

ADVISORY OPINION NO. 2009-14

Issued On January 14, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Board Member** of a **Multi-County Public Agency** asks whether she is permitted to participate, discuss and vote on matters relating to a contract between the public agency and a non-profit entity for which she serves as Executive Director.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an appointed board member to a multi-county public agency ("Agency") that provides public transportation to citizens in participating counties. The Agency is overseen by a ten-member Board of Directors appointed by each of the county commissions from the counties for which the Agency provides transportation services. The Requester was appointed to the Board of Directors by her respective county commission in October 2009. As a member of the Board of Directors of the Agency, the Requester does not receive compensation from the Agency for her service.

In addition to serving on the Agency's Board, the Requester is employed as the Executive Director of a county non-profit entity. She began her employment with the non-profit in February 2008, and continues to serve in that capacity.

The non-profit performs community outreach and various social programs for citizens in the county. In order to facilitate its mission, the non-profit provides transportation for eligible citizens throughout the county, and receives public money, federal reimbursement and fare donations for providing this transportation.

Prior to her appointment to the Agency, the Requester, in her capacity as Executive Director of the non-profit, executed a Cooperative Transportation Agreement ("Agreement") with the Agency to coordinate transportation for elderly and disabled persons in the Requester's county. As expressed in the Agreement, the mission is to "improve efficiencies and cost-savings to both entities."

Pursuant to the Agreement, the non-profit provides three of its vehicles and pays employment costs for four positions created by the Agency. In return, the non-profit receives all fares paid to the transportation project, and is entitled to seek Medicaid reimbursement for elderly citizens using the transportation.

The Agreement is for a term of one year, beginning July 1, 2009, and expressly mandates quarterly review by the Agency and the non-profit.

Following her appointment to the Agency Board of Directors, the Agency asked the Requester to recuse herself from discussion and voting on matters pertaining to the Agreement. The Requester seeks an opinion as to whether the Ethics Act requires her recusal.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-50) 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.

(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

(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§ 68-1-2(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 is whether an appointed, part-time public official must recuse herself from discussing and voting on matters relating to a contract between the Agency and a non-profit entity in which the official is employed as Executive Director.

Prior Related Advisory Opinions

Although the Commission has not directly answered this question before, the Commission has previously commented on the issue. Specifically, in Advisory Opinion 2006-06, the Commission stated:

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.

More recently, in A.O. 2009-08, the Commission held that an appointed board member of a Public Agency, who was also the Executive Director of a non-profit organization,

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may continue to serve on the board of the Public Agency, but **may not** serve on a subcommittee evaluating grant proposals in which the non-profit may be a potential grantee.

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-2-50)(3).

Although these prior opinions did not directly address the immediate question, the Commission continues to find the guidance equally applicable. Additionally, the Commission's comments reflect its adherence to recusal as a remedy to conflicts involving part-time, appointed public officials. In this matter, the Commission is again called upon to examine recusal as a remedy when a part-time, appointed public official faces a potential conflict of interest.

Voting

Under the West Virginia Ethics Act, a public official may not vote on a matter involving "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." W.Va. Code§ 6B-2-50)(1)(D).

In this matter, the Agreement between the Agency and non-profit was predicated upon the receipt of federal grant moneys to the Agency. The grant includes matching funds to be provided by the Requester's non-profit organization. Thus, the Agreement to provide transportation is predicated upon and involves appropriations of public monies.

The Requester is employed by the non-profit which has an existing contract with the public agency in which the Requester serves as a board member. The Agency is charged with overseeing, evaluating, appropriating monies, and reviewing the contract between the two entities. Although she does not receive direct financial gain from the contract, the non-profit which she is charged with overseeing does have a financial interest in the contract.

Under the Agreement, the non-profit contributes financially to the employment of four employees of the Agency. In return, the non-profit receives fares collected by the transportation agreement, and is entitled to seek reimbursement from Medicaid for eligible elderly individuals.

