ADVISORY OPINION NO. 2012-21

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Local Health Department** asks whether it is permissible under the Ethics Act for it and/or its employees to be a member of a non-profit entity comprised entirely of public employees whose functions include oversight and distribution of grant funding to their own local health departments.

FACTS RELIED UPON BY THE COMMISSION

The Requester is one of 49 local health departments in the State. Organized pursuant to West Virginia Code§ 16-1-1 *et seq.,* local health departments provide services necessary to protect the public health of the community in which it serves. Although each local health department is an autonomous governmental agency, they receive funding and appropriations from the State through a designated State Agency.

Additionally, the State Agency has a working relationship with the local health departments through its various divisions within the Agency. One such division is specifically charged with providing support for local health department employees and local boards of health as they deliver public health services and improve community health.

Historically, the State Agency has also served as a federal grant administrator and distributed federal grant monies to the Requester and other local health departments. According to the Requester, the State of West Virginia, by and through the State Agency, would apply for and receive federal funding and/or other grants. The State Agency would then allocate the funds among the 49 local health departments as sub-recipient grants through a competitive application process and funding matrix based on a variety of factors. The State Agency would handle all administrative oversight and invoicing, along with ensuring compliance with the multitude of federal guidelines and regulations. In short, all funding decisions and oversight rested with the State Agency.

Association and Non-Profit, Inc.

In 1986, the Requester, and several other local health departments, formed a voluntary association, which has since grown to include all 49 local health departments (hereinafter referred to as "Association"). The stated mission of the Association is to represent the interests of local health departments, and "to work together to leverage resources and influence public policy." Member health departments are required to

annually pay dues to the Association based upon the per capita rate of the community serviced. **All** local health departments are eligible to members of the Association.

The Association itself is comprised of a single delegate for each member local health departments. The delegates are public employees and chosen by their respective health department. As part of its organizational structure, the Association is overseen by an Executive Council. The Executive Council consists of a President, Vice-President, Past-President and three members-at-large. Voted on annually, any employee of a member health department may be nominated and stand for election. Hence, all members of the Executive Council are public servants employed with a local health department. Until recently, an employee working for the Requester was one of the three elected members-at-large on the Executive Council.

In 1995, the Association formed a private non-profit corporation to aide in furtherance of its mission (hereinafter "Non-Profit, Inc.").[1] According to the Requester, the Non-Profit, Inc. was to operate as a charitable entity organized exclusively for charitable, educational and scientific purposes, including making distributions to organizations that qualify as exempt organizations under 501(c)(3) of the Internal Revenue Code. In addition, the Non-Profit, Inc. was organized to solicit, receive, and manage contributions from individuals, businesses, and organizations.

According to its by-laws, all "appointed delegates to the... Association shall be members of the [Non-Profit, Inc.]." The Non-Profit, Inc. is overseen by a Board of Directors. The Board of Directors is comprised of the Association's Executive Council plus two members appointed by the President of the Association.

Federal Infrastructure/Accreditation Grant

In 2010, the State Agency received a federal grant in the amount of roughly $1.2 million to assist and benefit the local health departments. Thereafter, in 2011, the State Agency received another $600,000 bringing the total grant award amount to over $1.8 million. According to the Requester, "the chief declared purpose of the grant was to address performance management improvement and further enhance efforts to effect public health system changes that improve public health impact."

In February 2012, during a meeting of the Association, the Requester and other Association members were informed that a significant amount of the Infrastructure grant money provided to the State Agency had yet to be distributed or allocated, and if the

[1] The Non-Profit, Inc. was recognized as a 501(c)(3) entity by the IRS when it was formed. However, due to a filing error in September 2011, the organization lost its 501(c)(3) status and reverted to a Private Foundation status. The Non-Profit, Inc. still remains an active, registered corporation in the State of West Virginia.

money was not allocated and spent by September 29, 2012 (the end of the grant term), the money may have to be returned to the federal government. [2]

In light of the looming deadline, a group of Association members, along with the Association's Executive Director, met with representatives of the State Agency. Together they decided that the most expedient means of distributing the funds was to direct a portion of the grant funds ($400,000) to the Non-Profit, Inc. under a sub-recipient grant, and deviate from the State Agency's historical practice by allowing the Non-Profit, Inc. to (1) develop its own funding matrix, and (2) handle all the administrative oversight of distributing the grant funds.

Accordingly, on February 14, 2012, the Non-Profit, Inc.'s Board of Directors agreed to enter into a sub-recipient agreement with the State Agency. In addition, the Board of Directors recommended that a work group be formed to define the grant guidelines and funding matrix. While it appears that a work group was established, the majority of the work was actually handled by the Executive Director of the Association.[3] She developed a funding matrix based entirely on population, and initially established the mini-grant process.

