ADVISORY OPINION NO. 2013-53

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** member asks if he may vote to change the Board's financial institution to a local bank in which he is a shareholder. The Requester also asks if he is permitted to remain on the board if the measure passes.

FACTS RELIED UPON BY THE COMMISSION

Requester holds a position on a County Board of Education (BOE). Apparently, the BOE is considering changing banks. The Requester also owns two-tenths of a percent (0.2%) of the bank in question's stock. The bank pays the Requester dividend checks quarterly, which average eight hundred dollars ($800.00) per quarter, or three thousand two hundred dollars ($3200.00) per year.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

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

> 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) states in relevant part:

> In addition to [W. Va. Code§ 61-10-15], no elected or appointed public official ... 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. *Provided,* [t]hat nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

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

> In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate

family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract.

W. Va. Code§ 6B-2-5(d)(3) states:

(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.

W. Va. Code 61-10-15(a) states:

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

W. Va. Code 61-10-15(f) states:

The provisions of subsection (a) of this section do not apply to any person who has a pecuniary interest in a bank within the county serving or under consideration to serve as a depository of funds for the county or board of education, as the case may be, if the person does not participate in the deliberations or any ultimate determination of the depository of the funds.

158 W. Va. C.S.R. § 8.4 states:

The prohibition of W. Va. Code §6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.
Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

158 W. Va. C.S.R. § 8.5 states:

> 5.1. For the purposes of W. Va. Code §6B-2-5(d), the Ethics Commission will consider a person "recused" if he or she:
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> (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.
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> 5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract.

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In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code§ 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service.... " W. Va. Code§ 6B-1-2(c).

The Ethics Act's prohibition against use of office for private gain was designed to steer public servants away from inherently questionable situations. This prohibition is intended to prevent not only actual impropriety, but also situations that give the appearance of impropriety.

Under W. Va. Code§ 61-10-15(a), it is generally impermissible for county officials to become pecuniarily interested in a contract over which they have control. The Code makes a specific exception for interest in banks in W. Va. Code§ 61-10-15(f), though, as long as the person recuses himself or herself from the "deliberations or ultimate determination" of the depository or the funds.

The interaction between W. Va. Code§ 61-10-15(a) and W. Va. Code§ 6B-2-5(d) is dispositive here. W. Va. Code§ 61-10-15 was rewritten in 2002. Before then, officials governed by W. Va. Code§ 61-10-15 could not avail themselves of the hardship exception codified at W. Va. Code§ 6B-2-5(d)(4). The Ethics Commission did not (and does not) have the ability to grant an exception to W. Va. Code§ 61-10-15; therefore, county officials could not escape the strict construction of the code.

After 2002, W. Va. Code§ 61-10-15 added a statutory exception to the code specifically for officials who hold a financial interest in a bank. Nevertheless, the exception codified at W. Va. Code§ 61-10-15(a) does not relieve officials who qualify for that exception from compliance with the Ethics Act, and the Ethics Act contains no such exemption for officials with a private interest in a bank. In these situations, the exemption contained in W. Va. Code§ 61-10-15 exists merely to remove the statutory bar; affected officials must still comply with the plain language of the Ethics Act.

W. Va. Code§ 68-2-5(d)(1) bars elected officials or businesses with which they are associated from being a party to a contract into which the official may have direct authority to enter. Legislative Rule 158 W. Va. § 8.4 defines a prohibited business association as one in which the official holds stock constituting five percent (5%) or more of the total stocks. The Requester owns less than one percent (1%) of the outstanding stock. Accordingly, neitherW. Va. Code§ 61-10-15 nor the Ethics Act prohibit the BOE from contracting with the bank in which the Requester owns stock.

Limitations apply. First, W. Va. Code§ 68-2-5(b) prohibits public officials from using their public positions for financial benefit. Here, the Requester has provided very few facts. It is unclear why the BOE is considering changing banks, who initiated the idea, whether the Requester has had any role in any preliminary discussions, or what the BOE's total deposits with the bank will approximately total. The Requester is prohibited from steering BOE business to his bank. He must also always guard against exercising undue influence in casual conversation or at other opportune times.

Under Legislative Rule 158 W. Va.§ 8.5, the Requester is still required to recuse himself from all deliberations and voting regarding the bank. 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.

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§ 68-1-1, *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§ 68-2-3, 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