Nonetheless, the Requester maintains that this provision is inapplicable because she does not **directly** financially benefit. She further maintains that there is no opportunity

for her to use her position on the Agency for either her own benefit or that of the non-profit.

While the Requester may not directly financially benefit, the Commission disagrees with her assertion that she is not in a position to benefit herself or the non-profit. Foremost, as the Executive Director of the non-profit, she is paid by the non-profit for her performance and oversight of the organization. This would include oversight of the transportation Agreement. It is noteworthy that the Requester was the signatory to the Agreement on behalf of the non-profit.

Additionally, the Agreement provides for the financial benefit of the non-profit which she oversees. While the non-profit is providing an outlay of capital to the Agency as part of the Agreement, it is receiving a financial benefit in return by way of collection of fares and federal reimbursement. As cited by the Requester, the stated mission of the Agreement is to "improve efficiencies and **cost-savings** to both entities."

The Commission further finds that the mandated quarterly review to be undertaken by the Agency similarly falls under the "awarding of a contract" provision of W.Va. Code § 6B-2-5U)(1)(0).

Therefore, the Commission hereby finds that the Requester, as the Executive Director of the non-profit which is a party to a contract with the Public Agency she serves on, should recuse herself from any participation, discussion and voting on the Agreement. Instead, the Requester would have to recuse herself by fully disclosing the extent of her interest in the contract, and leaving the room. W.Va. Code § 6B-2-5U)(3).

Finally, the Commission would reiterate its comments from Advisory Opinion 2006-09, wherein it summarized the necessity of recusal from voting for matters involving an employer.¹

One rationale for this guidance in the Commission's voting rule is an acknowledgment that an employee serving in a part-time government position may feel uncomfortable voting against a matter in which his employer has a particular interest, even though the employee has no direct or indirect financial interest in the matter which would prohibit him from voting outright. Rather than placing an employee in the untenable position of having to explain to his employer why he voted contrary to his employer's position, the rule calls for the employee to be excused from voting because it would give the appearance of impropriety.

¹ Following issuance of A.O. 2006-09, the Ethics Commission's legislative rule on voting was incorporated into W.Va. Code § 6B-2-5.

Other Provisions of the Ethics Act

Similar to the prohibitions of W.Va. Code § 6B-2-50), other provisions of the Ethics Act also impose restrictions upon matters in which a part-time, appointed public official may participate and vote. W.Va. Code §§ 68-2-S(b) and (d).

Because the Commission is able to answer the question presented under W.Va. Code § 6B-2-5U), it will defer further analysis under these other provisions. However, the Commission would note that these other provisions similarly contemplate recusal by an appointed, part-time public official with a conflict of interest.

[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)(1). See *also* W.Va. Code § 6B-2-5(d)(3) ("If a public official. . . has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest.").

Recusal

Pursuant to W.Va. Code § 68-2-50)(3), in order for recusal to be proper, it is necessary for the Requester to excuse herself from participating in the discussion and decision-making process by physically removing herself from the room during the period, fully disclosing her interests, and recusing herself from voting on the issue.

While this is the proper procedure for the Requester to follow, there may be occasions in which the Requester may need to temporarily remain in the room to address questions in her private capacity as Executive Director of the non-profit.

In such circumstances, the Requester should verbally state for the record that she is recusing herself due to her position as Executive Director of the non-profit. Then the Requester should step down from her seat, and answer any questions that the other board members of the Agency may have for her in her capacity as Executive Director of the non-profit. Once the questions are completed, or if there are no questions, then the Requester should need to leave the room during deliberations and voting.

Conclusion

Finally, the Commission wishes to make clear that there is no allegation of impropriety with respect to the service of this board member, and no assertion that she has acted in any manner other than with the utmost of integrity in the performance of her duties. As with many of our State's appointed part-time public officials, she has devoted a tremendous amount of her personal time to assist in the mission of the Multi-County Public Agency and her own non-profit organization, and is to be commended for her public service.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.*, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 68-2-3, 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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