ADVISORY OPINION NO. 2013-25

Issued On July 11, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney for a Conservation District** asks whether a conflict of interest exists with an Elected Board Member and, if so, whether it may be cured by his recusal from voting thereon.

FACTS RELIED UPON BY THE COMMISSION

The Conservation District is one of 14 districts that participates in the state Agricultural Enhancement Program (AgEP) which offers a cost share program to local landowners who qualify for the program. The Conservation District receives AgEP funds from the WV State Conservation Committee/WV Conservation Agency.

The AgEP mission is to assist the agriculture cooperators of West Virginia with the voluntary implementation of best management practices on agricultural lands in order to conserve and improve land and water quality. Practices are determined by each individual Conservation District Board and applications are presented to each Conservation District Board for review and approval at monthly board meetings.

The members of the Conservation District Boards are elected.

The Conservation District has a program for lime spreading. Individual farmers or landowners apply to the Conservation District, seeking cost sharing on lime and lime spreading. The Conservation District Board votes to approve each landowner's application to participate in the program. Thereafter, the landowner is notified of the approved application and the landowner is responsible to purchase and spread lime or other nutrients as required by the program. These other nutrients may include fertilizer.

The Conservation District also provides a fertilizer cost sharing program. After the landowner has completed the approved practice of applying the lime and/or fertilizer or both, the landowner then submits invoices to the Conservation District Board for payment review and cost share payment approval. If the landowner has correctly followed the guidelines, then the Conservation District Board votes to approve payment and the Conservation District issues a check payable to the landowner as reimbursement to the landowner who has already incurred the obligation to pay for the lime and/or fertilizer and the cost of spreading thereof.

The Conservation District Board reviews the approved invoices submitted by the landowner and reimburses the landowner, **not** the merchant, at a cost share rate set in

the relevant policy. The cost sharing includes reimbursement for the cost of the lime, delivery and spreading. At no time does the Conservation District ever pay any money directly to the business or entity that spreads or delivers lime or fertilizer.

Only two or three entities or persons in the area provide both lime and/or fertilizer and/or spreading. One of the recently elected Conservation District Board members provides such products and services. (In the past, a Conservation District employee gave landowners the names of qualified individuals to spread lime and fertilizer--including the Elected Board Member--but now the Conservation District no longer does so, but leaves it up to the farmer to locate said sources.)

Thus, the Requester asks whether a conflict of interest exists with an Elected Board Member and, if so, whether it may be cured by his recusal from voting thereon. In the alternative, the Requester asks whether an Elected Board Member may contract with a vendor for delivery and/or spreading of either lime or fertilizer for landowners participating in the lime and/or fertilizer programs.

Additionally, the father of the same Elected Board Member owns a store that sells feed, fertilizer and lime. According to the Requester, the son has no involvement or any economic interest in his father's store and neither father nor son is financially dependent on the other. Other sources of information suggest that the son may have at least a limited financial interest in the store. Further, it is unclear whether father and son have any other financial relationship, e.g. loans together, joint ownership of property, etc.

The Requester asks if the relationship between father and son creates a conflict for a landowner to purchase material for lime and fertilizer from the father's store, and if so, whether recusal resolves the conflict.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits public officials from knowingly and intentionally using their offices or the prestige thereof for their own private gain or that of another person.

W. Va. Code§ 6B-2-5(d)(1) provides in part that no elected 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 over which the part-time official may have direct authority.

W. Va. Code§ 6B-2-5(d)(3) provides in part 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 government, the affected government body may make written application to the ethics commission for an exemption therefrom.

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The Ethics Act prohibits the use of public office for private gain. Thus, the mere appearance of the business of an Elected Conservation District Board Member on a list provided by the Conservation District could cause the public to perceive an appearance of impropriety. Here, it is possible that a landowner could select the board member's business in the hopes of more favorable treatment in current or future contracts.[1] *See* Advisory Opinion 2011-01 (County Council Member's private business must be removed from list provided to customers by Sheriff's Department) As a result, the District is prohibited from providing the name of the business of the Elected Conservation District Board Member either verbally or in writing to any interested landowner.

Next, 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 he or she has direct authority or control. This prohibition contains an exception for part-time **appointed** officials, but there is no exception for **elected** officials.2 Thus, the Conservation District Member is an elected member and as such, is subject to the prohibitions in W. Va. Code§ 6B-2-5(d). The Commission must determine, then, whether the reimbursement of a participating landowner constitutes a contract in which the Elected Board Member has a financial interest.

