ADVISORY OPINION NO. 2013-31

Issued On July 11, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the Board of Public Works** asks whether he may allow a private foundation to "piggyback" or participate in the State's Purchasing Card program.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Member of the Board of Public Works. The State of West Virginia has a contract with a financial institution to provide various financial services to the State of West Virginia. As part of this contract, the State receives a rebate from the financial institution which is based on the dollar amount spent on the card. The Requester asks whether a private foundation may use the State's Purchasing Card Contract and also receive a rebate from the financial institution.

The purpose of the private foundation is to aid, strengthen and further in every proper and useful way the work and services of a State University and its affiliated non-profit organizations. The private foundation is a tax-exempt, non-profit organization.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person... The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

ADVISORY OPINION

The Ethics Commission will examine its prior relevant advisory opinions. In Advisory Opinions 95-05, 95-28, 2005-04 and 2012-06, the Commission authorized a public agency to enter into arrangements that provided certain benefits to private businesses. In each case, the Commission concluded that the agreements involved an overriding public benefit sufficient to legitimize any resulting private gain. Thus, even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain. In each of these Advisory Opinions, the overriding public benefit arose in the context of an economic

development initiative. "Public benefit was the paramount goal. The benefit to private business interests was incidental and secondary." Advisory Opinion 2000-19.

For example, in Advisory Opinion 95-05, the Commission held that it would not violate the Ethics Act for a State Official to provide a letter of introduction to be included in a "coffee table book" about West Virginia being published by a private company because there were overriding legitimate public policy goals of educating the general public about the history and culture of the state and of providing a reference to promote economic development in the state.

Likewise in Advisory Opinion 95-28, the Commission held that it was permissible for a State Official responsible for the promotion of the state's tourism and economic development to invite a select group of individuals involved in the areas of high-end tourism and economic development to play golf at the Agency's expense. Further in Advisory Opinion 2005-04, the Commission found that a proposed agreement to link a State Agency's website with a software company allowing individuals to purchase discounted accounting software would not violate the Ethics Act. The State Agency would receive a commission from software sales that could be used to fulfill its statutory mission. Even though there was some element of private gain; the Commission concluded that the public benefit outweighs any potential for improper financial gain.

In Advisory Opinion 2012-06, the Commission concluded that the Requester's appearance at an international forum provides a benefit to West Virginia by: "allowing our State to be recognized for its achievements in fraud control; allowing the Requester to observe first-hand how Australian state governments approach financial management and procurement; and providing the Requester an opportunity to network with other government officials who also implement and manage electronic payments." The Commission authorized the Requester to attend the forum at a State subcontractor's expense, with limitations.

In other situations, however, the Commission has prohibited public officials or agencies from endorsing private entities. For example, in Advisory Opinion 2002-18, the Commission held that a government agency should not permit the use of its dog in the production of a dog food commercial since there is improper private gain to another with no overriding public benefit.

Similarly, in Advisory Opinion 2000-19, a public employee asked if she could endorse a software vendor in exchange for the vendor providing advanced training and software support to the State Agency. The Commission concluded that the proposed endorsement constituted the prohibited use of public office for private gain with no overriding public benefit. Likewise, in Advisory Opinion 2005-10, the Ethics Commission ruled that a Division Director of a State Agency that regulates motor vehicles was prohibited from appearing in an advertisement promoting an automobile dealer because there was private gain with no overriding public benefit.

Finally, in Advisory Opinion 2013-12, the Commission held that a Public Official appearing in a video posted on the website of a financial institution providing his office's electronic payment program would violate the Ethics Act because the State Official would lend the prestige of his public position to a private business for which there is no overriding public benefit.

Here, the Commission finds the financial benefit to the private foundation described herein would result in an overriding public benefit. The purpose of the foundation is to support a public institute of higher education. Thousands of citizens of West Virginia are students of the Public University. The education of the State's citizens is a paramount goal of the State. Both students and the State are the beneficiaries of the donations made to the private foundation formed to aid the Public University. A rebate from a financial institution would further the goals of the foundation and benefit the public by advancing the educational and economic development goals of the State.

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 similarly situated public servants unless and until it is amended or revoked, or the law is changed.

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