

**ADVISORY OPINION NO. 2004-19**

**Issued On October 7, 2004 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

A **Member of a State Commission** asks if he may vote on certain matters that may affect his brother's business.

**FACTS RELIED UPON BY THE COMMISSION**

The Commission regulates certain business activities. One aspect of this regulatory activity involves determining when and if certain fees are to be imposed on real estate developers. The Commissioner's brother is a residential real estate developer. However, the Commissioner has no financial interest in his brother's business.

The Commission is currently considering imposing fees on developers in certain locations. The business operated by the Commissioner's brother is one of several involved in a pending matter.

**CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials...serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official...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-2-5(b)(1) states in pertinent part that...a public official...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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

Legislative Rules - 158-9-2.1 A public official or public employee may not vote on or decide a matter ... when he or she has any pecuniary interest either directly or indirectly in the matter ... [ but may, if their interest ]... in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

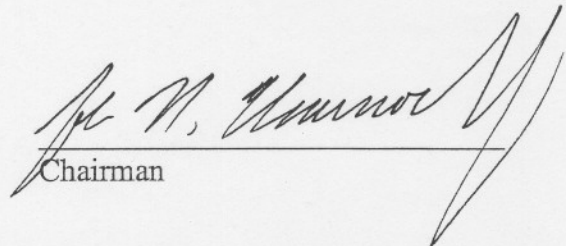
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The Ethics Commission's legislative rules generally prohibit public servants from voting on matters in which they have a direct or indirect financial interest. However, those rules also contain a proviso allowing them to vote, if they are affected by the matter only as a member of, and to no greater extent than any other member of, a profession, occupation or class.

The rules of the House and Senate achieve the same result, *e.g.*, public school teachers who serve in the Legislature are permitted to vote on a pay raise for public school teachers generally. Being affected only as members of the teaching profession, and to no greater extent than other teachers, they are permitted to vote on the legislation, even though it will benefit them financially.

The Commissioner's vote on fees to be imposed on real estate developers generally would only impact on his brother's business as a member of a class. In that situation, the Commissioner would not be precluded from voting on fee determinations.

Even where the fee determination involves the brother's real estate development business directly, the Commissioner may vote if such fees are being uniformly imposed on a class of five or more developers. However, if the Commissioner is asked to decide whether to impose a fee only on his brother's business, or a class of four or fewer developers, one of which is owned by his brother, the Commissioner should be recused from deciding that matter because his participation would create an appearance of impropriety.

  
Chairman