ADVISORY OPINION NO. 2012-12

Issued On April 12, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A local **Board of Health** asks whether a part-time Health Officer may accept patient referrals from the Health Department, and, if so, what limitations apply.

FACTS RELIED UPON BY THE COMMISSION

In accordance with the West Virginia Code, two or more counties, or any county and one or more municipalities located within any county or counties may form a local board of health. W.Va. Code § 16-2-5. The Requester is a local Board of Health which has been formed by a county and a municipality situated within the county. The Requester/Health Department is located in a rural part of the State.

The Board of Health oversees the operation of the local health department. It has various statutory responsibilities which include providing basic health care services and programs to the citizens it serves. W.Va. Code§ 16-2-11. Boards of Health are generally overseen by the West Virginia Bureau of Public Health which is an agency housed within the West Virginia Department of Health and Human Resources. *See generallyW.Va.* Code§§ 16-1-1 *et. seq.*

The local board of health is statutorily required to appoint a full-time or part-time health officer to serve at the will and pleasure of the board. W.Va. Code§ 16-2-12. He or she must be a licensed physician. The health officer serves for a one year term and is eligible for reappointment at the end of the term. The board may remove the health officer if he or she "fails or refuses to carry out the lawful orders or rules of the secretary ...." kl

The Requester currently has a part-time health officer who is seeking to transition out of this position. The Requester seeks to hire a new part-time health officer. It has advertised for the position. Based upon information and belief, only two applications were received. One applicant being considered is board certified in Obstetric and Gynecology (hereinafter Ob-Gyn). The other is a retired physician.

The Health Department provides basic health care services. One service offered is that once a month it holds a family planning clinic. Citizens may visit the clinic for prenatal screening or birth control. The part-time health officer oversees the family planning clinic and performs gynecological exams. As part of the examinations, patients may have their blood pressure checked or undergo various tests such as a Pap smear or thyroid test.

The health officer/medical doctor does not read the results of the tests. Instead, they are sent to laboratories and reviewed by other medical professionals. If the tests come back positive, then normally a nurse or assistant at the Health Department, not the health officer, contacts the patients and tells them that they should see their primary physician and/or a specialist for follow-up care. For example, if a patient has an abnormal pap smear, then she is directed to follow-up with an OB-Gyn.

Many of the patients seen at the family planning clinic do not have health insurance. Some qualify for Medicaid, others do not. When patients are contacted by the nurse or assistant from the Health Department, they are given the names of medical doctors who take referrals from the Health Department. There is a printed list which includes the names of obstetric providers. Based upon information and belief, the nurse or health assistant relates to the client during the follow-up telephone conversation the names of doctors who accept referrals. It is unclear if the Health Department staff provides them with the names from the list and/or mails them a copy of the list.

The Ob-Gyn being considered for hire is one of the doctors in the county who accepts referrals. If this Ob-Gyn is prohibited from taking referrals, then, according to the Requester, there will only be one other Ob-Gyn in the county who accepts referrals. Patients may also be referred to an Ob-Gyn for certain birth control procedures. The current health officer states that a good faith estimate is that the Ob-Gyn who is being considered, of her total patient load, 1% are from referrals from the Department.

If a patient who receives follow-up care with a medical provider qualifies for Medicaid, the doctor who sees the patient submits the bills to the West Virginia Department of Health and Human Resources (DHHR) and/or the Bureau for Public Health for processing and payment. The local Board of Health has no control over the payment of these bills.

The current health officer is paid $300.00 per month and an additional $150.00 for each family planning clinic he conducts. It is anticipated that the salary of the new health officer will be at or near the salary of the present health officer.

At present, there is one family planning clinic per month. The current health officer states that he and others in the medical community consider serving as the health officer a form of service to the community. The current health officer states that on several occasions he has seen patients on a follow-up basis and has received no money from the patient or any insurance company or Medicaid; instead, he has done it as a form of volunteer service to the community.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... 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, however,* That nothing herein shall be construed to prohibit...a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code§ 6B-2-5(d)(3) provides... If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

W. Va. Code§ 61-10-15(a) states in part that ... It is unlawful for any county or district officer to be or become peculiarly interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control...

ADVISORY OPINION

Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The Ethics Act

Pursuant to W.Va. Code§ 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control; however, this restriction in the Ethics Act also includes a proviso which exempts **part-time appointed** (emphasis supplied) public officials from the prohibition against having an interest in the profits or benefits of a public contract

over which they have authority or control, provided the official, in his or her public position, is excluded from matters relating to the contract.

