ADVISORY OPINION NO. 2012-43

Issued December 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Local Health Department** asks whether it may, without violating the Ethics Act, serve as a pass-through for a grant from a private charitable foundation for the benefit of two private entities that focus on public health.

FACTS RELIED UPON BY THE COMMISSION

For the past year, the Requester, a local health department created pursuant to W. Va. Code § 16-1-1 *et seq.,* has been serving in the capacity as a pass-through between a private charitable foundation (Foundation) and two private entities.

The first private entity is a voluntary association of local health departments throughout the State (Association). The stated mission of the Association is to represent the interests of local health departments, and "to work together to leverage resources and influence public policy". Member health departments are required to pay annual dues to the Association based upon the per capita rate of the community serviced. All local health departments are eligible to be members of the Association. The Requester is a member of the Association.

According to the Requester, the Association is an unincorporated subsection of another state-wide association and is not a legally organized entity for purposes of eligibility to receive grants from the Foundation.

The second private entity is a private non-profit corporation formed by the Association to assist it in furthering its mission (Non-Profit, Inc.). Recently restructured, the board of directors of Non-Profit, Inc. does not contain any voting members from any of the local health departments or DHHR. While originally organized as a charitable non-profit entity under 501(c)(3) of the Internal Revenue Service Code, Non-Profit, Inc. is no longer classified as a public charity. Instead, according to the Requester, Non-Profit, Inc. is classified by the IRS as a private foundation.

According to the Requester, the Foundation approved and authorized a three-year grant to the Association and Non-Profit, Inc. to: cover the cost of hiring an Executive Director to operate both private entities; and provide financial support for operational needs and for infrastructure to support the operations of both entities. Thereafter, when it became apparent that Non-Profit, Inc. was ineligible to receive the funding directly from the Foundation, the Requester offered to serve as the grantee/applicant for the sole purpose of serving as a pass-through for the funds that the Foundation had already approved. The Requester states that "there is no benefit derived by the [Health]

Department from its services, other than support to the Association and [Non-profit, Inc.]." The Requester further states that "this is a grant from a private foundation, not public monies, and the grantor is aware of the relationships among the parties." Finally, the Requester states:

> Without funding through the ... Foundation, the Association and [Non-Profit, Inc.] would not be able to carry out their activities. Those activities enhance the Department's ability to carry out its mission of promoting health, preventing disease, and educating the community on public health issues.

Following the Commission's issuance of Advisory Opinion 2012-21, the Requester asks whether it is permissible under the Ethics Act for it to serve as the applicant/grantee so that the Foundation may follow through with its prior decision to award funding to support the two private entities.

The Requester further states that "there is no oversight granted to the Department over the activities of either the Association or [Non-Profit, Inc.], except that needed for grant accountability." To that end, the Requester states that one of its members will serve as an ex-officio, non-voting member of Non-Profit, Inc. for grant accountability.

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.

W. Va. Code 6B-2-5(c)(1) reads, in relevant part:

> A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family...

ADVISORY OPINION

In establishing the Ethics Act, the West Virginia Legislature expressly held that "public

officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government."

Earlier this year, the Ethics Commission issued an advisory opinion involving the private entities involved herein, the Association and Non-Profit, Inc. Specifically, in Advisory Opinion 2012-21, a local health department asked whether it is permissible under the Ethics Act for it and/or its employees to be a member of a non-profit entity comprised entirely of public employees whose functions include oversight and distribution of grant funding to their own local health departments. Finding that an insoluble conflict existed, the Commission ruled that the public servant members of Non-Profit, Inc. were prohibited from handling, overseeing, and/or participating in funding decisions for which their employers were potential recipients. W. Va. Code§ 6B-2-5(b).

The Commission wrote, "By prohibiting public employees whose employers are potential grant recipients from participating in the funding process, the Commission ensures transparency in the process and limits the potential for favoritism." The opinion contains recommendations for bringing the situation into compliance with the Ethics Act, including: "for purposes of the Ethics Act, it could be permissible to use a non-profit organization to handle funding allocation matters under the following circumstances: **First,** if Non-Profit, Inc. and the Board were truly independent of the State of West Virginia and the local health departments....."

