

ADVISORY OPINION NO. 2009-04

Issued On April 2, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected County School Board Member** asks if he may vote on matters affecting the continuation of the Superintendent's employment contract when the head of a public institution by which he is employed has a pending civil action against the Superintendent in her personal capacity.

FACTS RELIED UPON BY THE COMMISSION

An Elected County Board of Education Member is employed at a public institution. The public institution is under the direction and control of a governing body. The day-to-day operations of the governing body are overseen by the head of the public institution who is appointed by the governing body.

The head of the institution has filed a civil action, in his personal capacity, against a County School Superintendent. The head of the institution is not the Requester's immediate supervisor. The Requester, as with all employees at the institution, is a subordinate of the head of the institution.

The Superintendent is under the direction and control of the County Board of Education. Matters may come before the Board which may affect the superintendent's employment contract or the terms of his or her employment. The Requestor seeks guidance on whether he may vote on matters affecting the employment of the Superintendent due to the pending civil action filed by the head of the public institution against the Superintendent.

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. 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§ 68-2-50) reads in relevant part:

U) *Limitations on Voting.*

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, 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.

(C) A personnel matter involving the public official's spouse or relative;

(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.

(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; or

(B) If the matter affects a publicly traded company when:

(i) The public official, or dependent family members individually or jointly own less than five percent of the issued stock in the publicly traded company and the

value of the stocks individually or jointly owned is less than ten thousand dollars;
and

(ii) Prior to casting a vote the public official discloses his or her interest in the publicly traded company.

(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.

ADVISORY OPINION

The Ethics Act sets forth specific rules regarding when elected and appointed public servants may vote. 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.

The situation presented is unique. However, the Requester has no financial interest in the outcome of the lawsuit filed by his ultimate supervisor, the head of the public institution by which he is employed. As such, there is no prohibition in the Ethics Act against him voting on matters which affect the superintendent's employment contract or terms of employment

The head of the institution may not seek to influence the vote of the Requester. To do so could constitute the prohibited use of office for private financial gain. The Requester should provide a copy of this opinion to the head of the institution.

The Legislative findings in the Ethics Act state:

(c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

W.Va. Code§ 6B-1-2(c)

The Legislative finding recognizes that due to the interrelationships of part-time public servants with their constituents and communities, oftentimes they may have to vote on matters in which they have a relationship with a party. Indeed, if public servants sought to recuse themselves on every vote because they know one party or the other, government would not function. While the Ethics Act does not prohibit the Requester from voting, there is nothing in the Ethics Act which prohibits the Requester from recusing himself if he believes that he cannot fairly decide the issues presented due to his employment with the public institution.

The Requester determine whether he is able to decide any personnel issues relating to the Superintendent based upon his duty of loyalty to his constituents, not loyalty, if any, due to his boss, the head of the public institution. If the public believes that he is not fairly representing their interests, then they may express their opinion at the ballot box. The Ethics Commission takes no position on whether he should or should not vote. Instead, in accordance with the plain language in the Ethics Act, it leaves that decision to the discretion of the public servant.

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/ R. Kemp Morton, Chairman
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