To determine whether the part-time appointed public official exception applies, the Commission must first determine if a local health officer is a public official, as opposed to being a public employee. The position of Health Officer is statutorily created. Pursuant to the code, they are appointed by the Board of Health, serve at its will and pleasure, have a set term of office, and may be removed for cause. W.Va. Code § 16-2-12. Based upon these factors, the Commission finds that a Health Officer is an appointed public official for purposes of the Ethics Act. *See* A.O. 2010-22. *See also* School Board Advisory Opinion 2010-01 wherein the Commission ruled that Board of Health Members are public officials under W.Va. Code§ 18-5-1a(a). As such, a part-time health officer may have an interest in a public contract over which her position at the health department gives her control.[1]

While part-time appointed officials may have interests in public contracts over which they exercise control, limitations apply. Specifically, if a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his or her office or employment to influence a government decision affecting his or her financial or limited financial interest. W. Va. Code§ 6B-2-5(d)(3).

In accordance with this code provision, and the prohibition against use of public office for private gain, the part-time health officer may not use his or her public position to attempt to persuade health department clients to choose her for follow-up care, or to urge Health Department employees to give her referrals. To ensure impartiality in the referral process, the Health Department shall create a written alphabetical list, by specialty, of medical doctors who accept referrals. The Health Department must make a good faith effort to inform all qualified physicians in the county that they may be placed on this list. Once the list is compiled, when the Health Department makes a referral, it must provide the list to the patients and allow them to choose their provider. The health officer's name may be on the list but the list may not reference her employment by the Health Department. This method ensures that referrals are made in a fair and impartial manner. It is also consistent with past opinions of the Commission relating to referrals.

For example, in A.O. 90-146, a State Department was responsible for facilitating public adoptions. On its staff, it had employees who were involved in providing private adoption services on their own time. The State Department allowed this outside activity

[1] Arguably, the contract in question may not be one contemplated by the Ethics Act as it involves a public contract between the WVDHHR and the medical doctor not the Health Department; however, the Commission declines to reach a conclusion on this matter as it would be academic in light of the part-time appointed exception in the Ethics Act. *See generally* A.O.s 99-26 and 99-29.

by its employees as facilitating private adoptions were not part of their public job duties, nor was it a service provided by the State Department.

The State Department asked what procedure it should employ when private citizens called the Department to ask for the names of individuals who provided private adoption services. In the past, the Department had, at times, provided the names of its own employees but realized that this tradition may constitute a conflict of interest; hence, it sought guidance from the Ethics Commission. The Commission ruled that the State Department could comply with the Ethics Act by compiling a listing of approved adoptive agencies and all available licensed social workers, including Department employees. This list would then be mailed to all prospective private adoption clients who requested such services. The Commission ruled that employees of the State Department could be included on this list so long as there was no indication that they were employed by the State Department. *See also* A.O. 95-13 wherein the Commission authorized businesses which employed school psychologists to be included on referral lists given to parents so long as there was no attempt to steer the parents to a particular provider.[2]

This opinion analyzes the application of the Ethics Act to the question presented. The Commission has no authority to interpret other rules which may limit or restrict the part-time health officer from receiving referrals. In this regard, the Requester should consult with the WV DHHR to ensure that there are no rules or regulations, including those governing Medicaid disbursements, which prohibit the referrals in question. Additionally, governmental entities, including the DHHR, Bureau for Public Health and Health Departments, are free to impose stricter standards on appointed public officials and employees than those contained in the Ethics Act. As such, if the local Board of Health or the State agencies which exercise control over the Board believe that a part-time health officer should not be on the referral list, then they are free to impose this limitation; provided that they are encouraged to consult with their attorney in drafting such a restriction. Moreover, these agencies may want to consult with the West Virginia Board of Medical Examiners to ensure that including the part-time health officer on the referral list does not violate any laws or conflict of interest provisions governing the medical profession.

The Commission also cautions that the part-time appointed exception in the Ethics Act does **not** apply to full-time health officers. As such, full-time health officers may not contract with the Board of Health for which they serve as a Health Officer unless the Board of Health seeks and receives advice or a contract exemption from the Ethics Commission.

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[2] In contrast, in A.O. 2011-01, the Commission ruled that a County Council Member's business could not be included on a list of local businesses willing and qualified to appraise property in probate matters as the County Council exercises control over the probate process; hence, there was a concern that a member of the public may believe that they may receive favorable treatment if the County Council Member's business was included on the list.

West Virginia Code § 61-10-15

Additionally, health officers appointed by county health departments are subject to the limitations in W.Va. Code§ 61-10-15 which imposes strict limitations upon county officials having an interest in public contracts over which they exercise voice, influence or control. W.Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949).

Here, the Commission finds that this code provision does not apply as the Health Department is **not** a County agency but a joint County/City Health Department. *See* A.O.s 99-03 and 2002-06 wherein the Commission ruled that W.Va. Code§ 61-10-15 does not apply to regional, as opposed to county, entities. While local boards of health are compromised of two or more counties or cities, or a combination of both, the West Virginia code also provides for county health departments. W.Va. Code§ 16-2-7. The Commission finds that County Board of Health Members and their Health Officers are subject to the stricter limitations in W.Va. Code§ 61-10-15. As such, county health officers may **not** receive patient referrals from their health departments unless they seek and receive a formal advisory opinion and/or a contract exemption.

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