Subsequent thereto, according to the Requester, the composition of the board of directors of Non-Profit, Inc. was restructured to address the concerns raised in Advisory Opinion 2012-21. Specifically, the board of directors of Non-Profit, Inc. does not contain any voting members from any of the local health departments or DHHR. Thus, the insoluble conflict has been removed.

Now a different scenario has arisen involving the same two private entities. Independent of the Requester, they applied for and were awarded a grant from the Foundation for capacity building for the Association. Only after the Foundation awarded the grant was it discovered that the private entities were ineligible to be grantees. The Requester stepped in to offer the use of its eligible status for the sole purpose of ensuring that the private entities could receive the funding that the Foundation had already authorized, thereby allowing those entities to continue to provide and enhance public health services. The Foundation is aware of and agreeable to this arrangement.

One of the intended outcomes of the grant is:

> [Non-Profit, Inc.] will identify and facilitate project and funding opportunities for [local health departments] to strengthen both individual [health departments] and the [Association] as an organization, ensuring sustainability in future years....

The Ethics Act prohibits public servants from using their public office or prestige of their public office for their own private gain or the private gain of another. W. Va. Code§ 6B-2-5(b). The question, therefore, is whether a government entity may use its name and tax status for the private gain of another entity for purposes of realizing funding for the private entities to promote public health. This question is markedly different than the one that Advisory Opinion 2012-21 addressed, since here there are no public funds involved, only those the Foundation has already deemed appropriate for disbursement to the private entities.

The Ethics Act prohibits public servants from soliciting gifts unless the solicitation is for a charitable purpose. W. Va. Code§ 6B-2-5(c). In Advisory Opinion 2005-02, the Commission ruled that "public health programs, which serve to protect the health and safety of West Virginia citizens, fall within the categories of activities or programs which are charitable." Thus, a County Board of Health was permitted to solicit funds from local businesses, groups and individuals to supplement public health programs.

Although applying for a grant does not fall within the definition of charitable solicitation, the Commission's rulings related to solicitation are relevant here, especially when taken together with exceptions to the Ethics Act's prohibition against use of public office for private gain. The statute specifically excepts from the definition of prohibited private gain incidental or de minimis use of public resources, and "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals... " W. Va. Code§ 6B-2-5(b).

According to the Requester:

> Without funding through the ... Foundation, the Association and [Non-Profit, Inc.] would not be able to carry out their activities. Those activities enhance the [Requester's] ability to carry out its mission of promoting health, preventing disease, and educating the community on public health issues.

The situation here is similar to that described in Advisory Opinion 2011-12 where a Town was allowed to appropriate funds to a non-profit organization even though several Town officials were on the board of the non-profit.[1] The Ethics Commission found that the activity was "consistent with the performance of usual and customary duties associated with the office or position or the advancement of public policy, which the Ethics Act explicitly authorizes."

The Commission is persuaded that the Requester's action as hereinabove set forth constitutes the performance of usual and customary duties associated with its office and the advancement of public policy goals. Equally important, no employee or member of the Requester or business with which he or she is associated is party to or has an interest in the profits or benefits of the grant agreement or any other related contract.

[1] As mentioned above, the board of directors of Non-Profit, Inc. does not contain any voting members from any of the local health departments or DHHR.

Although a member of the Association, the Requester derives no benefit in serving as the pass-through.

As a result of the foregoing, the Commission hereby finds that the Requester may serve as a pass-through for the subject grant for the benefit of two private entities without violating the Ethics Act. This opinion 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 Requester's government agency prohibit or otherwise restrict the proposed conduct. As a result, the Commission recommends that the Requester obtain a legal opinion to determine whether it may lawfully serve as a pass-through as proposed.

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 public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman