

**ADVISORY OPINION NO. 2011-15**

**Issued On November 3, 2011 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

An Appointed Member of a Board of Health who is the past president of a fraternal organization which sued the Board of Health and who has business interests affected by the Board of Health regulations seeks guidance on voting.

**FACTS RELIED UPON BY THE COMMISSION**

The Requester is an appointed Member of a Board of Health. He owns a company which leases video lottery machines to two locations within the county. There are approximately sixty-five locations in the county which have these machines. He states that his wife owns or operates several businesses where video lottery machines are located. He further states that he has other business interests in the county.

The Board of Health has adopted Clean Indoor Air regulations which, with limited exceptions, prohibit smoking in public places. Hence, this regulation impacts various businesses, including businesses which have video lottery machines.

The Requester is the former president of a fraternal organization which, while he was president, sued the Board of Health. In the lawsuit the fraternal organization sought to have certain portions of the Clean Indoor Air regulations declared invalid. The Circuit Court denied the requested relief and dismissed the case. The fraternal organization has appealed the lower Court's decision to the Supreme Court and the case is still pending.

The fraternal organization is a non-profit corporation whose members are various fraternal orders, clubs and associations in the county. The Requester states that he is no longer president of the organization or a board member.<sup>1</sup> He is a member of a fraternal order which belongs to the organization.

The Requester generally inquires whether he, as a Board of Health Member, may vote on matters involving the Clean Indoor regulations or the lawsuit. He states that it is his understanding that he should not vote

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<sup>1</sup> The Secretary of State's online database still lists the Requester as the President of the non-profit organization. In rendering this opinion, the Commission is relying upon the representation of the Requester that he is no longer President. Regardless, this fact is not controlling in regard to the holding of the Commission herein.

## CODE PROVISIONS RELIED UPON 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(e) reads:

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

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

*(j) Limitations on Voting.*

(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. Business with which they are associated means a business of which the person or an immediate family member 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.

(II) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

(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

The Commission finds that, in his capacity as a Board of Health Member, the Requester may not be involved in matters relating to a lawsuit which was filed by a fraternal organization while the Requester was president. The Board of Health has the right to defend the lawsuit as it sees fit. For purposes of determining litigation strategy, it is entitled to engage in full and frank discussions with its attorney.

It is essential that these attorney-client communications remain confidential. While there is no allegation that the Requester would reveal this confidential information to the organization, the limitations in the Ethics Act are intended to safeguard against the potential for abuse. Moreover, as the president of the organization at the time the lawsuit was filed, he has a vested interest in the outcome of the litigation. While he may no longer serve as president of the organization, it would be inconsistent with the spirit and intent of the Ethics Act, and relevant provisions therein, for the Requester to be involved in decisions or privy to information thereto relating to the Board's defense of the lawsuit.

Hence, the Commission finds that the voting provisions in the Ethics Act, when read in conjunction with the private gain provisions, require the Requester to recuse himself from being involved in deliberations or votes relating to the lawsuit. Pursuant to W.Va. Code § 6B-2-5(j)(3), in order for recusal to be proper, it is necessary for the Board Member to 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 discussing or voting on the issue. Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the board member left the room during all consideration, discussion and vote on the item under consideration.

This conclusion is consistent with past opinions of the Commission. In Advisory Opinion 99-19, an elected Member of a Board of Education (BOE), prior to her election, was a named party in a lawsuit against the BOE. The litigation was still pending at the time of her election. While she had her name removed from the lawsuit, still, the Commission ruled that as a BOE Member, she could not be involved in decisions concerning the pending litigation.<sup>2</sup>

In regard to voting on the Clear Air regulations, a different analysis applies. The Ethics Act permits a public servant to vote on matters in which they have a financial interest so long as the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class consists of five or more similarly situated persons or businesses.

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<sup>2</sup> As the Commission has concluded that he may not vote based upon the fact that he was the president of the organization at the time the organization filed the lawsuit, the Commission declines to analyze in this opinion whether his **membership** in the fraternal order which belongs to the organization precludes him from voting on the lawsuit.

Five or more businesses are affected by the Clean Air regulations. As such, the Requester may vote on amending the Clean Air regulation or other policies which govern smoking in public places. Moreover, the fact that he is a member and/or officer of an organization or order which has an interest in Clean Air regulations does not prohibit him from voting on the Clean Air regulations as five or more fraternal associations are affected.

Before the legislature amended the Ethics Act to provide specific guidance to public officials regarding when they were permitted to vote on matters, the Ethics Commission applied a broader standard. The Commission sought to determine, on a case by case basis, whether an issue was “personal” to the particular public official. For example, when the former president of a non-profit corporation that had sued the Board of Education was elected to the Board, like the Requester, he sought the Commission’s guidance on voting. The Commission found that the new Board member was prohibited from voting on issues related to the lawsuit; otherwise, it would give an appearance of impropriety. See Advisory Opinion 92-31.

The Commission went on to rule, however, that the new Board member was not prohibited from voting on issues that arose during his term as president of the organization, and stated:

[T]he Requester’s involvement in an organized effort opposing the Board’s consolidation procedures and policies does not disqualify him from voting, deciding or otherwise taking an official role as a Board member in determining those procedures and policies during his term as a Board member. Prior involvement in issues as a private citizen or as a candidate does not, by itself, create a disqualifying “personal” interest in those issues when they are dealt with as a Board member.

Advisory Opinion 92-31. This same principle and conclusion applies in regard to voting by the Requester on Clean Air Regulations.

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/ Kemp Morton

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R. Kemp Morton, III Chairperson