ADVISORY OPINION NO. 2013-52

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Ambulance Authority** asks if it may purchase land from the brother of the Board President. The Requester further asks what procedures it must follow to ensure an arm's length transaction.

FACTS RELIED UPON BY THE COMMISSION

The Requester provides emergency ambulance services to residents of the county in which it is located. Pursuant to W. Va. Code§ 7-15-5, its members, including the President, are appointed by the County Commission and serve only part-time.

The County Ambulance Authority ("Authority") asks if the Ethics Act permits it to purchase land owned by the Board President's brother. The Requester states that the Board President and his brother do not have any businesses together, do not reside together, and to the Requester's knowledge, have no financial relationship. The Requester further states that after an exhaustive search for alternative property, the Board President's brother's land is the only land in the area suitable for the Authority's needs.

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. 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. 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.

Further, W. Va. Code§ 6B-2-5(d) states, in relevant part:

> (1) ... [N]o elected ... official ... or member of his or her immediate family ... may be a party to or have an interest in the profits or benefits of a contract which the official ... may have direct authority to enter into, or

over which he or she may have control: Provided, however, That nothing herein shall be construed to ... prohibit a part-time appointed public official from entering into a contract which the part-time appointed pubic official may have authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation therefore, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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 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§ 6B-1-3(f) reads, in relevant part:

"Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

Finally, W. Va. Code§ 61-10-15(a) reads, in pertinent part:

It is unlawful for any member of a county commission ... 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...

ADVISORY OPINION

Both the Ethics Act and W. Va. Code§ 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in a public contract over which their public positions give them control. W. Va. Code § 6B-2-5(d)(1). Since the Requester is a county entity, the Commission must also consider

W. Va. Code§ 61-10-15.

The first issue to address is whether the Board President has a prohibited financial interest in the purchase of the land of his brother. If an immediate family member, e.g. a son, resides with the county official or if the county official has a financial relationship with the relative (e.g. business together or co-sponsor of a loan), then the county official has a financial interest in a county contract. See Advisory Opinion 2012-03. In that opinion, the Commission found that because the Requester's son resided with his father (Deputy Chief), the father had financial interest in the employment of his son, and therefore a financial interest in any employment contract. See *also* Advisory Opinion 2012-11, wherein the Commission held that unrelated, unmarried adults have a financial interest in the employment of each other under W. Va. Code§ 61-10-15.

By contrast, the Commission held in Advisory Opinion 2012-02 that a County Commissioner, who was also a licensed real estate sales associate, could purchase property from a real estate business with which he was associated. The Commission considered W. Va. Code§ 6B-2-5 (d), (f) and U). In that opinion, the County Commissioner, as a real estate agent, did not have a financial interest in the sale of property because mere agents are not included in the statutory definition of "associated" with a business as defined by the Act and its Legislative Rule. The County Commissioner, however, was not permitted to participate in the voting under W. Va. Code § 6B-2-5U), because the definition of "associated" is broader under the voting provision.

Likewise here, W. Va. Code§ 6B-2-5(d) does not prohibit the contract at issue because the definition of "immediate family member" does not include "brother" or "sibling" (as it does "child" in Advisory Opinion 2012-03). W. Va. Code§ 6B-1-3(f). Further, there is no financial relationship between the brothers. Therefore, the Board President does not have "an interest in the profits or benefits of the contract" under W. Va. Code § 6B-2-5(d). Even further, the Board President would not be subject to (d) because he is a part-time, appointed public official.

In regard to voting, the Ethics Commission must consider and apply the voting provision of the Ethics Act, codified at W.Va. Code§ 6B-2-5U). For the reasons set forth above, the Commission hereby finds that the Board President does not have a financial interest--as defined by the Ethics Act-- in the proposed property purchase. Therefore, the Board President may deliberate and vote thereon.

While the Ethics Act assists public servants in avoiding conflicts, the Legislature has also recognized that "[S]tate government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter.... " W.Va. Code§ 6B-1-2 (c).

Next, the Commission hereby finds that the President of the County Ambulance Authority is a county official subject to the restrictions of W.Va. Code§ 61-10-15. This criminal provision strictly prohibits a county official from having a direct or indirect financial interest in a contract. Since the Board President does not have a financial relationship with his brother and they live separately, the Board President is not "pecuniarily interested, directly or indirectly, in the proceeds" of the purchase of land from his brother.

Accordingly, the Commission hereby finds that the purchase of land from the Board President's brother is not prohibited under the Ethics Act nor W. Va. Code§ 61-10-15, and that the Board President may participate in the deliberation and vote related to the purchase pursuant to W.Va. Code§ 6B-2-5U) because the Board President's brother is not an immediate family member for purposes of§ 6B-2-5U) as herein set forth.[1]

The Requester also asks what procedures it must follow to ensure an arm's length transaction. First, the private gain provision of the Ethics Act prohibits favoritism in the selection process by virtue of the familial relationship. See W. Va. Code § 6B-2-5(b). The Ethics Commission has not been made aware of any facts to suggest that the proposal is based on favoritism. Before the Requester purchases the property, it shall carefully evaluate and document the reasons why this particular land is most suitable to the Authority. Further, the purchase price shall be based upon a reliable appraisal, and shall not exceed the fair market value of the property.

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

[1] The Commission further notes that it granted a contract exemption to a city allowing it to purchase property from its Mayor where "there does not appear to be other suitable property which is available for this purpose". *See* Contract Exemption 2012-03.