ADVISORY OPINION NO. 2013-37

Issued on July 11, 2013

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks if an appointed member of the County Sheriff Deputy Civil Service Commission may also be an employee of the County Sheriff's Department, and if not, whether the employee may remain on the Deputy Civil Service Commission if s/he resigns from the County Sheriff's Department.

FACTS RELIED UPON BY THE COMMISSION

West Virginia Code §7-14-12 governs the provisions of Civil Service Boards (hereinafter CSB). Those provisions direct that each CSB shall consist of three commissioners, one appointed by the bar association of the county, one appointed by the deputy sheriff's association of the county, and one appointed by the county commission of such county. The County Commission may remove a commissioner; however, a petition must be filed and a hearing held in the circuit court of the county in order to effect removal. West Virginia Code §7-14-3.

A CSB either acting as a body or by single commissioner may initiate and investigate, with full subpoena power, any deputy sheriff. The Board also holds exams and sets training for prospective and active deputy sheriffs. From those exams and trainings, the board maintains a "promotion list" which designates the order in which candidates should be hired and promotions be made within the department. The Board also sets and enforces rules regulating the conditions under which deputy sheriff's may work in addition to their duties.

The CSB must also determine the conditions under which a deputy is removed, discharged, suspended, or reduced in rank. In the event a Sheriff takes action against a deputy, the Sheriff must supply the Board with a written statement of the reasons for that action. Should the deputy demand, the Board also holds a public hearing wherein the Sheriff must justify his administrative action. Either party may appeal the Board's ruling to the Circuit Court of the county.

Should the Sheriff make an appointment or promotion contrary to the "promotion list' maintained by the CSB, s/he is deemed guilty of a misdemeanor. The obstruction of an investigation or examination by any individual is also deemed a misdemeanor. Both are offenses punishable by fine and imprisonment.

In the situation here, a county commission appointed a member to the CSB in 1997. In April 2007, that CSB member was hired by the Sheriff in the county on which s/he sits as a CSB member. The member has sat on the CSB since his/her initial appointment, including since s/he has been employed by the county Sheriff.

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(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to make unlawful the employment of any person with any governmental body....

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

> U) *Limitations on Voting.*
>
> (1) Public officials ... may not vote on a matter:
>
> > (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 ... 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 (emphasis added).
>
> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

ADVISORY OPINION

The Ethics Commission has addressed this situation in several previous opinions. In Advisory Opinion (hereinafter A.O.) 2011-12, the Commission determined that for purposes of this voting limitation, employment by a public agency constitute a personal financial interest which prohibits a public employee from voting on matters which affect his or her public employer. The Commission reasoned that public employees have a financial interest in their continued employment and the financial stability of their public employer. Further, A.O. 2011-12 decided that a financial interest requires recusal in all matters affecting the public employer. *See also* A.O. 2011-03 wherein the Commission ruled that a County Commissioner may **not** vote on matters relating to a city-owned hospital where he is employed; and, A.O. 92-13 wherein the Commission ruled that a

Director of a State Agency, in his capacity as an appointed Advisory Board Members, may **not** vote on matters relating to the public agency by which he was employed.

Further, in A.O. 2012-05, a County Commissioner was also employed as a teacher in a local high school. The Requester inquired as to whether he could vote on matters involving his employer, the Board of Education. The Ethics Commission ruled in his employment as a teacher precluded him from voting on matters affecting the Board of Education. Thus, he was directed to recuse himself from voting on those matters.

Here, the CSB appointee sits on the board to perform his statutory duties, which solely involve the Sheriff Department. Those duties include the initiation of investigations of employees within the Sheriff's office. As a result, the commissioner is tasked with the statutory authority to investigate himself and any of his co-workers. Further, the member must develop training and administer tests for use to determine the order in which he and his co-workers are promoted. Finally, the member must determine if the Sheriff, his employer, acted appropriately in a disciplinary action. It is clear in this case, the member who is employed by the Sheriff has a personal financial interest in all of these statutory duties. Therefore, the CSB member may not sit on the CSB whiles/he is employed by the Sheriff.

Further, it is the opinion of the Commission that recusal is not appropriate in this situation. Here, the **only** issues upon which the member votes are issues of investigations, training, promotions and disciplinary actions of his employer, the Sheriff. Therefore, the Commission finds that the CSB member may only continue to serve on the Board ifs/he resigns his/her employment with the Sheriff. At the times/he is severed from employment, s/he no longer has a direct financial interest in matters involving the Sheriff.

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