On March 15, 2012, the work group met and considered the Executive Director of the Association's proposed funding matrix and grant guidelines. Based upon the work group's input, the Non-Profit, Inc. changed the grant guidelines. These changes included creating a two-round process to allow for more local health departments to participate. Thereafter, on March 16, 2012, the Executive Director of the Association disseminated the updated grant guidelines and notice of the mini-grants to all 49 local health departments with a deadline of April 6, 2012 to submit a request for round 1 grant monies.[4] According to information provided, only nineteen (19) of the total 49 local health departments applied for the first round. The Requester was one of the nineteen local health departments to submit a grant request.

On April 6, 2012, the Executive Director of the Association notified all nineteen applicants that they would receive a portion of the funds. The Requester received the largest amount of grant funds.

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[2] According to the information provided to the Commission, only $40,000 of a budgeted $1.8 million grant had been expended as of February 1, 2012.

[3] Although it does not affect the Commission's analysis of this issue, the Commission is unable to determine the authority or legal status of the Association's Executive Director performing Non-Profit, Inc. work for and/or representing the Non-Profit, Inc.

[4] A second round of funding was also noticed with a deadline of May 6, 2012.

Contractual Agreement with the State Agency

On April 27, 2012, the Non-Profit, Inc. formally executed a sub-recipient grant agreement ("Agreement") with the State Agency for $419,928.00. The Agreement authorized the Non-Profit, Inc. to develop its own mini-grant process to provide funding to individual local health departments. In particular, the Agreement stated that:

> Grant process will include application for funding, review of applications to ensure that proposed activities support building capacity around pre-accreditation activities, performance management and improvement practices, monitoring of grantee through submission of financial and progress reports, and the project completion report which will document final outcomes of grant activity.

Additionally, the Agreement between the State Agency and the Non-Profit, Inc. contained the following conflict of interest provision:

> 14.01(a) **Conflicts of Interest:** The Grantee attests that it, its officers or members, employees, or subgrantees presently have no interest and shall not acquire any interest, direct or indirect which would conflict or compromise in any manner the performance of services. The Grantee further attests that during the performance of the Grant Agreement, the Grantee shall periodically question its officers, members and employees concerning such interests. Any such interest discovered shall be promptly presented in detail to the Department. The Grantee will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of private gain.

Questions about Conflict of Interest

Shortly after the April 6, 2012, round 1 awards were issued by the Non-Profit, Inc. (and before the Agreement was executed with the State Agency), questions began to rise about the grant process and the funding matrix. In particular, on April 9, 2012, the Requester sent a letter to the Association inquiring about the role of the Non-Profit, Inc. in the creation of the funding matrix, and the role of the Executive Director of the Association in the grant process. Additionally, according to information provided by the Requester, at least one other local health department was seeking an alteration of the funding matrix and an award of additional monies.

These concerns led the Non-Profit, Inc. to conduct an emergency board meeting on April 12, 2012. The Board decided to seek a legal opinion relating to potential conflict of interests. Thereafter, the Non-Profit, Inc.'s attorney provided a written legal opinion

maintaining that no conflict of interest existed under the Non-Profit, Inc.'s by-laws.[5] On April 19, 2012, the Non-Profit, Inc. held another board meeting and decided to proceed with the April 6 awards. Additionally, in order to address the funding concern raised by the other local health board, the Non-Profit, Inc. decided to alter the original grant guidelines and distribute additional funding. This resulted in an increase in funds for the Requester and the other local health department.

On the same day, the Requester submitted a letter to the Non-Profit, Inc. indicating its intent to rescind its application for grant funds. According to the letter, the Requester questioned "the duplication of efforts regarding the mini-grant process" by the State Agency, as well as a potential "undeclared conflict of interest in this matter" by the Non-Profit, Inc. board members.

Thereafter, on April 23, 2012, the Requester held an emergency meeting whereupon it unanimously agreed to rescind from the Non-Profit, Inc. grant process, and to seek an Advisory Opinion request from the Ethics Commission. On April 25, 2012, the Requester sought this Advisory Opinion.

Following the filing of the request for an Advisory Opinion, the Requester re-submitted his grant application directly to the State Agency for funding. The State Agency stated that it did not have an alternative grant process, and referred the Requester back to the Non-profit, Inc.

