ADVISORY OPINION NO. 2012-53

Issued On February 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** asks whether its members must recuse themselves from voting on expense reimbursement requests when all of the Members attend the same training session.

FACTS RELIED UPON BY THE COMMISSION

Board of Education (BOE) Members are statutorily required to attend training sessions and seminars as part of their BOE duties. *See* W.Va. Code§ 18-5-1a(e) requiring seven hours of annual training. The Requester states that to satisfy this annual requirement, the normal practice is for the Board Members to attend, as a group, one or more training seminars in West Virginia. Oftentimes the training sessions are sponsored by the West Virginia School Board Association.

The BOE must approve all travel expense reimbursement requests, including those requests submitted by BOE Members. The Requester notes that if all five (5) Board Members attend a training session, and if each Board Member is required to recuse him or herself when his or her expense reimbursement form is considered, then this process becomes cumbersome as each affected member is required to leave the room when his or her request is considered. In light of this fact, the BOE seeks guidance on whether recusal is required or whether there is some means of allowing the Members to stay in the room to vote on this item provided that there is some mechanism in place to ensure that the public is aware of what is being voted upon.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> U) Limitations on Voting.
>
> (1) Public officials ... 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 or an immediate family member is a director, officer, owner, employee, compensated

agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(II) 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

(3) For a public official's recusal to be effective, it is necessary to excuse himself ... from participating in the discussion and decision-making process by physically removing himself ... from the room during the period, fully disclosing his ... interests, and recusing himself ... from voting on the issue.

ADVISORY OPINION

As set forth above, the Requester seeks to comply with the Ethics Act; however, it asks whether under the unique circumstances presented if, in fact, the Ethics Act requires recusal. While the Ethics Act prohibits public officials from voting on matters in which they have a financial interest, the Ethics Act does not expressly state whether the approval of "group" travel expense is a financial interest which requires, in all circumstances, recusal.

In considering this question of first impression, the Commission finds that, as it relates to Boards of Education, not all travel expense requests arise to a financial interest requiring recusal. Specifically, the Commission hereby finds that a BOE Member does not have a financial interest requiring recusal under the following circumstances: (1) when three or more BOE Members from the same County attend the same training session; (2) the Superintendent or his or her designee has reviewed and approved the requests for reimbursement; and, (3) it is specifically disclosed on the agenda and during the public meeting that travel expense forms for the elected BOE Members are being approved. For example, an agenda item may read "Consider approval of expense reimbursement requests for Board Members' attendance at School Board Association training." Of course the minutes must also reflect this information.

In contrast, if only one or two BOE Members attend a training session, then the affected Members must recuse themselves when their requests are being considered and voted upon. For recusal to be proper, public servants must first fully disclose on the record their disqualifying interest in any matter before the governing body, then leave the room during the discussion, deliberation and vote on the matter. Additionally, the minutes/ record of the meeting must reflect the basis for the recusal and that the school board

member left the room during all consideration, discussion and vote on the item under consideration.

At this time, the Commission declines to establish a bright line rule for all governing bodies. Instead, the advice rendered herein is limited to Boards of Education. Moreover, if any school board member or public official ever has a question about the accuracy of an expense reimbursement request, then they have a fiduciary duty to exercise due diligence before approving the same. The rule of law established herein does not relieve them of that duty.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code§ 61-10-15, 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 county boards of education unless and until it is amended or revoked, or the law is changed.

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