Since the Conservation District Board approves the application of each landowner prior to the procurement of the lime and/or spreading, each Board Member has direct authority or control over each such application. Similarly, after a landowner incurs the expense, the Board votes to approve the landowner's request for reimbursement of her/his payment to a provider for goods or services; thus, each Board Member has direct authority or control over each such reimbursement request. If a Board Member provides the goods or service to a landowner, then that Board Member has a financial interest in the benefits of a public contract. The fact that the landowner pays for the service out of pocket prior to being compensated by the Conservation District does not solve the problem given that the transaction is between the landowner and an Elected Board Member.[3]

An exception to the public contract restrictions in the Ethics Act exists if it is a continuing contract which the governing body entered into prior to the election or appointment of the affected member to the governing body. In Advisory Opinion 2008-10, the

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[1] Depending on the information disclosed on a landowner's application, the Board Member could also be perceived to be using confidential information to further his or her own personal interests in violation of W.Va. Code§ 6B-2-5(e). For example, by directly soliciting land owners before any other service froviders have an opportunity to make their services available.

There is also an exception for contracts which do not exceed $1,000 per calendar year. Based upon information and belief, however, this exception is inapplicable.

[3] For purposes of the prohibitions in "d", it is not sufficient for public officials to recuse themselves from voting.

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.

As a result, if a participating landowner used the business of the Elected Board Member **before** his election, then the Conservation District Board is permitted to reimburse that landowner for those expenses. The Elected Board Member shall recuse himself from any such vote. Otherwise, based upon the foregoing, the Commission finds that the Conservation District may not reimburse landowner expenses where the provider is a Member of the Conservation District Board unless the Conservation District seeks and obtains a contract exemption. In order to obtain a contract exemption, it must demonstrate that imposing this restriction in the Ethics Act will result in excessive cost, undue hardship, or other substantial interference with the operation of the District. W. Va. Code§ 6B-2-5(d)(3).

The Ethics Commission notes that the hardship may fall to landowners who have already paid the Elected Member **after** his election, through no fault of their own. In Contract Exemption 2007-01, the Commission granted an exemption to a County Commission to allow an elected Commissioner to continue to rent HUD housing even though the County Commission exercised control over the County Housing Authority which administers HUD housing funds, and wrote:

> The Commission finds that to require the tenant, a widow, to vacate the premises would impose an undue hardship on her. While in most cases the " hardship" must be suffered directly by the government entity making a request, the Ethics Commission finds that ... in limited circumstances, [the statutory language] allows it to grant an exemption when a citizen ... will experience undue hardship.

The Requester has asked whether an Elected Board Member may contract with a vendor for delivery and/or spreading of either lime or fertilizer for landowners participating in the lime and/or fertilizer programs. Based on the Commission's past precedential opinions, the proposal is still a prohibited contract. The Ethics Commission has consistently ruled that subcontracts are subject to the same prohibitions in the Ethics Act as the contracts are. *See generally* Advisory Opinions 2013-22 and the opinions cited therein. Thus, the Elected Board Member may not contract with a vendor to provide goods and services that the Ethics Act prohibits him from directly providing.

Finally, the Requester states that the father of the same Elected Board Member owns a store that sells feed, fertilizer and lime. According to the Requester, the son has no involvement nor any economic interest in this store and is not dependent upon his father for financial assistance, nor is his father dependent upon him for financial assistance.

Other sources of information suggest that the son may have at least a limited financial interest in the store. Pursuant to W. Va. Code § 6B-2-6(a), all Elected Board Members are required to submit annually a Financial Disclosure Statement (FDS) to the Ethics Commission by February 1. On the FDS submitted last year, the Elected Board Member at issue here did not identify his father's business as an entity in which he has a financial interest or as a source of income. By the same token, however, his FDS did not list his lime and fertilizer business either, rendering it impossible to rely on the FDS definitively.

Based on conflicting and missing information, the Ethics Commission tabled this opinion last month and requested additional information about the Board Member's financial relationship with his father. The Elected Board Member, however, has declined to respond. The Commission notes that, despite repeated reminders, the Elected Board Member has failed to file his FDS this year. This fact, together with his failure to cooperate with the Commission in its attempt to obtain additional relevant information, troubles the Commission. The Commission frowns on such conduct, and questions whether the Elected Board Member is intentionally avoiding disclosing information that could subject him to prosecution for violating the Ethics Act.

Without more information, the Ethics Commission is unable to answer this question conclusively. **The affected Elected Board Member shall, within twenty (20) days comply with the Ethics Commission's request for information and submit a new request for an advisory opinion.** He is advised that knowingly failing or refusing to file a Financial Disclosure Statement constitutes a misdemeanor. W. Va. Code § 6B-2-10(c). He is further advised that knowingly giving false or misleading information to the Ethics Commission or knowingly and willfully concealing a material fact in filing the FDS constitutes a misdemeanor and could result in an ethics complaint against him. W. Va. Code§§ 6B-2-10(b) and (f). Pursuant to W. Va. Code§ 6B-2-2, the Ethics Commission is authorized to initiate a complaint against a public official should credible evidence appear thats/he has engaged in conduct that is a material violation of 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 public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson