

ADVISORY OPINION NO. 2006-09

Issued On August 3, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Mayor** asks if he may vote on a matter in which his employer has an interest.

FACTS RELIED UPON BY THE COMMISSION

The requester is employed by a State University. He is also a voting member of the City Council in the municipality where his employer is located and has been elected by the Council to serve as Mayor.

The City Council has been asked to authorize a tax-free bond to finance an apartment building which will be built by a non-profit corporation. The non-profit corporation plans to lease these apartments to students and faculty from the State University. Further, any profits generated by the building will be given to the State University. Finally, when the bonds which financed construction of the building are fully paid off, the State University may purchase the building for \$1.

The requester's duties relate to student organizations that operate on campus. He has had no involvement in any decisions concerning the State University's participation in this building project.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b), *use of public office for private gain*, provides in 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.

W. Va. Code § 6B-2-1(c) provides:

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.

158 C.S.R. 9, the Commission's Legislative Rule on voting, provides:

2.1 A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2 For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either

directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety.

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In creating the Ethics Act, the Legislature recognized 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.” Having noted this potential for inherent conflict, the Legislature proceeded in § 6B-2-5 to describe those situations where voting or taking official action on a matter is prohibited.

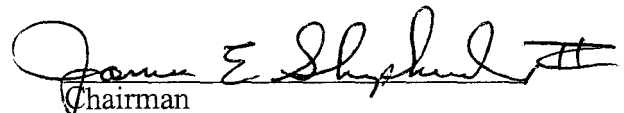
The only prohibition in the Ethics Act which may apply here is the prohibition in § 5(b) against a public servant using his public office for his own private gain or the private gain of another. Clearly, there are some situations where employees should not vote on matters regarding their employers, because their vote would result in a direct or indirect financial benefit to themselves. For example, an employee of a construction company serving on a City Council should not vote to award a construction contract to his employer.

Here, the requester’s employer is likely to benefit if these construction bonds are issued, and the proposed building project proceeds as planned. However, any pecuniary benefit to the requester is too hypothetical to conclude that he would receive some private gain from the approval of this project. Therefore, by voting to authorize the issuance of these tax free bonds as proposed, the requester would not violate any specific prohibition in the Ethics Act.

Nonetheless, both the Legislature and Commission have recognized that there are some situations where a public servant may be asked to cast a vote on a matter where he or she may be “affected in a manner which may influence his or her vote or which would clearly give the appearance of impropriety.” The Commission’s Legislative Rule on voting was adopted to provide guidelines for public servants in these circumstances.

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.

Accordingly, the Commission finds that the requester’s vote in this matter would create an appearance of impropriety as contemplated by the Commission’s voting guidelines, and the requester should refrain from voting.


Chairman