ADVISORY OPINION NO. 2013-06

Issued On April 4, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The head of a **State Agency** asks whether:

(1) Agency staff may meet with vendors to learn about their products and whether it matters if the vendors have existing contracts with the State agency or the counties it oversees;

(2) He may encourage counties to utilize the services of a particular vendor;

(3) The State Agency may provide money to vendors in order to support their existing relationships with counties;

(4) The State Agency may send counties information about certain vendors who provide services that may assist the counties in providing services to employees or students; and,

(5) It is ever appropriate for the head of the Agency to actively endorse a vendor.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the head of State Agency. The agency he oversees has oversight responsibility for all fifty-five counties in the State.

At times, the head of the agency receives information from vendors who seek to conduct business with the State Agency or the counties it oversees. These vendors may request the agency head to: encourage counties to use their products; send information about the vendors and their products to the counties; provide vendors with money to support their existing relationships with counties, even if there is no current contract between the vendor and the State agency; or to endorse their services or products. The Requester seeks guidance on handling these requests from vendors.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code§ 6B-2-5(b) provides:

> (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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. 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.

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Oftentimes State agencies purchase goods or contract for services. There is no provision in the Ethics Act which prohibits agency staff from meeting with vendors to learn more about their products or services. The action constitutes the performance of usual and customary duties associated with their public positions and does not constitute the prohibited use of public office for private gain. W. Va. Code§ 6B-2-5(b). This conclusion is the same whether or not the vendors have existing contracts with the State agency or the counties it oversees.

Next, the Requester asks whether, as head of the agency, he may encourage counties to use a particular vendor. No information is provided regarding what the Requester means by the term "encourage." Without more information, the Commission is unable authorize an agency head to recommend a particular vendor since this action may constitute a prohibited endorsement. Recently, the Commission addressed this issue in Advisory Opinion 2012-31, and found, in reliance upon its prior opinions and the plain language in the Ethics Act, that endorsing a vendor constitutes the prohibited use of public office for the private gain of another. Such an endorsement may give unfair advantage to one vendor over other equally qualified vendors.

Limited exceptions may exist, For example, if the State has a sole source contract with a vendor, then the Agency may advise the counties that the terms of a State contract require the use of a particular vendor(s) or product(s). Moreover, the Requester, if asked, is not prohibited from communicating to a county his opinion on the quality of services offered by a vendor.

The Requester also seeks guidance on providing information to counties about vendors or their products, or both. The Commission finds the Requester or agency employees may provide information to counties about vendors, as long as the State agency distributes the information in a fair and even-handed manner. Moreover, if a county uses a vendor's product and another county contacts that county about the product, then the county may give its opinion, be it favorable or unfavorable. Nevertheless, the Commission reminds the Requester and counties that even if they have a favorable view of the vendor's product, they may not provide a testimonial or letter of support unless there is an overriding public benefit. Advisory Opinion 2012-31.

The Requester also asks if his agency may provide money to vendors to support their existing relationships with counties. The Requester provides no information to assist the Commission in understanding a situation where this question may arise. As such, the Commission is unable to authorize an agency to provide money to vendors to support their existing relationships with counties. Indeed, a State Agency may only give

money to a vendor if State law expressly authorizes the expenditure.[1] Here, the Requester states there is no contract between the State Agency and the vendors. In the absence of a contract which has been let in accordance with applicable procurement laws, or express statutory authorization to provide such funding, the Commission finds this expenditure of public funds is not permissible as the Requester cites no policies or laws authorizing the expenditure of agency funds for this purpose.[2]

Last, the State Agency asks whether the head of the agency may ever actively endorse a vendor. In accordance with Advisory Opinion 2012-31, he or she may not unless there is an overriding public benefit. If a vendor is selected by the State Agency to provide services to counties through the procurement process, then clearly the State Agency may communicate to the counties which vendor has been selected. Moreover, if another State or a county calls the head of the Agency and asks his or her opinion about a product, then he or she may provide the same. If the Requester wants the Commission to consider whether a proposed endorsement is permissible, then the Requester may submit an opinion request detailing the nature of the endorsement and why he believes there is an overriding public benefit, otherwise such an endorsement is expressly prohibited by the Ethics Act.

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

[1] Obviously, a State Agency is authorized to "give money" to a vendor to pay for services rendered.
[2] *See* Advisory Opinion 2012-20 wherein the Commission explained that, concerning the determination of whether an expenditure of public funds violates the Ethics Act, the Commission relies upon common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure. Still, if the Requester wants to provide more details, the Commission will further analyze this issue.