ADVISORY OPINION NO. 2013-19
Issued on June 6, 2013
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Town Attorney** asks whether a Town Council Member may rent a building owned by the Town, and, if so, whether the Council Member must be recused from voting on the lease. He further asks whether the Town may rent the building to the Council Member for less than fair market value.

FACTS RELIED ON BY THE COMMISSION

The Town owns a building which a Town Council Member rents for a private business. The Council Member has had the business located in the town building for many years. The Council Member has been a member of the Council several times, however never at the time the lease of the building came before Council for a vote. The Council member was not on the Town Council at the time the lease was originated.

The Town recently discovered through an appraisal that the amount of rent to the Council Member is less than fair rental value. The lease will expire on July 1, 2013. The Council Member wants to continue to rent the Town's building at the current rental rate.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits a public official from knowingly and intentionally using his or her office or the prestige of his or her office for his or her own private gain or that of another person.

Further, 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-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a municipality the affected government body may make written application to the ethics commission for an exemption from subdivision (1) of this subsection.

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.

In furtherance of this goal, the Legislature established certain limits and prohibitions on a public servant contracting with his/her own governmental entity. In particular, the Ethics Act prohibits public servants from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code§ 6B-2-5(d)(1).

In Advisory Opinion 2008-10, the Commission found an exception to the public contract restrictions exist when a contract was lawful at the time it was agreed to. The Commission ruled that where the public servant had no control over the contract at the time of its execution, or where the public servant's interest in the contract arose after the contract was already in effect, a continuing contract exception exists.

The same situation exists here. The Town Council Member has a lease agreement with the Town. This lease was entered into at a time when the Council Member was not on Town Council, nor did s/he have control over the contract terms. However, now the Council Member's lease is close to expiration and an appraisal has determined the rent is less than fair market value. Further, the Councilperson is now in a situation where s/he could have control over the contract terms. Only July 1, 2013, the lawful continuing contract no longer exists and the Town must determine new terms of the contract.

After expiration of the lease, the Town may not rent its building to a Council Member, even if the Councilmember is fully recused from voting thereon. 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 Town may not do business with one of its public officials or employees, without exercising due diligence in ensuring that all interested persons or businesses are given a full and fair opportunity to compete for the government agency's business. As a result, the Town must advertise the building via public notice, a good faith search, and/or obtaining estimates or, in the case of purchases, reviewing recent comparable sales data. If thereafter the government agency determines that it is in its best interest to contract with one of its public officials or employees, then it must seek a contract

exemption from the Ethics Commission. Due to the Council Member's position on Town Council, absent a contract exemption, the Town may not rent its building to a Council Member, even if the Council Member recuses him/herself from voting thereon.

First, the Town must decide whether its best interest is to seek a contract exemption during a properly noticed public meeting. In order to comply with the Open Governmental Proceedings Act, the issue has to be placed on the agenda in a manner that is specific enough to let the public to know what is being considered. *See* A.O. 2012-16.

The affected Council Member shall not make, participate in making, or in any way attempt to use his or her office or employment to influence a government decision affecting the decision to seek a contract exemption. S/he may also not informally "lobby" or otherwise attempt to influence voting members of, or other decision-makers on the Town Council.

For recusal to be proper, the Councilperson must first fully disclose on the record his/her disqualifying interest in any matter before the Town, then leave the room before discussion, deliberation and vote on the matter. Additionally, the minutes and any other record of the meeting must reflect the basis for the recusal and that the Councilperson left the room during all consideration, discussion and vote on the item under consideration. The Town must then vote to seek the contract exemption.

In order to seek the exemption, the Town must request, in writing, permission from the Ethics Commission for the Town to be a party to a contract that is otherwise prohibited by the Ethics Act. The Town 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 enter into the contract with the Councilperson. The contract exemption request should include information reflecting the following; the basis for the Town's conclusion that entering into the subject contract is in the best interest of the Town; what other options the Town considered and reasons rejected; and the agenda/minutes of the meeting(s) at which the decision to seek a contract agreement was discussed and approved.

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 public agencies unless and until it is amended or revoked, or the law is changed.

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