ADVISORY OPINION NO. 2012-07

Partially overruled by AO 2021-21

Issued On March 1, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Mayor who recently accepted a part time direct sales position asks under what circumstances the Ethics Act requires him to recuse himself when a customer appears before City Council on an unrelated matter.

FACTS RELIED UPON BY THE COMMISSION

In West Virginia, the majority of mayors are elected by the qualified voters of the municipality.[1] Most mayors are part-time positions. Few mayors are independently wealthy; a number of mayors are retired. Most mayors work in some fashion in the private sector. For example, a mayor may own a funeral home or sell life insurance.

The Requester states that he recently accepted a part time direct sales position with a local company. As a result, he is in contact with many businesses and property owners within the municipality. The Requester understands that he is prohibited from using public resources (including subordinate staff or his mayoral title) to solicit sales. The Requester specifically states:

> I want to ascertain that I can sell goods and services to businesses and people that I know as long as the business relationship is kept separate and apart from my capacity as an elected official. I understand also the implication of being paid by a customer who may at some time come before City Council for consideration of some issue and my need to recuse myself should that be deemed necessary.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads, in relevant part:

> A public official or public employee may not knowingly or 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:

> (1) Public officials... may not vote on a matter:
> (A) In which they ... or a business with which they ... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... is a director, officer, owner, employee,

[1] In a Commission or Manager form of government, the mayor is elected from among the City's elected Commission or Council Members. W. Va. Code§ 8-3-2.

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

(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.

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

> Except as provided in this section, a person who is a public official ... 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 ... 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:
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> (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.

W. Va. Code§ 8-10-1 provides, in relevant part, "When not otherwise provided by charter provision or general law, the mayor of every municipality shall be the chief executive officer of such municipality "

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code§ 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service...." W. Va. Code§ 6B-1-2(c).

The Ethics Act's prohibition against use of office for private gain was designed to steer public servants away from inherently questionable situations. This prohibition is

intended to prevent not only actual impropriety, but also situations that give the appearance of impropriety.

Here, the Requester recognizes that his constituents and customers may overlap. He wants to ensure that he complies with the Ethics Act should a customer appear before City Council on a matter over which the City has jurisdiction to take official action.

Although the Requester acknowledges that he will not use public resources to advance his private business interests, the Commission takes this opportunity to remind other public officials who also have private business interests that the Ethics Act prohibits more than a *de minimis* use of public resources for private benefit.

Specifically, public servants may not use office equipment, office supplies or office space for the benefit of their private businesses. Further, they may not use subordinate staff to perform work associated with their private businesses while the subordinates are on the government time clock. Finally, before using subordinate staff to perform work associated with their private businesses while the subordinates are **not** on the government time clock, public officials should contact the Ethics Commission to determine whether such a work arrangement is permissible under the Ethics Act.

Next, W. Va. Code§ 6B-2-5(o) prohibits a public official from soliciting private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control, with certain exceptions. See, *e.g.* Advisory Opinions 90-155 (County Board of Education member may not use his public position to market insurance products to Board employees), 96-06 (County Board of Education Personnel Director prohibited from soliciting current and potential Board employees to purchase insurance), and 98-20 (County Board of Education member may not solicit Board employees or their spouses to purchase security systems). Also, the Commission finds that the Requester may not distribute business cards, flyers, or other promotional materials concerning his private business from his office and/or in City/Town Hall. It would create an appearance of impropriety for a mayor, the municipality's CEO, to actively promote her/his private business on municipal property.

Although the Requester states that he intends to "sell goods and services to businesses and people", the Commission takes this opportunity to remind public officials about the Ethics Act's prohibition against having an interest **in** a public contract. W. Va. Code§ 6B-2-5(d)(1) provides that "no elected ... official ... or member of his or her immediate family ... may be a party to or have an interest **in** the profits or benefits of a contract which the official ... may have direct authority to enter into, or over which he or she may have control. ... " The Act's reference to "contract" includes any financial transaction-including selling goods or services-with one's own governing body, when the total amount exceeds $1,000 in a calendar year. If a municipality desires to purchase goods or services from the private business of one of its municipal officials and the amount exceeds $1,000 in a calendar year, it must seek and obtain a contract exemption from the Ethics Commission pursuant to W. Va. Code§ 6B-2-5(d)(3).[2]

[2]A separate criminal provision applies to certain county officials, in addition to the prohibitions contained in the Ethics Act. See W. Va. Code§ 61-10-15.

