ADVISORY OPINION NO. 2013-47

Issued on October 3, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Town Manager** asks if Town Council members who are currently or formerly employed, or whose spouse is currently employed, by the County Board of Education may vote on issues concerning property deeded to the Board of Education by the Town.

FACTS RELIED UPON BY THE COMMISSION

A County Board of Education (BOE) is in the process of closing and selling an elementary school. The school building is situated over two parcels of land. One of the two parcels was owned BOE by the Town until 1950 when the Town deeded the parcel to the for public school purposes. The deed contains a reversionary clause which returns ownership to the Town in the event the property ceases to be used for public school purposes.

The BOE has asked the Town Council to allow the BOE to retain the lot so that the BOE may sell the property as a whole building. The language in the prior deed automatically reverts ownership from the BOE back to the Town once the land is no longer used for public school purposes. Therefore, the Town must vote on whether to take affirmative action to deed its interest in the property to the BOE.

Various Council members are currently or formerly employed, or their spouse is currently employed, by the BOE. The Town asks if those Town Council members may vote on issues relating to the property.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (1) 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.... 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.

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

> (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 or an immediate family member 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.

W. Va. Code§ 68-1-3(b) "Business" means any entity through which business for-profit is conducted including a corporation, partnership, proprietorship, franchise, association, organization or self-employed individual.

W. Va. Code§ 61-10-15 reads, in relevant part:

> (a) It is unlawful for any ... district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control

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The basic concept of the Ethics Act is that public servants may not use their public positions for their own private gain or the private gain of others. The Act's Legislative findings explain that the Act is intended to prevent public servants from using their public positions "...for personal gain beyond the lawful emoluments of their position ... [or] ... to benefit narrow economic or political interests at the expense of the public at large ...."

Various members of Town Council are connected to the BOE. One is a current teacher; another is married to a current teacher; and two others are retired employees and receive a pension as a result.

In Advisory Opinion 2001-29, relying on Legislative Rule§ 158-9-1, the Ethics Commission found that members of City Council may not vote on matters that are personal to them. The Rule provided that a matter is personal to a public servant" ... when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety." The Ethics Commission found that pension and retirement plans are personal to the members of City Council, and as a result they were prohibited from voting on a matter which would affect a company from which they are receiving retirement benefits. Legislative Rule§ 158-9-1 was repealed by operation of statute in 2008 when the West Virginia Legislature added the less strict provision on voting to the Ethics Act, codified as W. Va. Code§ 68-2-50).

The Ethics Commission has not yet had the opportunity to determine whether the less restrictive provisions of W. Va. Code § 68-2-50) prohibit public servants from voting on matters relating to their former employer that now holds their pension and retirement plans.

W. Va. Code § 6B-2-5U)(1)(A) prohibits public officials from voting on a matter 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 or an immediate family member is an employee. W. Va. Code§ 6B-1-3(b) defines business as "any entity through which business for-profit is conducted ...." The definition does not include a governing body.

In Advisory Opinion 2012-05, the Commission found that W. Va. Code§ 6B-2-5U)(1)(A) prohibited a candidate for County Commissioner who was also a teacher for a County BOE from voting on matters involving his employer, the BOE. In that opinion, the Ethics Commission relied upon the language in the prohibition against voting on matters related to a business by which he was employed, and determined that his employment by a public agency constitutes a financial interest requiring recusal. The Commission, however, neglected to consider the definition of "business", and that definition does not mention a governing body. W. Va. Code§ 6B-1-3(b). As a result of this oversight, the Commission hereby overrules Advisory Opinion 2012-05, and now finds that the Ethics Act does not prohibit a public official from voting on a matter in which his or her **public** employer has a financial interest.

Additionally, the retired employees have no financial interest, as defined by W. Va. Code § 68-2-50))(1)(A) in whether the Town decides to deed its interest in the property. Therefore, the Ethics Act does not prohibit them from voting on whether the Town should deed its interest in the property to the BOE.

The Town Council member who is currently employed by the BOE as a teacher is also subject to the stricter criminal provision of W. Va. Code §61-10-15. This provision prohibits teachers from becoming pecuniarily interested, either directly or indirectly, in the proceeds of any contract if, as a teacher, he or she has any voice, influence, or control over the contract. Here, the teacher does not have control over the contract through his position as teacher. Therefore, W. Va. Code§ 61-10-15 does not prohibit the Town Council member employed as a teacher from voting on the matter.

As a result of the foregoing analysis, none of the affected members of Town Council has a financial or pecuniary interest in whether the Town grants its remaining rights to the land currently owned by the BOE. Therefore, the Commission hereby finds that both current and retired employees of a County BOE, and their spouses, who are also members of a Town Council, may vote on whether the Town should deed its remaining rights to property to the County BOE for use as a public school only. Further, there are no facts to suggest that anyone on Town Council has any other financial or pecuniary interest in the ultimate sale of the property by the BOE.[1]

[1] The Requester does not indicate whether any of the Town Council or County BOE members, family members, or associated businesses are interested in purchasing the property. If any of the above wish to purchase the property, then those individuals should contact the Ethics Commission for additional guidance.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* and W. Va. Code§ 61-10-15 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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman