ADVISORY OPINION NO. 2013-13

Issued On April 4, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks whether the County may lease a county marina to an individual with whom he is a partner in an unrelated private business.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that he is business partners with an individual who submitted a bid to lease a county marina. The shared business is unrelated, and is limited to one endeavor: holding a lease interest in real property located in the same county. The intended purpose of the leasehold is to sublease the land to an oil and gas company for water consumption from the Ohio River. The property has not been sublet to date.

The Requester states that he has no other financial relationship with the bidder or the bidder's other business(es).

The Requester further states that the lease will be awarded to the most appropriate bidder. He states that the County Commission intends to award the contract to the bidder who will best run the marina for the public's use.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads:

> 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.

W. Va. Code§ 6B-2-5(d)(1) provides in part that no elected official or business with which he or she is associated may be a party to or have an interest in a contract which such official ... may have direct authority to enter into, or over which he or she may have control.

W. Va. Code§ 61-10-15(a) states in part:

> 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 ... [over] which such ... member ... may have any voice, influence, or control. ...

Advisory Opinion

Both the Ethics Act, W. Va. Code§ 6B-2-5(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. Pursuant to W. Va. Code§ 6B-2-5(b), a public official may not knowingly and intentionally use his office for his own private gain or that of another person. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Commission reminds public officials that the Ethics Act prohibits them from using their public office or the resulting prestige of their office for their own private gain or that of another. Thus, the Requester may not use his official position to obtain, influence or promote business for his own benefit, or that of a private business with which he is associated. Further, he may not communicate with his fellow County Commissioners about the marina lease or the relative merits of any of the bids related thereto.

The analysis herein will be limited to that of W. Va. Code§ 61-10-15, as a discussion of the provisions of the Ethics Act would be purely academic.

W. Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any member of a county commission who is pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which s/he exercises voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W. Va. 1949).

Here, the Requester has voice, influence, or control over the County's lease of the marina to a private business, by virtue of his position as an elected County Commissioner. In Fisher v. Jackson, 107 W.Va. 138, 147 S.E. 541 (1929), the West Virginia Supreme Court of Appeals held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions in W. Va. Code§ 61-10-15. *See also* Advisory Opinion 2003-02 ("The Board's members control the Board's contracts and their recusal from action in regard to its contracts does not excuse compliance with the requirements of 61-10-15.")

The question here is whether the Requester has a prohibited *indirect* pecuniary interest in the marina lease, under W. Va. Code§ 61-10-15. In Advisory Opinion 2012-39, a County Commissioner owned a business with a County Prosecuting Attorney. The Ethics Commission found that the County Commissioner had at least an indirect financial interest in the County Prosecutor's compensation. Similarly, in Advisory Opinion 2012-11, the Ethics Commission considered the meaning of the statute's inclusion of the term "indirect pecuniary interest", and found that there is a rebuttable presumption that where two adults share a home or otherwise live together, they have at least an indirect financial interest in the employment contract of the other.

Conversely, in Advisory Opinion 2003-02, the Ethics Commission allowed a County Board to contract with a non-profit organization for which a Board member's wife was an independent contractor, so long as his spouse was not directly involved in, or compensated for, providing the specific contracted services. The Commission noted, however, that if the Board member's spouse were to personally perform the services as an independent contractor, the Board member would be indirectly pecuniarily interested in the contract. In that situation, the spouse would become a subcontractor of the Board, and the Board member would violate 61-10-15. Similarly here, the County Commission would be directly contracting with a Commissioner's business partner. Therefore, the Ethics Commission finds that the lease of a county marina to a Commissioner's business partner would violate 61-10-15.

The County Commission may seek a Contract Exemption from the Ethics Commission. The decision to seek a contract exemption is the County Commission's to make, not an individual Commissioner's. As a result, a Commissioner is prohibited from participating in any way in the decision. If the County Commission votes to seek an exemption, then the County must demonstrate to the Ethics Commission that it will experience undue hardship, excessive cost, or substantial interference with the operation of government if it is unable to lease the marina to the Requester's business partner. *See* W. Va. Code§ 61-10-15(h). At minimum, any contract exemption request should include information reflecting the totality of bidders considered and the basis for the County Commission's conclusion that the other bidders are unacceptable. It must consider this matter during a properly noticed public meeting and the Requester must recuse himself from the discussion and vote. Further, the Requester during and outside of meetings, may not attempt to influence the County Commission's decision regarding the decision to seek a contract exemption.

Just as the Requester may not use his position to influence the purchase of the property, the County Commission's decision to award the marina lease must be based upon the best interests of the County, **not** favoritism.

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