ADVISORY OPINION NO. 2013-24

Issued on June 6, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Regional Solid Waste Authority** asks if it may continue to contract with an insurance agency while the Authority's Chairperson is Vice President and a principal therein.

FACTS RELIED UPON BY THE COMMISSION

The Chairperson for a Regional Solid Waste Authority's (SWA) Board of Directors is Vice President and a principle of an insurance agency.

The insurance agency has provided workers' compensation insurance to the Authority since coverage was privatized in the State. The Insurance Agency is the only agency in the Authority's multi-county region appointed by Brickstreet.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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

> 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§ 6B-2-5(d)(1) provides in part that no elected or appointed public official or business with which s/he 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 s/he may have control: *Provided, however,* That nothing herein shall be construed to prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which s/he may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of her/his interest in the contract.

W. Va. C.S.R. § 158-8-4.2 reads:

> Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code§ 6B-2-5(d)(3) provides, in part, that if a public official has an interest in the profits or benefits of a contract, then s/he may not make, participate in making, or in any way attempt to use her/his office to influence a government decision affecting her/his financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

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

> (1) Public officials ... may not vote on a matter:
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> (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 or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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Pursuant to W. Va. Code§ 6B-2-5(d)(1), a public official may not have more than a limited interest in the profits or benefits of a public contract over which s/he has direct authority or control; however, this restriction in the Ethics Act also includes a proviso which exempts **part-time appointed** public officials from the prohibition against having an interest in the profits or benefits of a public contract over which they have authority or control, provided that the official, in her/his public position, is excluded from matters relating to the contract.

In Advisory Opinion 2012-12, the Ethics Commission applied the foregoing statutory exception and ruled that a part-time appointed health officer could have interests in public contracts over which she exercised control. *See also* Advisory Opinion 2003-07 (County Farmland Protection Board permitted to contract with part-time appointed Board member).

Here, the SWA Chairperson is a part-time appointed public official and therefore fits within the exception carved out in W. Va. Code§ 6B-2-5(d)(1) allowing the public body to enter into the contract so long as the interested party is recused from the decision-making process.

While part-time appointed officials may have interests in public contracts over which they exercise control, limitations apply. Specifically, a public official with an interest in the profits or benefits of a contract may not make, participate in making, or in any way attempt to use her/his position to influence a government decision affecting her/his financial or limited financial interest. W. Va. Code§ 6B-2-5(d)(3). Further, pursuant to the prohibition against use of public office for private gain, the SWA Chairperson may not use his public position to attempt to persuade his fellow Board members or SWA employees to take favorable action regarding his insurance company.

Therefore, it does not violate the Ethics Act for the SWA to contract with a Board Member if the Board Member is fully recused from any and all matters related to his insurance company, and any and all workers' compensation issues.

For recusal to be proper, the Chairperson must first fully disclose on the record his disqualifying interest, then leave the room during the 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 Chairperson left the room during all consideration, discussion and vote on the item under consideration.

As advisory opinions are prospective only, any future contracts or modifications thereto where a member of the SWA's Board of Directors is, or may be, an interested party to a contract, that member must be fully recused from all discussions and decisions regarding the selection of a vendor and the terms of the contract.

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