Thereafter, on May 17, 2012, the Requester held another meeting during which it decided to formally withdraw from the Non-Profit, Inc. and the Association. Although the Requester has not sought reimbursement of its Association dues, which are paid in full until the end of the year, the Requester has withdrawn its membership in both the Association and the Non-Profit, Inc.

On June 28, 2012, this Advisory Opinion request was initially presented to the Commission. At the time, the Request posed seven questions, with multiple sub-parts. Of the seven items, only a few appeared to be matters over which the Commission had jurisdiction. In addition, based upon the information available at the time, it was unclear if the Requester had standing to seek an Advisory Opinion. Accordingly, the matter was tabled to allow for further information on standing, and to determine if any of the affected entities desired to join in the Advisory Opinion request.

[5] The legal opinion did not consider or address conflicts under the Ethics Act (W.Va. Code§ 6B-1-1 *et seq.).*

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-3(a) reads in relevant part:

> A person subject to the provisions of this chapter may make application in writing to the ethics commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter... and would thereby expose the person to sanctions 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) reads in relevant part:

> [N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control.

W. Va. Code§ 6B-2-5U)(3) reads in relevant part:

> 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

I.
Standing

When this matter was initially presented to the Ethics Commission, it was unclear if the Requester had standing to seek an opinion. Specifically, the question arose as to whether the Requester's resignation and withdrawal from the Association and the Non-Profit, Inc. divested the Requester of standing.
W.Va. Code§ 6B-2-3(a) reads in relevant part:

> A person subject to the provisions of this chapter may make application in writing to the ethics commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter ... and would thereby expose the person to sanctions by the commission[.]

At the time of the filing of the Advisory Opinion, the Requester was a member of both the Association and the Non-Profit, Inc. In addition, one of the Requester's employees was a both a delegate and a member of the Association's Executive Council. Further, because the Requester's employee was a member of the Association's Executive Council, the employee was also a member of the Non-Profit's Board of Directors and involved in the funding decisions.

While the timing of the Requester's withdrawal is an important factor, it does not control the Commission's consideration of standing. Rather, the Ethics Act affords any person subject to the Ethics Act an opportunity to seek an opinion about prospective conduct. W.Va. Code§ 6B-2-3(a). As a local health department whose employees and officers are public servants, the Requester is subject to the Ethics Act. *See e.g.* A.O. 2012-12 (relating to restrictions on a part-time appointed health officer). Further, as a local health department, the Requester is eligible for membership in the Association and the Non-Profit, Inc.

The Requester seeks an opinion relating to prospective conduct, i.e may it and/or its employees be a member of a non-profit entity comprised entirely of public employees whose functions include oversight and distribution of grant funding to their own local health departments. The Ethics Act expressly authorizes public servants to seek Advisory Opinions regarding their own proposed conduct. W.Va. Code§ 6B-2-3(a).

Additionally, the Commission has issued Advisory Opinions at the request of candidates for public office who were not yet public servants. *See* e.g. A.O. 2012-26 (Candidate for County Commission sought opinion relating to spouse's employment with county if elected); A.O. 2011-14 (Candidate for Assessor sought opinion relating to dual employment if elected); A.O. 96-23 (County Commissioner candidate sought opinion relating to spouse's service on county PSD if elected); and A.O. 91-53 (County Commissioner Candidate sought opinion relating to having an interest as partner in law firm in contracts with the commission).

Accordingly, the Commission hereby finds that the Requester has standing to seek this Advisory Opinion.

11.
Question Presented

The Requester asks whether it is permissible under the Ethics Act for it and/or its employees to be a member of a non-profit entity comprised entirely of public employees whose functions include oversight and distribution of grant funding to their own local

health department.[6]

Application of the Ethics Act

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).

The Commission recognizes that the State Agency's decision *to* give the grant funding process and oversight *to* the Non-Profit, Inc. was borne of a perceived necessity, and not an attempt by any particular public employee *to* directly benefit their respective employer. However, the State Agency's decision *to* use a private entity comprised solely of affected public servants requires the Commission to analyze whether the Ethics Act permits this course of action.

Having reviewed the facts and the Commission's prior Advisory Opinions, the Commission hereby finds that it is impermissible under the Ethics Act for the public employees/servants of the Non-Profit, Inc. *to* handle, oversee, and/or participate in funding decisions in which their employer is a potential recipient. W.Va. Code§ 6B-2-5(b). The Commission finds that an insoluble conflict exists, and, similar to the Commission's holding in A.O. 2009-08 and A.O. 2011-18, the public servants serving on the Board of Directors, work group, committee and/or any other entity empowered to consider, evaluate, discuss, rank, and/or oversee funding decisions, including the funding matrix, need to be recused so as not to violate the Ethics Act. *See* W.Va. Code § 6B-2-3U)(3)(outlining the procedures for recusal).

