

ADVISORY OPINION NO. 2000-10

Issued On July 6, 2000 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Chairman of a State Commission** asks if it would be a violation for Commission members to vote on licensing matters which affect their own licenses from the Commission.

FACTS RELIED UPON BY THE COMMISSION

The legislation which created the State Commission provides that one of its primary duties is to "regulate the issuance, transfer, and renewal of licenses." It has the power to "restrict, deny or postpone the issuance of licenses" to additional licensees.

The Commission is governed by nine voting members, two of whom serve ex officio, three are appointed by the Governor to represent the general public and four are appointed by the Governor from among those who currently hold licenses issued by the Commission. The number of those licensed is presently restricted to forty.

The licenses issued by the Commission may be transferred, sold, offered as security to financial institutions or otherwise encumbered. The significant financial value of the licenses may be affected by the issuance of more licenses or the termination or non-renewal of licenses.

The Chairman asks whether Commission members who hold licenses should be recused from considering and voting on license applications, since their actions can significantly alter the value of the licenses they hold.

CODE PROVISIONS RELIED UPON BY COMMISSION

WV Code 6B-2-5(j) *Limitations on participation in licensing and rate-making proceedings.* -- No public official or employee may participate within the scope of his or her duties as a public official or employee ... in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation or association in which the public official or employee or his or her immediate family owns or controls more than ten percent.

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 specific proviso which allows them to do so, 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.

However, the Legislature took a different approach in the Ethics Act when dealing with voting by public servants who are involved in license and rate-making proceedings. The Ethics Act prohibits public servants from taking official action on license and rate making matters which **directly affect** their own licenses, or those of a business which they, or the members of their immediate family, own or control an interest of more than ten per cent. There is no proviso allowing them to vote if they are affected only as a member of a group.

The Act's limitation on participation in licensing and rate making proceedings prohibits the State Commission's members from taking official action on matters which directly affect their own licenses. The problem is in identifying those matters which can be said to directly affect their own licenses. For example, do matters affecting a license in which they have no ownership interest, such as the license of a current or potential competitor, directly affect their own licenses?

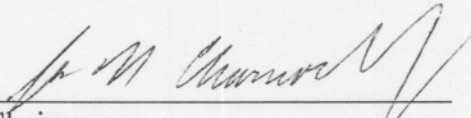
The State has more than forty professional and occupational licensing boards and commissions responsible for activities spanning from accountancy and acupuncture to veterinary medicine. Each issues licenses and is responsible to insure the competence of those who hold and exercise the licenses.

As an example, the medical licensing board issues the licenses physicians must have if they are to practice in the State. The board's issuance, denial or termination of a medical practitioner's license will have no significant financial effect on the value of the medical license of a physician serving on the licensing board and such a matter can not be said to directly affect the board member's own license.

Here the State Commission's licensing actions present a different situation entirely. There are currently only 40 licenses available. Commission action to issue additional licenses would reduce the value of existing licenses and action to terminate existing licenses would enhance the value of

those that remain. Therefore, the Ethics Commission finds that such matters directly affect the licences of those Commissioners who hold licenses and rules that they may not take part in the discussion or vote on such matters.

The Ethics Commission can neither anticipate all the matters with which this State Commission will be confronted nor provide an answer to whether each would directly affect the licenses of Commission members who hold licenses. Those which appear to fall outside the limits of this Advisory Opinion will have to be dealt with on a case by case basis, as they arise.


Chairman