ADVISORY OPINION NO. 2013-43

Issued On October 3, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Solid Waste Authority** asks what is its obligation, if any, when a member has a purported conflict of interest but refuses to recuse himself.

FACTS RELIED UPON BY THE COMMISSION

The Requester previously sought an opinion from the Ethics Commission to determine whether a member of the County Solid Waste Authority (SWA) should recuse himself because of a potential conflict of interest. In that opinion, recorded as Advisory Opinion 2013-03, the Commission ruled in relevant part that:

> The SWA's attorney should carefully review with the affected SWA Members this rule of law and determine whether in fact the Board Member/Banker is an employee, and whether he has been involved in approving loans for the Board Member/Waste hauler. If so, then the SWA Member/Banker must recuse himself from matters affecting the SWA Member/Waste hauler ... [t]he Board Member/Banker shall also recuse himself from matters relating to the lawsuit.

Accordingly, the SWA's attorney reviewed this rule of law in accordance with the Commission's opinion, and determined that the affected board member has a conflict of interest. The attorney based this decision on the nature of the Member/Banker's relationship with the Member/Waste Hauler, and also because the Member/Banker was relaying information to the Member/Waste Hauler that was obtained during Executive Sessions from which the Member/Waste Hauler was recused.

According to the Requester, the Member/Banker has ignored the attorney's advice and stated that he would not recuse himself from the meeting in question or any meeting.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or public employee may not knowingly or intentionally use his or her office or the prestige of his and her office for his own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private

gain does not constitute use of public office for private gain under this subsection.

W. Va. Code§ 6B-2-5(d)(1) explains in relevant part that:

> In addition to [W. Va. Code§ 61-10-15], no ... public employee ... may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control.

W. Va. Code§ 6B-2-5(e) states:

> No present or former public official or employee 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) states in relevant part:

> (B) If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months.

ADVISORY OPINION

This opinion is a matter of first impression. The Requester asks what its own obligation is when one of its members refuses to comply with the Ethics Act. The question presented is similar in content to Advisory Opinion 1997-30. In that case, a Town Recorder was presented with bills for Town purchases made from a business owned by a Council Member. The Recorder was concerned as to whether she would violate the Ethics Act by paying the bills.

The Commission explained that the Ethics Act prohibits public servants from being a party to a public contract, purchase or sale, and if the Recorder paid the bills in question, the Council Member in question would receive public funds he or she would not have a right to receive. Therefore, the Recorder would be guilty of using her office for the private gain of another in violation of W. Va. Code§ 6B-2-5(b)(1).

Here, similarly, the potential exists for at least one underlying violation by another public servant. In this case the Member/Banker might violate W. Va. Code§§ 6B-2-5(b), (d)(1), (e), and U) by failing to recuse himself. The question, then, is whether the Requester,

i.e. the other members of the governing body, individually or collectively, violate the Ethics Act when the member with the purported conflict of interest refuses to recuse himself. The instant case can be differentiated from Advisory Opinion 1997-30 by the nature of the Requester's involvement with the alleged violations. In order for the Recorder in Advisory Opinion 1997-30 to violate the Ethics Act, she would have to take an affirmative step to assist with the ethics violation by paying the bills - mere knowledge of the bills would not be enough to trigger a violation of the Ethics Act. In other words, the Recorder's own conduct in paying the bills was the operative issue.

In this case, Respondents did nothing to assist with the Member/Banker's alleged violations, and therefore should not be guilty of assisting in his actions. The rationale behind this decision is similar to a classic tort law concept - namely, that while a person may be held liable for committing a negligent act, the same person may not be held liable for failing to take any action while another commits one. Similarly, here, the Commission hereby finds that individual members of a governing body do not violate the Ethics Act by continuing a meeting after one member has refused to recuse himself.

Here, the individual members are not obligated to physically remove the Member/Banker from the meeting; instead, the remaining members of the Solid Waste Authority have satisfied their ethical obligation by complying with the steps outlined in Advisory Opinion 2013-03. If a member of the Solid Waste Authority who has a conflict of interest as defined by the Ethics Act refuses to recuse himself as required by the Ethics Act, then that member violates the Ethics Act thereby.

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this opinion invalid.

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 public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman