ADVISORY OPINION NO. 2012-46

Issued On January 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A potential **City Council Member** asks whether his law firm may continue to represent the City if he is appointed to serve on City Council.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an associate in a law firm. He has no ownership interest in the firm.

His law firm represents a City. There may be a vacancy on City Council. If so, he may be asked to fill the vacancy. He wants to know if his law firm may continue to contract with the City if he becomes a member of City Council.

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(d)(1) provides in relevant part:

> [N]o elected ... official ... or member of his or her immediate family ... may be a party to or have an interest in ... a contract which such official ... may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

W.Va. **C.S.R.** § 158-8-4.2.

> 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.

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. Business with which they are associated means a business of which the person....is ....an employee...

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Pursuant to the Ethics Act, W.Va. Code§ 6B-2-5(d)(1), an elected public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. This same limitation extends to businesses with which an elected public official is associated.[1]

Here, the Requester does not directly contract with the City; instead, the City contracts with the Requester's law firm. As such, the Commission must determine whether his employment with the law firm arises to a "business association" for purposes of triggering the interest in public contract prohibitions in the Ethics Act.

The Ethics Commission's Legislative Rule governing public contracts specifically defines business association as a business in which public officials or employees, or their immediate family members, are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class. W.Va. C.S.R. § 158-8-4.2. The Requester is an employee, not a director, officer or holder of stock. As such, if he is appointed to City Council, his law firm may continue to contract with the City since the Requester is not "associated" with the business for purposes of having a prohibited financial interest in the contract between the law firm and the City. *See* A.O. 2012-02 discussing this rule of law as it applied to an elected County Commissioner whose employer was a real estate agency which was engaged in a real estate transaction with the county where the affected county commissioner served.

While the Requester's law firm may continue to contract with the City, limitations apply. Specifically, the Requester may **not:** (1) receive any commissions or remuneration as a result of the contract between the law firm and the City; (2) work behind the scenes to steer business to his law firm; or, (3) participate in the deliberations or vote on matters relating to the contract with his law firm, e.g. approving invoices. Pursuant to the Ethics Act, in order for a public official's recusal to be effective, it is necessary to excuse

[1] There are exceptions to the public contract prohibition, including the following: part-time appointed public official exception, e.g. an appointed member of a State Board; and, (2) a limited interested exception which applies when affected public official has an interest of $1,000.00 or less in the gross profits of the contract. These exceptions do not apply in the present case. W.Va. Code § 6B-2-5(d).

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§ 6B-2-5U)(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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman