

ADVISORY OPINION NO. 2005-06

Issued On June 2, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Council Member** asks whether the presiding officer of a City Council may require him to vote when he has moved to abstain from voting on matters in which he has a good faith basis to believe that in casting a vote he may be violating the Ethics Act. The **City Council Member** further inquires whether he has immunity from an administrative enforcement action under the Ethics Act if he has been directed to vote by the presiding officer.

FACTS RELIED UPON BY THE COMMISSION

The City has implemented rules which govern parliamentary procedure for meetings. An elected member of the City Council may move to abstain from voting on matters in which they have a personal pecuniary interest.

Pursuant to the procedural rules adopted by the City, the presiding officer rules on whether to grant or deny a motion to abstain. The City interprets its rules to require the member to vote if the presiding officer so directs. The City further interprets its rules as requiring the vote to be cast even if the elected City Council Member believes that in so casting the vote he or she is violating the Ethics Act.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b) provides in pertinent part that: 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-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or 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 ... a contract which such 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 such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract...

W.Va. C.S.R. § 158-9-2 provides in pertinent part that:

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. An interest is not "personal" if the interest of the public official or public employee in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

2.3. For a public official's or public employee's recusal to be effective, it is necessary for the official or employee to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclose his interest, and recuse himself from voting on the issue.

2.4. In any case where a Senator or Delegate is voting as part of their official duties of office, the members of the Senate and the members of the House of Delegates are governed by the rules of their respective houses. The provisions of subsection 2.3 of this rule shall not apply to members of the Legislature when acting as a member thereof.

ADVISORY OPINION

The Ethics Act prohibits a public servant from using his or her office for private gain. The Act further prohibits, with limited exceptions, a public servant from having an interest in the profits or benefits of a public contract.

When a public official votes on a matters in which he or she has a pecuniary interest, the act of voting may constitute a violation of the Ethics Act. In these instances, as set forth in the Legislative Rule on voting (W.Va. C.S.R. § 158-9-2), and in accordance with the past opinions of the Commission, the public official should seek to be recused from voting. It is the opinion of the Commission that for a City to require a member to vote, when the member believes that his or her action in casting the vote may arise to a violation of the Ethics Act, constitutes a direct conflict with the applicable law governing voting under the Act. Therefore, the member shall not be required to vote in these circumstances.

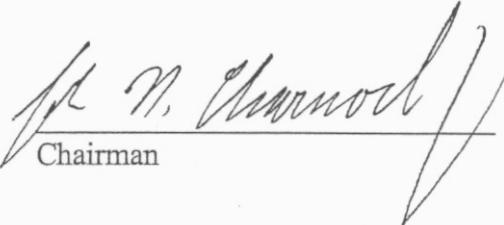
The requester of this opinion also inquires whether he or she has immunity from the Ethics Act when he or she has requested to be excused from voting, but proceeds to vote at the direction of the presiding officer. In these circumstances, although the elected official has been directed to vote, it is the opinion of the Commission that he or she is not immune from an administrative enforcement action under the Ethics Act.

The conclusion that there is no immunity is based upon the plain language of the Act. There is no specific or general language in the Act conferring immunity upon public officials who are directed by

the presiding officer to cast a vote. In contrast, the Ethics Act makes a specific exception for members of the Legislature who are required by the presiding officer to vote. The Act states that when members of the Legislature have sought to be excused from voting, and then are required to vote by the presiding officer, they cannot be held guilty under the Ethics Act for a vote so cast. W.Va. Code § 6B-2-5(i). Consistent with the rules of statutory interpretation, the Commission finds that the omission of any statutory exception for an elected member of a political subdivision compels the conclusion that this class of elected officials does not have immunity under the Act for votes cast at the direction of the presiding officer.

From a common sense standpoint, the Commission recognizes that where a member makes a good faith effort to recuse themselves from voting, and is then required to vote, these facts may constitute a defense to an Ethics complaint. Still, there may be instances when the casting of a vote arises to a violation of the Ethics Act. Any conflict between local rules or ordinances and the Ethics Act may be cured by the public official being permitted to excuse himself from voting when he or she has a good faith basis to believe that by casting the vote, he may be violating the Ethics Act.

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 public servants and other persons unless and until it is amended or revoked, or the law is changed.


Chairman