ADVISORY OPINION NO. 2011-12

Issued On July 14, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney for a Town** asks if the Town's elected officials may vote to appropriate funds to a non-profit organization on which they and/or their family members serve as board members and/or officers.

FACTS RELIED UPON BY THE COMMISSION

A non-profit organization located in the Town seeks appropriations from the Town. The mayor is a member of the board of directors; the Recorder's father is also on the board; one Council member is an honorary member, and two of his children are members; and one Council member, whose father and brother are members, is an unpaid officer of the board. Neither the Town elected officials, nor their relatives who serve on the board of the non-profit organization are compensated therefor.

Historically, the Town has appropriated funds to this organization which it deems to provide an invaluable service to the Town. The Town appropriates funding to other non-profit entities as well. The board members do not benefit financially from their service on the board nor from the funds the Town appropriates to the organization.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-1-3:

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> (b) "Business" means any entity through which business **for-profit** is conducted including a corporation, partnership, proprietorship, franchise, association, organization or self-employed individual. (emphasis supplied)
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> (f) "Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

W. Va. Code § 6B-2-5(b)(1):

> A public official ... 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.... The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides, in part, that no elected 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 prevent or make unlawful the employment of any person with any governmental body.

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) would result in excessive cost, undue hardship, or other substantial interference with the operation of a county school board, it may make written application to the Ethics Commission for an exemption therefrom.

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

> (1) Public officials... may not vote on a matter:
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> (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, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.
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> (D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.
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> (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

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 ... 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 Commission must answer three questions: (1) whether the Town's appropriation of funds to a non-profit organization on whose board certain officials and/or their relatives serve constitutes the prohibited use of public office for private gain; (2) whether any of the Town's elected officials have a financial interest in a public contract (i.e. the appropriation of funds to a non-profit organization on whose board they and/or their relatives serve); and (3) whether any of the Town's elected officials may vote on the appropriation of funds to a non-profit organization on whose board they and/or their relatives serve.

Before addressing the three questions, the Commission will dispose of the issues related to the relatives of the Town's elected officials, all of whom are adults. According to the Requester, none of the relatives are financially dependent upon any of the Town's officials, neither are any of the officials financially dependent upon their relatives who serve on the board of the non-profit organization. Finally, none of the relatives reside in the same household as the Town's elected officials. As a result, the presence of relatives on the board of the non-profit organization does not affect the Commission's analysis below.

#1 – Private Gain

The Ethics Act generally prohibits public employees from using their public office for their own private financial gain or that of another. W. Va. Code § 6B-2-5(b). The Ethics Act further provides, however, that the performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain. W. Va. Code § 6B-2-5(b)(1)

Thus, the Town's elected officials, despite their own and/or their relatives' board membership, may generally advocate on behalf of, and otherwise support, the non-profit organization. This activity is consistent with the performance of usual and customary duties associated with the office or position or the advancement of public policy, which the Ethics Act explicitly authorizes. *See* Advisory Opinion 2010-23 (County School Superintendent's advocacy for passage of an excess levy constitutes the performance of usual and customary duties associated with the position permitted by the Ethics Act).

#2 – Interest in Public Contracts

The Ethics Act, W. Va. Code § 6B-2-5(d)(1), prohibits municipal elected 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 Act excepts employment contracts with the governmental body.

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. A limited interest is an amount not to exceed one thousand dollars in the gross revenues in a public contract or contracts per calendar year.

Although the non-profit organization's interest in the contracts exceeds $1,000, the board members themselves do **not** have a financial interest in the non-profit organization's contracts. In Advisory Opinion 2010-04, the Commission ruled that the non-profit organization's financial interest in a contract may not be imputed to a board member thereof in the absence of evidence that the board member received any financial benefit himself by virtue of the contracts between the board and the governing body on which he served. Thus, this prohibition does not apply to the situation presented herein as it relates to uncompensated **board members**.

As a result, the Town may continue to appropriate funding to the organization.

#3 – Voting

The Ethics Act sets forth specific rules regarding when elected and appointed public servants may vote. The overriding purpose of the voting provision is to ensure that a public official does not vote or take action on a matter in which he or she has a financial interest. In Advisory Opinion 2009-06, the Commission was asked whether a City Council member may vote on a matter or otherwise take action to benefit a church where he is a member; additionally, his father served on the church council. Noting that neither the Council member nor his father had a financial interest in the church or property, the Commission ruled that the Ethics Act does **not** prohibit him from voting or taking action on matters which affect the church.

In Advisory Opinion 2010-04, the Commission found that an elected County Board of Education (BOE) member who was also a member of the board of directors of a non-profit organization with which the BOE contracted, **is** covered by this prohibition in W. Va. Code § 6B-2-5(j)(1)(A). As a result, although the common member did not have a financial interest in the organization, the Commission required him to recuse himself from voting on any matters related to any contract or other transaction between the BOE and the non-profit organization.

The Commission made this conclusion in reliance on the definition of "director", but neglected to consider the definition of "business" which expressly excludes non-profit organizations. W. Va. Code § 6B-1-3(b). As a result of this oversight, the Commission hereby overrules that portion of Advisory Opinion 2010-04, and now holds that public officials who are uncompensated board members of a non-profit organization are not required to recuse themselves on any matters related to any contract or other transaction between the governing body and the non-profit organization.

CONCLUSION

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.

Drema Radford, Acting Chairperson