In the course of performing his regular business activities, it is inevitable that the Requester's customers may end up before City Council on certain issues. Under certain circumstances the Requester is required to recuse himself.

There are a number of ways a citizen may appear before Council. One way is simply to address Council on an issue of public concern. During such public comment portions of Council meetings, Council is prohibited from taking official action on matters subject to such public comments unless the issue is already on the meeting agenda. *See* OMA Advisory Opinion 2011-03. Another way that a citizen may appear before Council is when Council is considering adopting an ordinance or charter revision that directly affects the citizen. Or, a citizen may request a zoning variance or an exception to the building code requirements. In other situations, a citizen may appeal a decision of a municipal official to Council.

The Ethics Act does not contain specific language to address the situation described. Instead, it contains prohibitions against accepting gifts from interested persons, W. Va. Code§ 6B-2-5(c); and prohibitions against seeking employment with or buying/selling property to/from interested persons, W. Va. Code§ 6B-2-5(h). Therefore, the Commission will borrow from those sections to provide guidance to the Requester and similarly situated municipal public officials.

In Advisory Opinion 2005-12, a member of a County Planning Commission who owned a business selling products used by contractors asked for guidance on voting on matters regarding customers of his business. The Commission held:

> It is necessary for the requester to be recused from those decisions where he is currently supplying the developer or a contractor for a particular subdivision, or is currently bidding on such a mater, as he may be considered to have at least an indirect financial interest in the outcome of such matters. Otherwise, the requester is not prohibited from voting on matters when approval may or may not lead to business with the developer, a contractor working for the developer, an individual home builder, or contractor working for a home builder.

Similarly, here the fact that a citizen purchased goods or services from the Requester is insufficient to require the Requester to recuse himself from a proceeding. If the citizen is a current customer, however, the mayor must recuse himself from deliberation and voting on the matter. For recusal to be effective, the mayor must 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. W. Va. Code§ 6B-2-5U)(3)[3]

The guidance provided herein should not be construed to apply to transactions for goods or services purchased through a commercial establishment which offers the

[3] Although it may not be applicable to the Requester, other mayors may be in a business that prohibits them from disclosing the details of the conflict that requires recusal, e.g. a doctor may not disclose the name of a patient. In such instances, the affected official should simply disclose on the record that she has a personal conflict of interest that requires her to recuse herself, and then leave the room.

same goods or services for sale to the general public.

Although the Requester does not serve in such a capacity, West Virginia law permits mayors to preside over municipal court. W. Va. Constitution Article 8, §1. *See also* W. Va. Code§ 8-10-1. For those mayors who also serve as municipal judge, they need to take special care if a customer appears before them in their judicial capacity. Again, the fact that a citizen purchased goods or services in the past from a mayor is generally insufficient to require the mayor to recuse herself/himself from the proceeding. The mayor shall, however, disclose the fact of the transaction, and if either party requests that the mayor recuse herself/himself from the proceeding following such disclosure, the mayor shall do so. Further, mayors are prohibited from presiding over a judicial matter involving a customer when the transaction occurred within the preceding six months.

In conclusion, there is no prohibition in the Ethics Act against a mayor having an outside business or employment. Nonetheless, the Requester:

- may not use public resources for the benefit of his private business;
- may not use subordinate staff to perform work associated with his private business while the subordinates are on the government time clock;
- may not solicit private business from subordinates;
- may not distribute promotional materials concerning his private business from his office and/or in City/Town Hall;
- may not have an interest in a public contract, with certain exceptions; and
- must recuse himself when a current customer appears before Council.

Finally, when a current customer is competing for a municipal contract, the Requester must recuse himself from:

- Drafting bid specifications or requests for proposals;
- Recommending selection of the vendor; and/or
- Approving the method or manner of payment to the vendor.

The Commission appreciates the Requester's initiative in seeking advice given the number of mayors who are similarly situated.

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

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