ADVISORY OPINION NO. 2013-18

Issued on June 6, 2013
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks whether he may vote on the selection of the County's insurance provider if he is a client of one of the insurance firms the County is considering. If not, then the Commissioner asks whether he may vote in the event of a tie.

FACTS RELIED UPON BY THE COMMISSION

A County Commissioner owns a private business which is a client/customer of a specific insurance firm. The Commissioner does not own or have any financial interest in the insurance firm. The County Commission is considering selecting an insurance firm for the County. The insurance firm which provides services to the Commissioner in his private business is one of the firms being considered. The Commissioner does not stand to gain financially from the selection of the insurance firm.

In the past, the Commissioners have disagreed between insurance proposals. Therefore, in the event of a tie, a third Commissioner will be necessary to make the decision.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (1)... [N]o elected official 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 ...
>
> (3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest...

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:
>
> (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....is .....an employee ...

Finally, W. Va. Code§ 61-10-15(a) reads, in pertinent 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 or service... if, as a member ... he or she may have any voice, influence or control... .

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests.

Both the Ethics Act and W. Va. Code§ 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in a public contract over which their public positions give them control. W. Va. Code§ 6B-2-5(d)(1). W. Va. Code§ 61-10-15, a criminal provision, prohibits covered persons, such as county commissioners, from having a personal financial interest, **directly or indirectly,** in public contracts over which their public positions gives them voice, influence or control. In Advisory Opinion 2013-13, The Ethics Act seeks to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Commission previously prohibited County Commissioners from considering a lease proposal of the County's marina by a business partner of one County Commissioner. In Advisory Opinion 2013-13, a Commissioner had an unrelated private business with one of the bidders on the marina. The Commission found that even though the business was unrelated to the marina, the County Commissioner had 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. Therefore, his partner's gain of this contract resulted in a prohibited contract, unless the County Commission obtained a contract exemption, because of even an indirect pecuniary interest.

In contrast with Advisory Opinion 2013-13, the County Commissioner here has no relationship at all with the insurance firm, other than as a customer. The only financial interest the County Commissioner could be the potential decrease in insurance premiums. That potential decrease is wholly speculative.

The Ethics Commission also ruled a County Commissioner could not vote in matters which may have an indirect financial interest on his business partner. In Advisory Opinion 2012-39, a County Commissioner and County Prosecuting Attorney owned a private business together. The Commission found the County Commissioner could vote on the general budget of the Prosecutor's Office, however, he could not vote on or

participate in matters in which the County Prosecuting Attorney has a financial interest e.g. approving the Prosecutor's expense reimbursement.[1]

In Advisory Opinion 2012-47, the Commission found no violation of the Ethics Act where a County Commissioner voted on the finances of a County Board on which he was nominally paid to serve. The Commission has reasoned that County Commissioners normally serve on county boards as a means for a County Commission to monitor and observe the workings of its boards. The Commission further found County Commissioners, do not, for purposes of the voting provisions in the Ethics Act, have a financial interest which prohibits them, in their capacity as county commissioners, from voting on matters affecting the boards. This same conclusion follows even if they receive nominal compensation for their service on a county board.

The Commission hereby finds that, here, the Requester does not have any financial interest in the insurance firm which seeks the Commission's patronage. Any perceived interest, such as a rate decrease to the Commissioner's private business, is too remote to be considered even an indirect gain financial interest. Therefore, the Commissioner may vote.

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

[1] The Ethics Commission recognized the Prosecutor's salary is set by statute and the salaries and expenses of other employees were not related to the County Commissioner's business interests.