

ADVISORY OPINION NO. 2003-12

Issued On September 4, 2003 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Board** asks whether its Trustees and senior executive staff are disqualified from taking official action in regard to publicly traded corporations in which they have personal financial interests.

FACTS RELIED UPON BY THE COMMISSION

The Board is responsible for the investment of certain State funds. On occasion the Board must consider possible shareholder litigation against publicly traded corporations in which the Board has equity or debt investments. The Board is represented by special outside legal counsel and its senior executive staff normally participate in the Board's decision making process, providing information and recommendations, though they have no vote on such issues.

Earlier this year, a Trustee found he had an ownership interest in a corporation against which the Board was considering legal action. Although the Trustee's share ownership was nominal, he recused himself from voting or taking official action on the matter.

The Board wants to establish those circumstances which will require its Trustees and senior staff to recuse themselves from consideration of official action against a publicly traded corporation, because of personal financial investments in the corporation.

The Board is particularly concerned about situations where its personnel own stock in mutual funds and may be unaware of their indirect ownership of equity or debt of specific corporations in which the mutual funds have invested. The Board is also concerned with corporations whose stocks or bonds are so widely held that the Board might be unable to secure a quorum, if recusal were required of those who held even a single share of the corporation's stock.

CODE PROVISIONS RELIED UPON BY COMMISSION

WV Code 6B-2-5(b) *Use of public office for private gain.*, provides in 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.

WV Legislative Rules 158-9-2

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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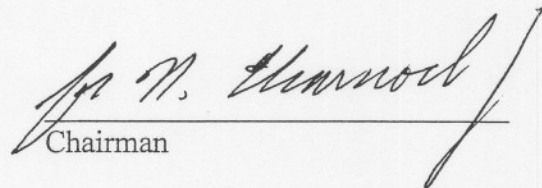
The Ethics Commission's Legislative rules on voting say that public servants may not vote on matters which have become personal to them. These rules say that matters become personal to a public servant "... when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety."

The Commission finds that the Board's Trustees must recuse themselves from official action in regard to corporations in which they have a direct financial interest. This would include the direct ownership of both debt or equity interests. However, indirect financial interests through mutual fund ownership is a different situation.

The actual portfolio composition of mutual funds is a matter which most investors would be aware of only on a periodic or occasional basis and the Commission finds that it would be unreasonable to impute knowledge of all the investments of a mutual fund to its stockholders. Therefore, public servants who own mutual funds are not required to recuse themselves from matters affecting corporations in which the mutual funds have invested.

The Commission reaches a similar result in regard to the Board's senior staff members, based on the Ethics Act's prohibition against the use of office for private gain. The Commission finds that the Board's senior staff members should be recused from official action in regard to corporations in which they have a direct financial ownership interest, but may take action in regard to those in which they have, through mutual fund ownership, only an indirect financial interest.

Situations may arise in which the direct ownership of a single share, or even several shares, of stock would be *de-minimis* and would not require the owner's recusal. Such situations must be dealt with by the Commission on a case by case basis and specific facts must be presented for a determination.


Chairman