# ADVISORY OPINION NO. 2012-41

**Issued On October 4, 2012 By The**

**WEST VIRGINIA ETHICS COMMISSION**

OPINION SOUGHT

A **County Board of Health** asks whether it is permissible for a licensed septic tank cleaner to serve on the Board.

FACTS RELIED UPON BY THE COMMISSION

Local Boards of Health provide basic health services, including "the administering of public health laws as specified by the commissioner as to general sanitation, the sanitation of public drinking water, sewage and wastewater..." W.Va. Code§ 16-2-11(a)(1)(ii). The Requester is a County Board of Health. Its members, as required by the West Virginia Code, are appointed by the County Commission. W.Va. Code§ 16-2-7.

The code sets forth the qualifications of appointees. It does not require members to have any particular background in public health. Instead, it only imposes the following qualifications:

> Each member appointed to the county board of health shall be a resident of the county. No more than two members who reside in the same magisterial district may be appointed and no more than two members may be appointed who are personally licensed or certified in, engaged in, or actively participating in the same business, profession or occupation. No more than three members of a county board of health may belong to the same political party

W.Va. Code§ 16-2-7.

The County Commission has recently appointed to the Requester's Board an individual engaged in the sewage tank cleaning business. The West Virginia Department of Health and Human Resources Bureau for Public Health's Legislative Rule governs sewage tank cleaners. W.Va. C.S.R. §§ 64-9-1 *et. seq.* This rule requires any person engaged in the business of removing, transporting or disposing of the contents of a sewage tank to first obtain a permit from the Health Department in the county where his or her business is located. The permit authorizes the person to operate in any county in the State.

Sewage tank cleaners must be certified at least once every three years. They pay a fee of $48.00 which may be paid over a three (3) year period. W.Va. C.S.R. § 64-9-4.11.

One requirement for the issuance of a permit is that their equipment, including vehicles, used to collect or transport waste must past inspection by a sanitarian.

The Requester has a permit/license to clean sewage tanks. The permit was issued by the Board of Health on which he serves as an appointed Board Member.

If a homeowner or business wants their septic system pumped, they are not required to obtain a permit from the County Board of Health or the State. Moreover, once a licensed sewage tank cleaner has pumped a septic system, local boards of health have no duty to inspect the work.

The Requester believes there are approximately two persons licensed by its County to perform this work. Other septic tank cleaners may perform work in the Requester's County so long as they have been properly issued a permit by another county health department in the State of West Virginia.

## 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.

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

> (g) Limitation on practice before a board, agency, commission or department. -- Except as otherwise provided in section three, four or five, article two, chapter eight-a of this code: (1) No elected or appointed public official and no full-time staff attorney ... appear in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:
> (A) A contested case involving an administrative sanction, action or refusal to act;
> (B) To support or oppose a proposed rule;
> (C) To support or contest the issuance or denial of a license or permit;
> (D) A rate-making proceeding; and
> (E) To influence the expenditure of public funds.
>
> (2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person...

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

U) Limitations on Voting.
(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, 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...

(2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

**ADVISORY OPINION**

The Ethics Act prohibits public officials from appearing before the agency on which they serve for purposes of supporting or contesting the issuance of a license or a permit. W.Va. Code§ 6B-2-5(g). The Ethics Commission must determine whether this provision in the Ethics Act prohibits an appointed member of a county board of health from applying for, or receiving, a sewage tank cleaning permit from the county board on which he serves.

The Ethics Commission finds that this provision in the Ethics Act does not prohibit persons engaged in a profession from appearing before the agency or board on which they serve for purpose of obtaining a professional licensure. For example, the code requires that certain members of the Board of Medicine must hold the degree of doctor of medicine. W.Va. Code§ 30-3-5. This same article in the code requires the Board of Medicine to license medical doctors. It would be unworkable to find that members of professions may not be licensed or certified by the agency or board on which they serve.

Instead, the intent of the statute, as expressed in the plain language, is to prohibit public servants from appearing on "behalf" of others. For example, a doctor who serves on the Board of Medicine could not represent a fellow doctor before the board in a licensing proceeding.

Similarly, a different result would follow if the Board of Health Member had to appear before the Board or Board of Health staff for purposes of securing permits for projects. For example, in A.O. 97-17 the Commission ruled that a surveyor/Board of Health Member could not meet with Board of Health staff for purposes of discussing projects to

determine whether permits should be issued. Nevertheless, here the situation is different as the Requester, while he must be personally licensed, is not required to obtain a license or permit for, or on behalf of, businesses or homeowners who wish to have their sewage systems cleaned.

While the affected Member may continue to serve, limitations apply. First, the Board of Health must have a sanitarian who is not employed by the County Health Department inspect the Board Member's equipment/vehicles when they are inspected for purposes of permit renewal. The Bureau for Public Health, Office of Environmental Services states that it has district sanitarians that are available to perform this function.

Second, in regard to voting, the affected member may not vote on matters affecting him uniquely as opposed to affecting five or more similarly situated sewage tank cleaners. He may vote on matters affecting general sanitation issues so long as it does not affect him uniquely. W.Va. Code§ 6B-2-50).

Under the Ethics Act, in order for a public official's recusal to be effective, it is necessary to excuse him/herself from participating in the discussion and decision-making process by physically removing him/herself from the room or executive session during the period when the item is being discussed or decided, fully disclosing his/her interests, and recusing him or herself from voting on the issue." W. Va. Code§ 68-2-50)(3). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the affected official left the room during all discussion and vote on the item under consideration.

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

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson