ADVISORY OPINION NO. 2012-44

Issued On December 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency,** statutorily charged with promoting volunteerism, asks whether it may appropriate $1,500.00 to a related Association on whose board its executive director and chairperson serve.

FACTS RELIED UPON BY THE COMMISSION

A State Agency was created to assist West Virginians in strengthening their communities through service and volunteerism. It consists of a board of directors and employs an executive director and staff. Its primary function is to administer funding for AmeriCorps programs in West Virginia. The Requester also engages in other activities including assisting with hosting a leadership conference and administering a data base which matches interested parties with volunteer opportunities.

AmeriCorps grantees must either be non-profit associations or government entities. The State Agency provides technical assistance to these agencies and oversees programs once they are implemented.

The State Agency was originally created by Executive Order. Then, it was continued by Legislative Enactment. Some of its duties include:

> Coordinating with existing programs for service and volunteerism in order to prevent unnecessary competition for private sources of funding;
> (g) Providing technical assistance to service and volunteer programs, including the development of training methods and curriculum materials;
> (h) Developing a statewide recruitment and placement system for individuals who are interested in community service opportunities;
> (i) Preparing quarterly reports on progress for submission to the governor and preparing an annual report for submission to the governor and the Legislature on or before the first day of January of each year which shall detail the commission's activities for the preceding year; and
> U) Serving as the state's liaison to national and state entities or other organizations which also promote national and community service and volunteerism.

Some of its powers are:

> Applying for and accepting funds, grants, gifts and services from local government, the state or the federal government, or any of their agencies, or from any other public or private source. It is authorized to use funds derived from these sources to defray administrative costs and implement programs to fulfill the commission's duties and responsibilities.

The State Agency receives both Federal and State funding. According to its 2011 Financial report, its income/budget from Federal, State and other sources was approximately four million dollars and is presumably in that range for the current fiscal year.

The Requester also notes in its request that it has formed a non-profit organization to serve as the fiscal agent for various programs it administers. Three of the State Agency's Board Members serve on the board of this non-profit. The Requester does not seek guidance on its interaction with, and support of, the non-profit.

Recently, a non-profit association (Association) was formed in West Virginia. This association, like similar associations in other states, provides training, harnesses collective buying power, shares best practices and generally serves as a connector for non-profit entities and related State agencies. The State Agency's executive director, serves on the board of the Association. The Requester has encouraged her service on the Board. The State Agency's Chairperson also serves on the Association Board in his private capacity as an executive director of a large non-profit.

The State Agency has been considering ways to partner with the Association. For example, cross-promoting training, sharing duties relating to the annual conference for volunteers/non-profit, and developing training programs.

The Association is seeking a grant from a foundation. The Requester is considering providing $1,500.00 in matching funds to allow the Association to secure the grant. Normally, the State Agency Board only approves expenditures in excess of $3,000.00. Nevertheless, due to the service of the State Agency's Executive Director and Chairperson on the Association's Board, the Requester would first seek approval from its Board before distributing this funding. Before taking this action, the State Agency seeks guidance on the application of the Ethics Act.

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-2-5U) 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 Requester is statutorily charged with the responsibility of serving as the State's liaison to national and state entities or other organizations which promote national and community service and volunteerism. The question presented here is whether it would run afoul of the Ethics Act for it to appropriate $1,500.00 to an association comprised of non-profits for purposes of allowing the non-profit to secure a grant.

The Commission has previously ruled in a non-precedential opinion that a State agency may use a de minimis amount of State resources to support the efforts of a non-profit/foundation. While this opinion is not binding, the Commission finds its analysis relevant to deciding the issue before it. In considering the facts presented, and the fact that the Requester's budget is approximately four million dollars, the Commission finds the sum of $1,500.00 to be de minimis; hence, for purposes of the Ethics Act, the agency may give this money to the Association for the intended purpose, i.e. providing matching funds to allow it to secure a grant.

The Commission cautions the Requester that 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. *See* A.O. 2010-19. While a de minimis amount of public resources to support the Association is permissible for purposes of the Ethics Act, still, the Agency must consult with the State Auditor to determine whether the $1,500.00 constitutes an authorized expenditure of funds. Moreover, it should consult with its attorney or the Attorney General, or both, on this issue.

If down the road the State Agency anticipates distributing more than a de minims amount of public funds to the Association, then it should consider seeking an opinion from the Attorney General, or seeking clarification through a declaratory action, in regard to whether the power to use funds derived from the state or the federal government to defray administrative costs and implement programs to fulfill the commission's duties and responsibilities includes the power to appropriate its funds to foundations or associations. Or, the State Agency may consider clarifying its powers through the Legislative process by proposing legislation, or a legislative rule, to expressly authorize it to use its funds for this purpose. The Ethics Commission also advises this same course of action in regard to the non-profit the Requester has formed.

Next, the Commission must determine whether the Agency's Executive Director and Chairperson may be involved in their public capacity in matters relating to the Agency's decision to appropriate $1,500.00 to the Association. The executive director is serving on the Association's Board at the request of the State Agency's Board. Since she is serving on the Board as part of her public job duties, the Commission finds that it does not run afoul of the Ethics Act for her to be involved in advising the Requester/State Agency in regard to whether it should distribute $1,500.00 to the Association. Additionally she may be involved in other matters which affect the Association. This situation is different than the one considered by the Ethics Commission in A.O. 2012-17 wherein a non-profit comprised of local health department employees were responsible for overseeing the distribution of grant money to their public employees. Here, in contrast, the State Agency employee, as part of her job responsibilities, serves as a liaison to an Association whose mission is to assist other non-profit entities, **not** her own public employer.[1] This situation is more analogous to A.O. 2011-12 wherein this Commission authorized City Council Members to provide funding to non-profit groups despite their membership therein.

In regard to the Chairperson of the State Agency, while he is not compensated for his service on the Board of the Association, he does serve by virtue of his private employment with a large non-profit. To avoid the potential for conflict, the Commission finds that he should recuse himself from voting on contributing money to the Association, and upon other matters which affect it. A.O. 2009-18.

For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. The minutes/record of the meeting must reflect the basis for the recusal and that he left the room during all deliberation, discussion and vote on the item under consideration. Additionally, he may not communicate with the Executive Director or other staff

[1] The situation is also different than that presented in A.O. 2011-17 wherein the Commission found that a conflict existed for an agency's executive director to serve on the board of an association comprised of members it regulated. In the present case, the Requester does not regulate non-profits; instead, it is charged with assisting them.

members about matters affecting the Association.

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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman