members of a governing body and are also employed by a nonprofit which may receive funding from the governing body on which they serve. The Commission finds that if the governing body is considering a budget for which there is a line item appropriation to a nonprofit corporation by which an elected or appointed member of a governing body is employed, then the elected or appointed member should not be precluded from voting on the entire budget. However, before casting a vote the elected or appointed member should first disclose his or her employment by the nonprofit organization in order that the general public is aware of the interest. If the governing body is specifically addressing whether an appropriation should be included for the nonprofit corporation, then the public official should physically remove him or herself from the room during that portion of the discussion. The Commission finds that disclosure of the employment by a nonprofit organization promotes transparency in government to which the public is entitled while at the same time allowing the public official to fulfill his or her responsibility of voting on whether a budget should be accepted or rejected.

Although the comments in A.O. 2006-06 relate specifically to members of non-profit organizations, the Commission finds the guidance equally applicable to all part-time appointed members on funding boards and their respective industry, employer or organization. Thus, the Commission hereby finds that the two members, although disqualified from continued service on the subcommittee, may continue to participate as members of the full board: *Provided, however*, that they must recuse themselves from participating in the discussion and decision-making process by physically removing themselves from the room during the period, fully disclosing their disqualifying interests, and recusing themselves from voting on the issue. W.Va. Code§ 6B-2-5U)(3).

Conclusion

Finally, the Commission wishes to make clear that there is no allegation of impropriety with respect to the service of these two board members, or any board member, of this State Agency. There is no allegation of any improper conduct by either board member, and no assertion that they have acted in any manner other than with the utmost of

integrity in the performance of their duties. As with many of our State's appointed part-time public officials, these Board members devote a tremendous amount of their personal time to assist in the mission of the State Agency, and are to be commended for their public service. Indeed, the State Agency is to be commended for seeking formal guidance from the Ethics Commission ,n resolving this complicated matter.

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/ Drema Radford, Vice Chair
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