ADVISORY OPINION NO. 2013-50

Issued on November 7, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks if its employees assigned to the various Conservation Districts may participate in the state-funded Agricultural Enhancement Program that is administered by the districts.

FACTS RELIED UPON BY THE COMMISSION

Conservation Districts were created to conserve land from soil erosion. *See* W. Va. Code§ 19-21A-2. The districts have been in existence in some form since 1939 and were originally called "Soil Conservation Districts" until 2002 when their name was changed to "Conservation Districts." A district may consist of land in one or more counties. Landowners in one or more counties may form a district by petitioning the State Conservation Committee.

Conservation Districts participate in the Agricultural Enhancement Program (AgEP) which offers a cost share program to local landowners who qualify for the program. This program provides cost-share for a variety of best management practices farmers can implement to reduce soil erosion, improve water quality and enhance production on their farms, e.g., one cost-share practice involves the spreading of lime.

The AgEP mission is to assist the agriculture cooperators of West Virginia with the voluntary implementation of best management practices on agricultural lands in order to conserve and improve land and water quality. Practices are determined by each Conservation District and applications are presented to each Conservation District Board for review and approval at monthly board meetings.

Districts have the statutory power to conduct surveys relating to the character of soil erosion. Districts may also expend public funds for demonstration projects on land within a district for the purpose of determining which "means, methods and measures" best prevent soil erosion. Some of the Districts' programs involve cost-sharing whereby landowners receive certain benefits but also pay a portion of the cost.

The State Agency is a board that oversees the implementation of soil conservation and watershed programs in the State. The State Agency is also charged with working with the Conservation Districts and the elected Conservation Supervisors to implement conservation programming at the local level.

The Requester asks if the employees assigned to the various Conservation Districts may participate in the AgEP that is administered by the districts. The employees provide

services to the districts and to the AgEP. They are not, however, members of any Conservation District.

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-2-5(d) reads, in relevant part:

> (1) No elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated 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.

> (3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

ADVISORY OPINION

In Advisory Opinion 2010-20, the Commission ruled that a Conservation District was not permitted to expend public funds to construct a soil conservation project on property owned by an Elected Board Member of the District. In reaching this conclusion, the Commission relied upon W. Va. Code§ 6B-2-5(d)(1) which prohibits full-time public servants from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control.

The State Agency employees assigned to work with the Conservation Districts either serve as administrative staff who take minutes at District meetings and accept payments or are technicians who verify that the work required for various programs was completed. Therefore, the Commission finds that the State Agency's employees **may** participate in the AgEP program because the employees do not exercise direct authority or control over the program. The employees are cautioned, however, not to take any actions relating to their own involvement in the AgEP program beyond ministerial functions, including

evaluating whether the necessary work was completed to fit with the AgEP program's guidelines for their own participation, or approving any payment thereof.

The staff advice rendered herein is based upon the facts provided. If all material facts have not been provided, or if new facts arise, you should contact us for further advice as it may alter the analysis and render this advice invalid. This advice is limited to the analysis of whether the Ethic Act would be violated by the proposed conduct. The Ethics Commission is without authority to determine whether other laws or rules, including the policies of the government agency by which you are employed or serve, prohibit or otherwise restrict the proposed conduct.

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