In reaching this conclusion, the Commission notes that it is guided by its Legislative intent to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees. The State Agency has chosen to cede its administrative functions *to* a private entity comprised of public employees who wear "two hats" in handling funding issues. As an employee of a potential recipient, the public employee owes a duty of loyalty to his/her employer and has an interest in ensuring that funding is available for his/her agency. However, as a member of the Non-Profit, Inc., the employee owes a duty of loyalty to the organization to fairly distribute funds. *See* e.g. A.O. 2011-17 ("concern of an appearance of impropriety and potential conflict with the Board member wearing 'two hats'"). [7]

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[6] In its original request for an Advisory Opinion, the Requester posed a multitude of questions. However, many of these questions are outside the scope of the Commission's jurisdiction. Instead, the Commission has limited its consideration of the issues to this legal question under the Ethics Act.

[7]Additionally, while not directly within the purview of the Ethics Act, the Commission questions whether the Agreement between the State Agency and the Non-Profit, Inc. even allows the Non-Profit, Inc. to be a sub-recipient. *See* Section 14.01(a) of the Agreement (Conflict of Interest).

While the Commission is mindful of the underlying reason for this situation, it is also mindful of its charge to uphold the Ethics Act. By prohibiting public employees whose employers are potential grant recipients from participating in the funding process, the Commission ensures transparency in the process and limits the potential for favoritism.

Future Role of Non-Profit, Inc.

Having now concluded that member employees of the Non-Profit, Inc. must recuse themselves, the Commission must now address the implications of this finding in future funding situations. Given the current structure of the Non-Profit, Inc., and by connection thereof the Association, the Commission finds that the required recusal of all the public employees from any and all funding matters prevents the Non-Profit, Inc., as currently structured and constituted, from being involved in any way administratively (e.g. acting as a pass through) in the distribution of the funds; or in the oversight (e.g. reporting/auditing) of the funds.

However, for purposes of the Ethics Act, it could be permissible to use a non-profit organization to handle funding allocation matters under the following circumstances: **First,** if the Non-Profit, Inc. and the Board were truly independent of the State of West Virginia and the local health departments. For example, if the Board of the Non-Profit, Inc. had representative members from the community as a majority of its membership, not merely public employees of a local health department. **Second,** if as a matter of law, the State Agency has clear legal authority to give this funding to the Non-Profit, Inc., generally; and whether it may do so without going through a competitive process (e.g. Request for Proposals, or being placed on the State's approved vendor list). Additionally, as a matter of law, it is unclear whether the State Agency has legal authority to delegate a portion of its executive powers (e.g. allocation and administration of grant funding) to a non-profit organization, and may require the State Agency to obtain a legal opinion from the Office of the.Attorney General. **Third,** if the federal grant guidelines expressly permit this delegation of authority to the Non-Profit, Inc..

As it relates to the Non-Profit, Inc., the Board of Directors and membership is comprised of interested public servants who must be completely recused. Unlike A.O. 2009-08 and A.O. 2011-18, the Non-Profit, Inc. does not possess an overarching body of individuals that can neutrally evaluate/handle grant applications. Instead, all members of the Non-Profit, Inc. are affected public employees with a potential financial interest, direct and/or indirect.

As a result, the Commission finds that the evaluation and administration of the grant funds may only be handled by the State Agency, as that is currently the only entity that can neutrally evaluate, decide, and administer the allocation of grant funds.

Prior distributions

While this Advisory Opinion is prospective in nature and applicable to all future grant funding/distributions, the September 30, 2012 deadline concerns the Commission. This Commission is mindful that this ruling could impose a financial hardship on the local health departments.

Accordingly, with respect **only** to the Infrastructure (Accreditation) Grant money that had been previously allocated by the State Agency to the Non-Profit, Inc. (i.e. $419,928.00), the Commission hereby delays application of this holding until **December 31, 2012.** In making this conclusion, the Commission notes that the State Agency has stated that it has just approved the funding matrix and grant guidelines for the mini-grants to the local health departments, and monies are being re-appropriated through the Non-Profit, Inc. only as a pass through to the local health departments. The delay allows the existing funding allocated to the local health departments, which may have already been spent, to be kept by the local health department. All additional monies and/or future grants shall be subject to the holding in this matter effective immediately.

Conclusion

Finally, the Commission imputes no ill motive to any of the entities in this matter. All entities involved share a collective desire to act in the best interest of the public health. 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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson