ADVISORY OPINION NO. 2013-58

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Ratified on January 21, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of a Regional Drug Court Team and its Advisory Board** asks whether a Regional Drug Court may contract with a County Commissioner, who also works as a dentist, to provide dental work for a participant of the Drug Court.

FACTS RELIED UPON BY THE COMMISSION

W.Va. Code§ 62-15-1 *et al.* created the "West Virginia Drug Offender Accountability and Treatment Act" ("Drug Court Act") which authorizes judicial circuits to establish Drug Courts or Regional Drug Courts. A Drug Court is a judicial intervention process which may include pre-adjudication or post-adjudication participation for eligible participants. The Requester serves on the Drug Court and, as such, helps participants find affordable medical and dental services. The Supreme Court of Appeals is responsible for the funding and administration of Drug Courts. W.Va. Code§ 62-15-1-9. The Supreme Court appoints the Drug Court Team and its local advisory committee. The Drug Court Act requires certain public official positions to serve on the advisory board. County Commissioners do not serve on the Drug Team or its advisory board.

W.Va. Code§ 62-15-11(b) states: "Nothing in this article shall prohibit local advisory committees or drug court teams from obtaining supplemental funds or exploring grants to support drug courts."

The Requester states that in the past six years, the County Commission has provided funding (approximately 3% of Drug Court's budget) on two occasions to the Drug Court for needs not covered by the Supreme Court and that the Drug Court may request funding from the Commission in the future. The medical and dental assistance is not - and would not be -paid for with funds from the County Commission, but rather from individual donations and grants.

PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads, in relevant part:

> 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) reads, in relevant part:

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... public official ... 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 the profits or benefits of a contract which the official ... may have direct authority to enter into, or over which he or she may have control....

W. Va. Code§ 6B-2-5U) reads in relevant part

> (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:
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> (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.
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> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

W. Va. Code§ 61-10-15 reads, in relevant part:

> (a) It is unlawful for any member of a county commission ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member ... he or she may have any voice, influence or control....

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Both the Ethics Act, W. Va. Code§ 6B-2-5 (b) and (d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the

appearance of impropriety.

Pursuant to W.Va. Code§ 6B-2-5(d)(1), a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. In Advisory Opinion 2011-02, the Ethics Commission found that it was permissible under the Ethics Act for a County Council member to contract with a Conservation District where the Council provided funds to the Conservation District, but was not mandated to do so and the Council did not appoint the members of the Conservation District nor approve its budget.

Similarly, in this case, the County Commission does not appoint the members of the Drug Court or its advisory committee. Further, the County Commission does not approve its budget nor is it statutorily mandated to fund the Drug Court.

In Advisory Opinion 2011-02, the Ethics Commission discussed previous opinions by the Commission wherein it ruled that providing funding to a governing body, standing alone, does not constitute direct authority or control for purposes of the public contract prohibition in the Ethics Act, W.Va. Code§ 6B-2-5(d). Specifically, in Advisory Opinion 1994-08, the Commission ruled that it would not violate the Ethics Act for a County Commissioner to contract with a County Solid Waste Authority although the County Commission appointed two of its members and had the authority to determine the amount of funding for the Authority. *See also* Advisory Opinion 93-05 (Commission ruled that the Ethics Act did not prohibit a County Commissioner from contracting with a Public Service District). In these opinions, while the subject contracts did not violate the Ethics Act, the Commission found that they were prohibited by the stricter provisions in W.Va. Code§ 61-10-15.

As in Advisory Opinion 2011-02 and the cases relied upon therein, the Commission finds that the contract in question here is permissible pursuant to the Ethics Act as the voluntary allocation of funds does not rise to direct authority or control over the Drug Court; however, since a County Commissioner is affected, it is necessary to examine the application of the stricter provisions in W.Va. Code§ 61-10-15.

In analyzing W.Va. Code§ 61-10-15, in Advisory Opinion 2011-01, the Commission held that:

> Since the County Council is the ultimate decision-maker over the Sheriff's budget and the Sheriff serves as conservator [of protected persons] by virtue of his **official** position, the Commission finds that these factors are sufficient to conclude that the Requester, as a County Council Member, **has** the requisite voice, influence or control in the Sheriff's contracts with her nursing home.
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> Thus, W.Va. Code§ 61-10-15 prohibits the Requester from accepting protected persons from the Sheriff for placement in her nursing home. As

> a result, the Requester may only accept the placement of a protected person in her nursing home if the Sheriff seeks and receives a contract exemption. In order to obtain a contract exemption, the Sheriff needs to demonstrate that the Commission's decision herein creates an undue hardship, substantial interference in government operations, or excessive cost.

Conversely, in Advisory Opinion 2011-02, *supra,* the Commission found that the contract was permissible even under the stricter standard inW.Va. Code§ 61-10-15, but added the following:

> Weighing the various factors, the Commission finds that a County Council Members business may contract with a Conservation District under the following circumstances: (1) the contract is let via a sealed bid process; (2) the project is not funded by County money; (3) the project is not the subject of an agreement between the District and the County including any agreement for flood control as authorized by W.Va. Code§ 19-21A-13 ; and (4) the affected Member recuses himself from the District's appropriation request or any request for funding. *See* W.Va. Code§ 6B-2-5U).

Further, in Advisory Opinion 2011-02, the Commission affirmed Advisory Opinion 1996-26 by paraphrasing its prior ruling as follows:

> [A] County School Board Member could contract with a County Parks and Recreation Commission although the County's special education levy provided about 6% of the Park Commission's operating budget. Similarly, the Commission ruled in A.O. 2010-14 that a School Board's financial support in the form of providing free office space to a teacher's credit union, a non-profit organization, did not constitute the requisite degree of control to trigger the limitations in W.Va. Code§ 61-10-15.

Here, the County Commission has no control over the drug court's budget, but rather, may choose to make voluntary contributions to it. Nor does the County Commission appoint members to the Drug Court or its advisory committee. Rather, the Supreme Court has this responsibility. Therefore, under W.Va. Code§ 61-10-15, the Ethics Commission holds that the County Commissioner may provide dental work to a participant in the program under the following conditions: (1) the contract for dental work must be let out via a sealed bid process; (2) the dental work is not funded by County or commingled funds; and (3) the affected County Commissioner recuses himself from the Drug Court's appropriation request or any request for funding to the Drug Court.

For recusal to be proper under the Ethics Act, the affected County Commissioner must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the

discussion and vote on the matter.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.* and W. Va. Code§ 61-10-15, 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman