

## **ADVISORY OPINION NO. 2009-02**

**Issued On March 5, 2009 By The**

**WEST VIRGINIA ETHICS COMMISSION**

### **OPINION SOUGHT**

A County Commission asks whether it may extend the benefits of a County funded employee wellness program to elected County officials, including members of the County Commission.

### **FACTS RELIED UPON BY THE COMMISSION**

A County Commission, through its Prosecuting Attorney, asks whether extending the benefits of a County funded employee wellness program to elected County officials, including members of the County Commission violates the Ethics Act.

In 2005, the County Commission established an employee wellness program in hopes of improving employee health and potentially reducing health care premiums. Participants may join an approved exercise facility and, if they go to the facility a minimum of two times a week, qualify for direct reimbursement from the County for the cost of monthly membership ranging from \$23.50 to \$40 per month. The County has also paid for employees' entry fees for the "Biggest Loser" contest conducted by the local health department.

At least one County Commissioner has expressed an interest in joining the program, and the Commissioners have asked whether the Ethics Act allows them to extend the benefits of the program to County elected officials, including themselves. The Commissioners state that County elected officials may not opt out of county provided health insurance coverage, and that their participation in the wellness program would ultimately reduce health insurance costs. Although the County's insurance provider has encouraged full participation in a wellness program as a means of reducing health insurance costs, participation does not guarantee an attendant reduction in the County's health care costs, nor does the health insurance company offer a premium discount to the County for the program.

### **CODE PROVISIONS AND OTHER LEGAL AUTHORITY RELIED UPON BY THE COMMISSION**

W. Va. Code§ 6B-2-5(b)(1) reads:

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. Incidental use of equipment or resources available to a public official or public employee by virtue of his

or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain....

W. Va. Code § 7-7-4(a)(1) provides, in pertinent part, that all county commissioners shall be paid compensation out of the county treasury in amounts and according to the schedule set forth in subdivision (2) of this subsection for each class of county as determined by the provisions of section three of this article.

W. Va. Code § 7-5-20 reads:

Every county through its county [commission] shall have plenary power and authority to negotiate for, secure and adopt for the officers and regular employees thereof, ... , a policy or policies of group insurance written by a carrier or carriers chartered under the laws of any state and duly licensed to do business in this state and covering life; health; hospital care; surgical or medical diagnosis, care and treatment; drugs and medicines; remedial care; other medical supplies and services; or any other combination of these ....

The county [commission] is hereby authorized and empowered to pay the entire premium cost, or any portion thereof of said group policy or policies....

West Virginia Constitution Article 6 § 38 reads:

No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any Legislature authorize the payment of any claim or part thereof, hereafter created against the state, under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void. Nor shall the salary of any public officer be increased or diminished during his term of office, nor shall any such officer, or his or their sureties be released from any debt or liability due to the state: **Provided**, the Legislature may make appropriations for expenditures hereafter incurred in suppressing insurrection, or repelling invasion.

## ADVISORY OPINION

The Ethics Commission was first asked to weigh in on employee wellness programs in Advisory Opinion 98-28. There a State Agency asked whether it could underwrite a wellness program for all state employees by providing financial incentives to participating employees as a means of reducing overall health care costs. An example of such an incentive was a cash award for attending a blood screening when more than fifty percent of an agency's employees participated. There the Commission wrote that the Ethics Act's prohibition against use of office for private gain "does not apply to this agency's use of its financial resources in a program intended to reduce the overall cost

of agency operation, even if the program results in immediate financial gain to its members".

In Advisory Opinion 2002-04, the Commission stated that "wellness programs are being recognized as a legitimate part of an agency's efforts to increase the health and welfare of its personnel, while reducing agency expenses." There, the Commission, without any cost benefit analysis or other rationale for its decision, authorized a County Commission to extend the benefits of a county funded wellness program to county elected officials.

In Advisory Opinion 2004-22, the Commission was asked whether a State Agency may sell electronic games to school employees and parents at a discounted price obtained to conduct a trial health promotion initiative. In denying the Agency's request, the Commission wrote:

This particular proposal involves a game system that is being evaluated to determine whether it is a cost-effective tool for promoting beneficial aerobic activity in overweight children. **Absent a reasoned medical determination that this system promotes wellness and reduces health costs for the State**, authorizing discounted purchases by employees of the State Agency, State University or participating boards of education, would violate the prohibition against use of public office for private gain.

(emphasis in original)

Similarly, here there is no specific documentation that the participation of elected officials in the county's wellness program will result in reduced health care costs for the County. The County's insurance provider has not promised reduced rates if a certain percentage of its covered members participate. According to the Requester, there are eight (8) elected officials in the County; the maximum annual amount of reimbursement which a participant may receive is \$480. Extending the wellness program to elected officials could result in an annual cost of \$3,840 to the County with no guarantee of a reduction in health care costs. Finally, the wellness program is not provided as a benefit of the County provided health insurance program.

As noted earlier, approved wellness programs reduce agency expenses. Preventive health measures result in a direct benefit to an employer when its employees are healthier, for example, by reducing absenteeism. As we have ruled in the past, this is an appropriate perquisite to offer public employees. Such is not the case for elected officials whose compensation package is statutorily set.

We note that although the Ethics Commission is only empowered to interpret the Ethics Act, we may not do so in a vacuum. Thus, we must take into consideration provisions of the Code and the Constitution that directly bear on this request.

The requirements for county officials' compensation are established by constitutional and statutory provisions outside the Ethics Act. W. Va. Code§ 7-7-4 (a)(1) specifies the pay structure for county officials, based, in part, on the class of the County. West Virginia Constitution Article 6 § 38 prohibits any increase in compensation for County officials unless expressly authorized by the Legislature. In W. Va. Code§ 7-5-20, the Legislature specifically increased the compensation of County officials by providing for health insurance benefits to be paid by the County.

Since the Legislature has not authorized Counties to spend public monies on wellness programs for County elected officials, we find that it would violate W. Va. Code § 6B-2-5(b)(1) for the County to extend the benefits of its wellness program to its elected officials.

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, rules or agency policies. 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.

We now believe that AO 2002-04 failed to consider the legal principle that public officials may not increase their own compensation and benefits. Advisory Opinion 2002-04 is hereby overruled. To the extent that other county elected officials, in reliance on AO 2002-04, are presently participating in wellness programs at county expense, such expenditures are hereby authorized to continue through Fiscal Year 2008-09. County elected officials who participate in wellness programs at county expense thereafter violate the Ethics Act. Only the Legislature may confer additional benefits upon elected County officials. Unless and until the Legislature statutorily establishes such a benefit, the Ethics Commission finds that County Commissions should not confer this benefit upon themselves or other elected County officials.

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