Overruled, in part, by AO 2022-19

ADVISORY OPINION NO. 2013-30

Issued on August 1, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Commissioner** of a State Agency asks if he may retain partial ownership of a race horse that may compete in the State.

FACTS RELIED UPON BY THE COMMISSION

A Commissioner of a State Agency that promotes and regulates live dog and horse racing throughout the State owns a 20% interest in a race horse. The horse has previously competed out-of-state but the principal owner is considering racing the horse in West Virginia. Currently, there are two tracks within the State where live horses compete and those races are broadcast to other locations. The State Agency approves the racing schedules, purse amounts for the races, how bets may be placed, and general care and treatment of the animals including medications available on the day the horse competes.

The State Agency promotes and regulates live dog and horse racing throughout the State. Currently, there are two tracks within the State where live horses compete and those races are broadcast to other locations. The State Agency approves the racing schedules, purse amounts for the races, how bets may be placed, and general care and treatment of the animals including medications available on the day the horse competes. It is also empowered to investigate alleged violations, to remove racing officials or employees, and to delay payment of disputed purse winnings.

CODE PROVISIONS 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(e) reads in relevant part:

> No present ... public official ... may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code§ 6B-2-5U) provides in part that public officials may not vote on a matter in which they have a financial interest, including stock holdings equal to five percent or more of the total outstanding stock of any class unless they are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses.

W. Va. Code §6B-2-5(k) provides in part that no public officials may participate within the scope of his or her duties as a public official, except through ministerial functions, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation or association in which the public official or employee or his or her immediate family owns or controls more than ten percent.

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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. W. Va. Code§ 6B-1-2(d).

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Regardless of the answer to the Requester's question, the Ethics Act prohibits him from using his public office to promote or benefit the race horse or other owners thereof. W. Va. Code§ 6B-2-5(b). Even if the Commission were to find the ownership interest permissible, the Requester would not be allowed to vote on any matters relating to horse racing because W. Va. Code§ 6B-2-5U) prohibits public servants from voting on matters in which they have a financial interest.

The current and proposed Legislative Rule §178-1-4 permits each Commissioner "full and complete entry to any and all parts of the grounds of a racing association licensed to conduct thoroughbred racing," including trailers, vehicles, and stables. Such access could give the Requester an unfair advantage over other horse owners. W. Va. Code§ 6B-2-5(e) prohibits public servants from using confidential information to further his own personal interests. Even if the Requester does not use confidential information, the Ethics Act seeks to avoid even the appearance of impropriety.

Further, Legislative Rule§ 178-1-25 requires each person who has at least a five percent ownership in a horse to hold an occupational permit issued by the Requester's Agency, which would require the Requester to come before his own Agency for a permit. W. Va. Code§ 6B-2-5(k) prohibits public officials from participating in licensing and rate-making proceedings that directly affect the license or rates of an organization which the official

has more than a ten percent interest and does not include a class exception similar to subsection U). The Requester has a twenty percent interest in a horse which, if it competes in West Virginia, would prohibit him from obtaining permits and licenses for himself and his horse. He is also prohibited from voting on licenses or pay rates generally because his interest would be directly affected.

Finally, Legislative Rule§ 178-1-20.2 prohibits owners and employees of race tracks who have a twenty percent or greater interest in an organization which owns race horses to allow an interested horse to compete under his, her, or its own license. Presumably, this limitation is aimed at curbing both actual impropriety, as well as the appearance of impropriety. While not dispositive here, when read with the Ethics Act, the Legislative Rule's prohibition against track owners owning at least a twenty percent interest in a horse that will compete at its location prohibits a situation, and resulting conflict, such as the Requester's situation. The Requester's ownership would therefore create a use of public office for private gain which both the Agency's Legislative Rules and the Ethics Act were designed to prohibit.

As a result of the foregoing analysis, the Commission hereby finds that the Ethics Act prohibits the Requester from retaining partial ownership of a horse that will compete in West Virginia.

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