

**ADVISORY OPINION NO. 97-29**

Issued on October 9, 1997 by the

**WEST VIRGINIA ETHICS COMMISSION**

**PUBLIC SERVANT SEEKING OPINION**

Member of a State Board

**OPINION SOUGHT**

Is it a violation of the Ethics Act if a member of a State Board votes on a proposed project which may benefit that member's public employer?

**FACTS RELIED UPON BY THE COMMISSION**

The requester is a member of a State Board and also the executive director of a County Economic Development Authority. A matter is pending before the State Board which would affect the location of a significant project in the area. A preliminary study of potential sites has recommended that a site in the requester's county be selected for the project. The Board must now vote on whether to accept the preliminary study and recommend that the project continue to its next phase.

The requester receives a salary as the executive director of the County Economic Development Authority. By agreement of the parties, compensation may not be based upon any performance or activity as a public servant. The County Economic Development Authority has no ownership interest in any property that may be acquired if the project receives ultimate approval.

**PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code 6B-2-5(b)(1) states 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. 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.

West Virginia 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 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.

The Ethics Commission's Legislative Rules on Voting, at 158 CSR 2, provide in pertinent part that [a] public official or employee may not vote on or decide a matter that has become "personal" to that individual....a matter will be considered "personal" to a public official or 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.

### ADVISORY OPINION

The code of conduct in the Ethics Act is designed to prevent conflicts between the governmental responsibilities of public servants and their private financial interests. The foundation of the code is its prohibition against the use of office for private gain. It prohibits public servants from using their public positions, or the prestige or influence of those positions, for their own private gain, or the private gain of another.

The specific rules comprising the code of conduct grow out of and are bounded by this concern to prevent conduct motivated by **private** financial gain. With only one exception, all the rules comprising the code of conduct deal with situations which are, or appear to be, motivated by a use of office for private financial gain.

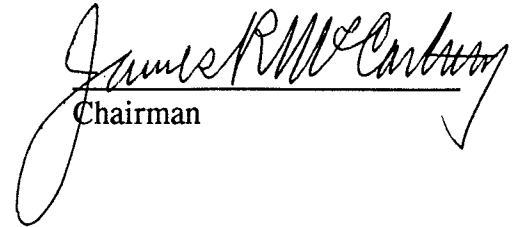
The Ethics Act's code of conduct has no specific rule telling part-time public officials what they should do if called upon to vote on a matter which might have a financial impact on their full-time employer. It does provide that "[t]he performance of usual and customary duties associated with the office 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."

In this situation the requester is asked to vote on an issue which could indirectly benefit a governmental entity, the County Development Authority by which she is employed. The benefit, if any, to her **public** employer would not constitute prohibited **private** gain as that term is used in the Ethics Act.

The Ethics Commission does have a legislative rule on voting which contains a provision that public servants should not vote on matters which are personal to them. However, this rule, like the provisions of the Act itself, deals with conduct which is aimed at **private** financial gain. The Commission finds that the exhortation not to vote if a matter is "personal" to a public official does not apply to a situation which involves two public positions and no direct personal financial benefit to the public servant involved.

The facts here suggest no direct personal benefit to the requester from her vote. Her personal benefit from the selection of her County as the project site would be no greater than any other citizen of the County. The Commission finds that its legislative rule directing public servants not to vote on matters which are "personal" to them does not apply to part-time public officials' votes on matters affecting their full-time **public** employers where there is no direct personal benefit to the public officials.

Under the precise facts of this case, the Commission finds that the essential element of private gain does not exist in the situation with which the State Board member is confronted. The potential benefit to her government employer, or to the citizens of the County, does not constitute prohibited private gain. It would not be a violation of the Ethics Act if she were to vote on the matter pending before the Board.

  
Chairman