Overruled by 2013-47

ADVISORY OPINION NO. 2012-05

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Public Employee** who is a candidate for County Commission asks whether he may, if elected, vote on matters affecting his public employer.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by a County Board of Education (BOE) as a teacher in the county school system. He teaches at a local high school. He has recently filed to become a candidate for County Commission in the county in which he is employed as a teacher.

He states that, at times, matters come before the County Commission relating to the BOE. For example, if a local high school baseball team needs its field replaced, it may ask the County Commission to jointly fund the project.

He states that he believes he should be able to vote on such matters as it involves the school system, not him directly. In contrast, the Requester states that, if it directly involved the school where he teaches, he would recuse himself.

The Requester generally states that County Commissioners with children or grandchildren in the county school system also face ethical challenges in voting on matters affecting the school system due to their vested interest in seeking what is best for their children or grandchildren. He generally poses the philosophical question of whether their personal relationship with their children is any different than his personal interest in seeking what is best for the county school system through his position as a County Commissioner.

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 part that ... no elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control: Provided, That nothing herein shall be construed to make

unlawful the employment of any person with any governmental body....

W. Va. Code § 6B-2-50) reads in relevant part:

0) *Limitations on Voting.*

(1) Public officials ... may not vote on a matter:

(A) In which **they** (emphasis supplied), an immediate family member, or a business with which they or an immediate family member is associated have a financial interest.

(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 him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

ADVISORY OPINION

The Commission must determine whether a public employee, who is also an elected official, may vote on matters affecting his or her public employer. The Commission considered this question in 2006 when a City Mayor asked whether he may vote on matters relating to his public employer, a public university. In that opinion, A.O. 2006-09, the Commission ruled that to avoid the appearance of impropriety, the City Mayor/public employee, could not vote on matters affecting his public employer.

Since the issuance of that opinion, the Ethics Act was amended to set forth specific guidance on when public officials may vote. *See* W.Va. Code§ 6B-2-5(j).[1] One provision states that public officials may **not** vote on a matter in which **they** (emphasis supplied) have a financial interest. The Ethics Act does not define, for purposes of this provision, what constitutes a personal financial interest.

[1] H.B. 4524 (2008 Regular Session)

The Ethics Commission has previously analyzed the voting provision in regard to whether it prohibits a public official from voting on matters affecting non-profit boards on which they served as uncompensated (emphasis supplied) board members. In that opinion, A.O. 2011-02, the Commission focused on the language in the voting restrictions relating to what constitutes a financial interest in regard to non-profit board members who derive no financial benefit from their work with a non-profit.[2] Here, in contrast, the Commission must determine whether employment by a public agency constitutes a "financial interest" which requires recusal.

The Commission finds that for purposes of this voting limitation, employment by a public agency constitute a personal financial interest which prohibits a public employee from voting on matters which affect his or her public employer. The reasoning for this conclusion is that public employees have a financial interest in their continued employment and the financial stability of their public employer. While this financial interest does not rise to an interest which prohibits their public employer from contracting with the public agency on which they serve as a public official; still, this financial interest requires recusal in all matters affecting the public employer. *See also* 2011-03 wherein the Commission ruled that a County Commissioner may **not** vote on matters relating to a city-owned hospital where he is employed; and, A.O. 92-13 wherein the Commission ruled that a Director of a State Agency, in his capacity as an appointed Advisory Board Members, may **not** vote on matters relating to the public agency by which he was employed.[3]

There is an exception in the Ethics Act which states that a public official may vote on matters which affect a class of persons. A class is defined as five or more similarly situated persons or businesses. The Commission finds that, even if a vote on matters affecting the school system affects all citizens in the county with school age children, this fact does not bring the Requester within the class exception. Instead, while he is a teacher at a local high school, his employer is the County BOE. As such, votes on matters affecting the BOE are matters which uniquely affect his employer, not a class of five or more similarly situated County BOEs. This finding is also consistent with the general principle that a public official's fiduciary duty is owed to the governing body on which he or she serves, not his employer.

In regard to the philosophical question posed by the Requester in regard to elected County Officials with children or grandchildren having a vested interest in the school system, the Commission finds that there is a legal and policy distinction as their interests are different. In particular, they are not employees of the school system. As such, the public would not

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[2] W.Va. Code§ 6B-2-5U)(1)(D) expressly prohibits a public official from voting on matters involving a nonprofit by which either the public official or his or her immediate family members are employed.

[3] In contrast, in A.O. 97-29, the Commission ruled that a State Board Member who was employed by an Economic Development Authority could vote on matters before the State Board relating to the location of a project in his county. The basis for the Commission's decision was that while the vote would indirectly affect the Economic Development Authority through its efforts to bring new businesses into the county, the Authority did not own the property. Additionally, the Commission's decision was limited to the precise facts presented.

perceive that they may be casting a vote based upon the position of their public employer. While they have a financial interest in the quality of the school system, this interest falls within the class exception as matters affecting the school system similarly affect all citizens who have children or grandchildren in the school system.

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 public agencies unless and until it is amended or revoked, or the law is changed.

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