ADVISORY OPINION NO. 2013-03

Issued On February 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Solid Waste Authority** asks whether a board member who is associated with a bank may vote on matters affecting a fellow board member who is a client of the bank.

FACTS RELIED UPON BY THE COMMISSION

A County Solid Waste Authority (SWA) has a Board Member who is also a waste hauler. This Board Member is authorized to serve in accordance with the rule of law established in A.O. 2006-15, and in accordance with the enabling legislation for solid waste authorities which contemplates that members of the industry are eligible to serve on the board. In particular, this language reads: **No** member who has any financial interest in the collection, transportation, processing, recycling or the disposal of refuse, garbage, solid waste or hazardous waste shall vote or act on any matter which directly affects the member's personal interests. W. Va. Code § 22C-4-3.

Another SWA Member is a past President of a bank. Although he is retired, he serves on the bank's board. Moreover, the Requester believes that the SWA Member/waste hauler is a customer of this bank and the SWA Member/banker acts as his personal banker.

Based upon this relationship, the Requester asks whether the SWA Member/banker must recuse himself from matters affecting the SWA Member/waste hauler. The SWA seeks an answer to this question, in part, as the SWA Member/waste hauler has filed a lawsuit against all SWA Members except the banker. When the SWA discusses the lawsuit, the SWA Member/banker participates in discussions relating to the lawsuit and presumably has access to otherwise confidential information regarding litigation strategy.

The SWA has a conflict of interest policy which Board Members are required to sign.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (b) Use of public office for private gain. -- (1) 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§ 68-2-5(e) reads in relevant part:

> (e) Confidential information. -- **No** present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W.Va. Code § 68-2-50) 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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> (8) If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: Provided, That this limitation only applies if the total amount of the loan or loans exceeds fifteen thousand dollars.
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> (2) A public official may vote:
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> (A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

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In establishing the Ethics Act, the Legislature sought to create a code of conduct to guide public officials and employees in their public service. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code§ 68-1-2(d).

While the Ethics Act assists public servants in avoiding conflicts, the Legislature has also recognized that "[S]tate 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... " W.Va. Code§ 6B-1-2 (c). Though public servants **should** (emphasis supplied) seek to recuse themselves when a matter becomes personal, not every personal relationship requires recusal. W.Va. Code§ 6B-1-2U).

In regard to the issue presented, the Ethics Commission must consider the voting rules codified in the Ethics Act, W.Va. Code§ 6B-2-5U). Based upon this rule, the Board Member/banker must recuse him or herself on matters involving a client of the bank with which he is associated if:

(1) The Board Member/banker is an employee of the bank, i.e. receives a Form W-2 from the bank;

(2) The Board Member/waste hauler has a loan from this bank; and,

(3) The Board Member/banker is presently or within the past twelve (12) months directly involved in approving a loan request for the Board Member/waste hauler.

Based upon the foregoing, the SWA's attorney should carefully review with the affected SWA Members this rule of law and determine whether in fact the Board Member/Banker is an employee, and whether he has been involved in approving loans for the Board Member/waste hauler. If so, then the SWA Member/banker must recuse himself from matters affecting the SWA Member/waste hauler, unless he is affected as a member of a class of five or more. The Board Member/banker shall also recuse himself from matters relating to the lawsuit.

For recusal to be proper, public servants must first fully disclose on the record their disqualifying interest in any matter before the governing body, then leave the room during the discussion, deliberation and vote on the matter. Additionally, the minutes/ record of the meeting must reflect the basis for the recusal and that the affected member left the room during all consideration, discussion and vote on the item under consideration.

If the SWA Member/banker is only a bank board member who has not been directly involved with loans to the SWA Member/waste hauler, then the Ethics Commission finds that recusal is not required. The provision in the Ethics Act governing voting on matters affecting bank clients does not expressly extend to bank board members, only employees involved in approving loans. The Commission bases this conclusion upon the well accepted canon of statutory construction that the express mention of one thing implies exclusion of all others *(expressio unius est exclusio a/terius).* State ex rel. Riffle v. Ranson, 195 W. Va. 121,128,464 S.E.2d 763,770 (1995).

If the SWA Member/banker does not have to recuse himself, still, the Commission cautions that he is prohibited from disclosing confidential information including but not limited to litigation strategy and matters relating to settlement negotiations, if any. Also, the SWA must independently determine, in consultation with its attorney, if the financial relationship between the two board members requires recusal in accordance with the SWA's conflict of interest policy. The Ethics Commission has no authority to interpret this conflict of interest policy.

Additionally, the Commission notes that various public agencies exercise appointment power over county solid waste authorities. The enabling legislation confers this power as follows:

> (b) The authority board of directors is comprised of five members who are appointed as follows: One by the director of the division of environmental protection, two by the county commission, one by the board of supervisors for the soil conservation district in which the county is situated and one by the chairman of the public service commission. The members of the board are appointed for terms of four years for which the initial shall start on the first day of July, one thousand nine hundred eighty-eight...

If the appointing authorities believe it constitutes an inherent conflict for one or more of the SWA members to serve due to their personal financial interests or relationships, then they may exercise their appointment power and choose not to re-appoint that person. W. Va. Code§ 22C-4-3. The Commission makes no finding as to whether the members in question should or should not serve; however, if the appointing authorities believe the SWA is not serving the interest of the public due to one or more conflicts which have arisen, then they may address this problem through their control over the make-up of the Board.

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this opinion invalid.

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

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