ADVISORY OPINION NO. 2012-42

Issued On December 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Conservation District** asks whether it may expend public funds to award a $500.00 scholarship to a District supervisor's child who resides with his parents.

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 are governed by the "Conservation Districts Law of West Virginia", codified in W.Va. Code§ 19-21A-1, *et seq.* The Conservation Districts Law provides that a District's governing body shall consist of ten elected supervisors (sometimes referred to as "board of supervisors").

A District may consist of land in one or more counties. Land owners in one or more counties may form a District by petitioning the State Conservation Committee.[1] Each county in a District shall elect two non-partisan supervisors.[2] The majority of the Districts consist of two or more counties. However, the District at hand encompasses only one county.

There are 14 conservation Districts in West Virginia. They are overseen by the State Conservation Committee (sometimes referred to as "the Committee"), a state agency. See W.Va. Code § 19-21A-4. The Committee is charged with keeping the District supervisors organized and informed under the provisions of W.Va. Code§ 19-21A-1, *et seq.* The Committee is authorized to expend its money, services or materials in part to the various conservation Districts in order to assist them in carrying on their operations. See W.Va. Code § 19-21A-4 (f)(6).

The Districts have statutory power to conduct investigations into the condition of soil erosion and floodwater and sediment damage. See W.Va. Code§ 19-21A-8(1). The Districts are to carry out preventive and control measures and works of improvement within the district, including but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land. See W.Va. Code§ 19-21A-8(3). The Districts have the power of condemnation. See W.Va. Code§ 19-21A-8(5).

The statutory power to provide financial aid is limited. The Districts are authorized "to furnish financial or other aid to any agency, governmental or otherwise, or any occupier of lands within the District in the carrying on of erosion-control and prevention operations and works of

[1] W.Va. Code§ 19-21A-14 when read in conjunction with 19-21A-5 as amended in 2002.

[2] W.Va. Code§ 19-21A-6. Counties which meet the population requirements shall elect additional supervisors in accordance with this code section.

improvement within the District, subject to such conditions as the supervisors may deem necessary to advance the purposes of this article." *See* W.Va. Code§ 19-21A-8(4).

The Requester has implemented a scholarship program through which it annually awards five (5) eligible applicants $500.00 each to further their education in a major consistent with the District's mission statement.[3] The applicants must have graduated from the county high school to qualify. A resident child of one of the supervisors has applied for a scholarship.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b) reads:

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)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control… (2) 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. A limited interest for the purposes of this subsection is:
(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year; ...

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.

(3) 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.

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[3] The District's mission statement declares: "Our mission is to provide local self-government leadership and initiative in the development and conservation of soil, water and natural resources. A balanced planning, education and management program that protects, restores and improves those resources will be accomplished in cooperation with landowners, government agencies and private organizations."

W. Va. Code§ 61-10-15(a) states in part that ... It shall be unlawful for any member of a county commission... or any county or District officer ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member, officer... he may have any voice, influence, or control.

ADVISORY OPINION

The question presented is whether the Requester may expend public funds to award a $500.00 scholarship to a District supervisor's child who resides with his parents. Before addressing the propriety of awarding the money to a supervisor's child, we need to first decide whether the Requester has statutory authority to grant the scholarship in its current form. In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure.

The Commission is unable to find express or implied authority to use the Requester's public funds for the purpose of awarding scholarships. W.Va. Code §19-21A-8(4) authorizes Districts "to furnish financial or other aid to any ... occupier of lands within the District in the carrying on of erosion-control and prevention operations and works of improvement within the District". This state code does not explicitly authorize a District to expend its public money on scholarships. Therefore, the Commission does not find any authority for the expenditures by the Districts for scholarships. The Commission recommends that the Requester seek an opinion from the W.Va. Attorney General's Office as to whether Conservation Districts are authorized to grant scholarships.

Assuming that the expenditures for scholarships are authorized, the Commission takes this opportunity to analyze whether the Requester could grant a scholarship to a child of a board member under the Ethics Act and West Virginia Code§ 61-10-15.

The Ethics Act

The Ethics Act prohibits public servants from using their public position for their own private gain or the private gain of another. *See* W.Va. Code§ 6B-2-5(b). W.Va. Code§ 6B-2-5(d) prohibits public servants from having a financial interest in a public contract. The Ethics Act defines a prohibited financial interest as one greater than $1,000.00 per calendar year. W.Va. Code§ 6B-2-5(d)(2)(A). A lesser interest is called a limited financial interest. This limited interest exception is available to elected officials. The part-time appointed member exception would not apply to a supervisor because he/she is elected, not appointed to the Board.

The Commission hereby finds that the scholarship is not a prohibited public contract because the scholarship amount is only $500.00, less than the $1,000.00 per calendar year threshold.

The Ethics Act prohibits public officials from voting on or participating in matters in which they or their immediate family members have a financial interest, even if the interest is a limited

financial interest. So, a resident child of a board of supervisors may be awarded a scholarship of $500.00 per calendar year - as it is within the $1000.00 per year threshold - so long as the decision is based on the merits, and not favoritism, and the supervisor recuses him/herself from all participation in the selection of the scholarship recipients, including determining eligibility for applicants, etc. 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 or her office or employment to influence a government decision affecting his or her financial or limited financial interest. She/he may not informally "lobby" or otherwise attempt to influence voting members of or other decision-makers in, the government agency to select his/her child.[4] The supervisor would be in violation of the Ethics Act if the Requester granted a scholarship in an amount greater than $1000.00 to the supervisor's son, absent a contract exemption, even if the supervisor properly recused himself/herself from the process.

W. Va. Code§ 6B-2-50)(3) provides that 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/herself from voting on the issue.

West Virginia Code§ 61-10-15

W. Va. Code§ 61-10-15(a) is a criminal misdemeanor statute that applies only to certain county officials. W.Va. Code § 61-10-15 contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, District school officer, ... or any member of any other county or District board or any county or District officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. This provision does not contain a $1,000.00 limited interest exception nor exceptions for part-time appointed officials.

The Commission recently determined that Conservation Districts are not subject to West Virginia Code§ 61-10-15 which was enacted in 1879. See A.O. 2010-20. The Commission found that there is no Supreme Court case or Attorney General Opinion specifically finding that Conservation Districts fall within the purview of this code section. The Commission reasoned that the Districts are unique to the extent that they are formed with the consent of a

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[4] Full recusal will also protect the supervisor from violating the prohibition against appearing before the Board in a representative capacity on behalf of his/her child to influence the expenditure of public funds. W. Va. Code§ 6B-2-5 (g) (Limitation on practice before a board, agency, commission or department.) provides, in part, that: -- 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 or accountant shall ... 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: ...
(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 ...

State Board, *i.e.* the State Conservation Committee, not by the County Commission. Due to the unique nature of the Districts, and in the absence of clear language in West Virginia Code § 61-10-15 bringing them within its purview, the Commission found that they are not subject to West Virginia Code§ 61-10-15. The Commission affirms its earlier opinion in A.O. 2010-20. If the supervisor was subject to the statute, a supervisor's child could not accept a scholarship even if it was less than $1,000.00, under the stricter standards of West Virginia Code§ 61-10-15.

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. Specifically, the Commission does not purport to determine whether the legislature authorized Conservation Districts to award scholarships to students. 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