ADVISORY OPINION NO. 2012-47

Issued On January 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it constitutes a conflict of interest for a County Commissioner to serve as a voting member of a County Ambulance Authority.

FACTS RELIED UPON BY THE COMMISSION

County Commissions are authorized to form ambulance authorities. W.Va. Code§ 7-15-4. The County Commission and other participating governing bodies are charged with making appointments to the Board. The enabling legislation specifically provides that "Any individual who is a resident of or member of the governing body of any participating government is eligible to serve as a member of the board." W. Va. Code§ 7-15-5. Members of the Board are eligible to receive nominal compensation for their service, i.e. up to $20.00 per Board meeting not to exceed $600.00 in a fiscal year. W.Va. Code§ 7-15-6. The Requester does not state whether it allows the Commission representative to receive this money.

The Requester states that the County Commission provides significant funding to the County Ambulance Authority. The Requester seeks to know whether a County Commissioner who serves on the Ambulance Authority may vote on funding requests from the Ambulance Authority, or other matters which affect it, since he or she is also an Authority Board Member.

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. Business

with which they are associated means a business of which the person... is a[n] employee

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There is nothing in the Ethics Act or W.Va. Code§ 61-10-15 which prohibits a Member of a County Commission from serving on a County Board. Indeed, the enabling legislation for ambulance authorities, W. Va. Code§ 7-15-5, states that any member of a governing body of any participating government entity is eligible to serve.[1] This conclusion is also consistent with A.O. 2001-24 wherein the Commission found it was permissible for a County Commissioner to serve on a public transit authority and to accept the compensation associated with his service, $50.00 per meeting, not to exceed $600.00 in a fiscal year.

The Commission is only authorized to interpret the Ethics Act. While the Ethics Act does not prohibit County Commissioners from serving on county boards, at times, other laws may limit their service. Specifically, the common law doctrine against self-appointment stands for the proposition that, "When a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some other than self is always contemplated." 41 W. Va. Op. Att'y Gen. 209 (1946). As such, any County Commission or City Council considering appointing one of its own members to a board or commission when the statute does not expressly permit "self-appointment" should consult with its attorney on whether the proposed appointment is permissible especially when appointed to a compensated position. Governing bodies may also want to consider requesting an Attorney General opinion or seeking clarification through the Legislative process on this issue. This doctrine appears to be inapplicable in the present case as the enabling legislation for ambulance authorities expressly states that members of participating government bodies are eligible to serve.

Next, the Commission must determine whether a County Commissioner who serves on a County Board may vote on matters affecting that Board which come before the County Commission. The Commission finds that there is nothing in the Ethics Act which prohibits County Commissioners from voting on matters which affect a county board on which they serve.

County Commissioners normally serve on county boards as a means for a County Commission to monitor and observe the workings of its boards. County Commissions have a vested interest in the success of its boards and commissions.[2] County

[1] Similarly, in regard to county airport authorities, the law expressly requires a county commissioner to serve. W. Va. Code§ 8-29A-2. In contrast, County Commissioners are expressly prohibited from serving on a county housing authority W. Va. Code§ 16-15-3.

[2] The Ethics Commission Committee on Open Governmental Meetings is also charged with interpreting the Open Meetings Act. In addressing the service of a county commissioner(s) on a county board, the

Commissioners who serve on these boards, which are subunits of county government, do not, for purposes of the voting provisions in the Ethics Act, have a financial relationship which prohibits them, in their capacity as county commissioners, from voting on matters affecting the boards. This same conclusion follows even if they receive nominal compensation for their service on a county board.

Based upon information and belief, the majority of county commissioners who serve on county boards do **not** receive additional compensation for their service. For those counties which allow Commissioners to receive compensation for serving on these boards, the Commission strongly recommends that the Requester or County Commissioners Association seek to establish definitive standards through the Legislative process.

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

Open Meetings Committee noted in O.M.A.O. 2011-06:

> Clearly the County Commission has a vested interest in the success of the Authority. Indeed, the Authority's interests are the County's interests. For this reason, the Legislature deemed that not only are county commissions required to appoint the development authority board members, the statute further requires the county commission to appoint a member "to represent the county commission on the board". W. Va. Code§ 7-12-3.