ADVISORY OPINION NO. 2012-37

Issued On September 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor** asks whether she may vote for a candidate to fill a vacancy on Council who is a customer of her husband.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the City's Mayor. There is a vacancy on City Council. A former Council Member is interested in filling the vacancy, and is willing to decline the $100/year pay. According to the Requester, he is the most experienced candidate.

The Requester's husband owns buildings that he rents to the former Council Member.

CODE PROVISIONS 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 ... her office or the prestige of ... her office for ... her own private gain or that of another person.

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

> [N]o elected official may be a party to or have an interest in a contract which such official may have direct authority to enter into, or over which he or she may have control....

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

> (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....

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them control. W. Va. Code§ 6B-2-5(d)(1). By virtue of her marriage, the Requester has a financial interest in her husband's business dealings. *See* Haislip v. White, *et al.,* 124 W. Va. 633,642, 22 S.E.2d 361, 365-66 (1942) (Mutual liabilities between spouses "creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly within the family circle.")

The Requester's financial interest in her husband's financial transactions with the candidate does not, however, constitute a financial interest in a public contract, even indirect. Instead, it is a private business transaction.

The Ethics Act also prohibits use of office for private gain of oneself or another. To the extent that Council members are authorized to receive compensation, private gain will accrue to whomever Council selects to fill the vacancy. The prohibition is implicated when a public official uses her public position unfairly to benefit herself or another. Here the candidate has indicated that he will not accept the $100/year compensation. Even if he were to be compensated, the Commission finds that $100/year is *de minimis,* and therefore the Requester's support of the candidate who rents from her husband does not violate the private gain provision. If the amount were higher, this could rise to a violation of the private gain provision.

The voting provision of the Ethics Act prohibits a public official from voting on a matter in which she or an immediate family member, or a business with which she or an immediate family member is associated has a financial interest. W. Va. Code § 6B-2-5U)(1)(A). "Public officials ... or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class." W.V.C.S.R. § 158-8-4. The fact that the candidate rents space from the Requester's husband does not give rise to a prohibited interest of the Requester in the candidate's service on City Council

As a result of the foregoing, the Requester **may** promote the candidacy of and vote on the selection of the candidate who rents from her husband without violating the Ethics Act. She is not required to recuse herself therefrom.

The advisory opinion rendered herein is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Ethics Commission for further advice as it may alter the analysis and render this opinion invalid. This opinion is limited to the analysis of whether the Ethic Act would be violated by the proposed conduct. The Ethics Commission is without authority to determine whether other laws or rules, including the policies of the Requester's government agency prohibit or otherwise restrict the proposed conduct.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, 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