ADVISORY OPINION NO. 2012-48
Issued On January 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Licensing Board** asks:

(1) Whether an executive director may rent a house from a Board Member;

(2) Whether an executive director may rent a house from a Board Member who is also a member of the regulated community; and,

(3) Whether the conclusion is different if the executive director has a property exemption.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a Chapter 30 State Licensing Board. It is governed by a Board whose members are appointed by the Governor. The Board's enabling legislation requires at least five members to be licensed in the profession which the Board regulates.

The Board is seeking to hire a new executive director. Several people have applied. One candidate rents a house from a Board Member. This Board Member is a member of the profession which the Board regulates.

At present, the candidate who rents the house is employed by another State Agency. His current public employer has a contract with his landlord (who is also a Board Member on the State Licensing Board). Due to his current public job responsibilities, and the control he exercises over public contracts in his current position, he sought and received a property exemption to rent the house in accordance with W.Va. Code § 6B-2-5(h).

The Property Exemption requires the affected State employee to remove himself from decisions affecting his landlord. Additionally, any decisions must be made by a person who is not the affected State employee's subordinate.

The Requester states that its executive director and staff members must handle complaint matters against the regulated community, including members who serve on its Board. The agency has a small staff, less than five people. The Requester seeks guidance on whether it may employ an executive director who rents from a Board Member/regulated licensee without violating the Ethics Act. Specifically, the Requester seeks to determine whether this person's employment as executive director would result

in an inescapable conflict of interest due to his financial relationship with the Board Member/regulated licensee, and the terms of the property exemption.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code§ 6B-2-5(h) reads in relevant part:

> (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:
> (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
> (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.
> (C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:
>
> (4) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

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...

W. Va. Code§ 6B-2-5(0) reads in relevant part:

> (o) Except as provided in this section, a person who is a public official or public employee may not solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control. A person who is a public official or public employee may solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control when:

(A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or
(B) The solicitation is limited to the posting of a notice in a communal work area; or
(C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling; or
(D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative.

ADVISORY OPINION

The first issue the Commission must consider is whether an employee may rent a house from a Member of his governing board. While the Board Member is only one of several board members; still, the Board members, individually and collectively, share the responsibility of selecting and supervising its Executive Director.

The Ethics Act prohibits a public official or employee from soliciting business from a subordinate. W.Va. Code§ 68-2-5(0). Here, the lease agreement pre-dates the person's employment as executive director, assuming he is the successful candidate for the position. As a result, in regard to this particular provision of the Ethics Act, the business arrangement between the board member and potential job candidate, i.e. landlord and tenant, is permissible so long as the Board Member/lessor removes himself from all personnel matters affecting the executive director/lessee.[1]

The Commission generally considered this same question in Advisory Opinion 2000-07 wherein a County Board of Education Member leased property to a principal. The Commission held that the business arrangement, landlord and tenant, was permissible so long as the BOE Member/lessor did **not** vote on personnel matters impacting the financial interests of his tenant, the school principal. For example, he could not vote on a pay raise for the principal.

In the present case, while the business arrangement is permissible for purposes of § 68-2-5(0), the analysis does not stop here. Instead, as the Board Member is also a member of the regulated community, it is necessary to examine the application of§ 6B-2-5(h). This provision in the Ethics Act prohibits public servants from leasing property from vendors and members of the regulated community unless they seek and obtain a

[1] 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 other board members or staff on personnel matters relating to the executive director.

property exemption.

The candidate for the executive director's position has already obtained a Property Exemption. Nevertheless, the Requester correctly notes that the terms of the agreement require him, and his **subordinates** (emphasis supplied), to be removed from all matters affecting his landlord. As the Requester has a small staff, and as the executive director is the head of the agency, if this person were to become the agency's executive director, it does not appear workable to remove him from matters affecting the Board Member/Landlord.

As such, based on the facts presented, it is the opinion of the Commission that it creates an inescapable conflict for this person to be selected as executive director. Specifically, due to the administrative structure of the agency, and the business relationship between the job candidate and the Board Member, it would not be possible to comply with requirements of the property exemption. Of course, if the affected person is the best candidate, the Board could hire him so long as it was a condition of his employment that he ceases to rent the subject property from the Board Member.

The Commission takes this opportunity to remind governmental entities, including State agencies, that they are free to impose stricter standards on public officials and employees than those contained in the Ethics Act.

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