ADVISORY OPINION NO. 2011-22

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Government funded non-profit organization asks whether an employee of the State agency that funds it may serve on the non-profit organization's board.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a non-profit corporation that provides programmatic support and technical assistance to a State government agency; it is funded by both federal grants and state appropriations. It manages regional based field offices and coordinates with regional boards of directors; assists local government agencies with certification and continuing education processes; provides grant management, writing, and assistance to government agencies; and, assists state and local groups with grant activity.

The Requester asks whether an employee of the State agency that funds it may serve on the non-profit organization's board. Board members serve without compensation.

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.
>
> 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.

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).

Although the Ethics Act prohibits the use of office for private gain, it anticipates that the performance of usual and customary duties on behalf of constituents does not ordinarily constitute private gain. W. Va. Code§ 6B-2-5(b). The volunteer service of a public employee to the board of a non-profit organization does not generally implicate the Act's prohibition against use of office for private gain so long as the public employee does not use her/his public position to unlawfully favor the non-profit organization.

In Advisory Opinion 2011-12, the Commission found that a Town's elected officials, may advocate on behalf of, and otherwise support, a non-profit organization despite their own and/or their relatives' board membership, the Commission wrote: "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 also* 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).

Indeed, the State agency which funds the Requester may desire to have one of its employees serve on Requester's board to provide fiscal oversight. The Commission takes administrative notice that many public and private boards have as a requirement that certain governing bodies appoint some or all of the members of their boards, e.g. County Commissions appoint members of County Solid Waste Authorities, W. Va. Code § 7-16-3; Municipalities appoint members of Convention and Visitors Bureaus (non-profit organizations) OMA AO 2008-07; County Commissions appoint members of a Multi-County Public Agency in participating counties, AO 2009-14; and the Morgan County Commission appoints three of the seven members of the Morgan County Rescue Service, (non-profit organization) OMA AO 2010-01.

In the alternative, the State agency may adopt stricter standards than those imposed by the Ethics Act. For example, the State agency may choose to prohibit its employees from serving on boards of directors of funding recipients; or allow them to serve but implement safeguards to remove such employees from the funding process.

Thus, the Commission hereby finds that the Ethics Act does not prohibit a public employee of the State agency from serving on the board of a non-profit organization that the State agency funds.

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/R. Kemp Morton, Chairperson
West Virginia Ethics Commission