ADVISORY OPINION NO. 2011-06

Issued On May 5, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney** for a **County Public Service District** (PSD) asks whether a PSD board member, who in his **private** capacity has participated in other rate cases related to a particular utility company, may participate in the PSD's deliberations and actions related to the PSD's role in the West Virginia Public Service Commission's investigation of that utility company.

FACTS RELIED UPON BY THE COMMISSION

This matter arises out of an on-going dispute between a private utility company ("Utility Company") and its approximately 2,100 customers. Over the past several years, the Utility Company has sought approval from the West Virginia Public Service Commission (PSC) for rate increases. The proposed rate increases have been controversial and opposed by numerous homeowner associations and citizens. The latest rate increase request remains pending before the PSC.

One of the homeowner associations opposing the rate increase is a subdivision consisting of approximately 180 homes. All of the homes in the subdivision are customers of the Utility Company. A board member of the county public service district ("Board Member") resides in the subdivision and is a member of the homeowners association ("HOA"). In addition, the Board Member is a member and officer of the HOA's board of directors.

During the past two rate increase cases, as well as an earlier certification of convenience and necessity, the HOA has intervened and actively opposed the Utility Company. In each of those matters, the HOA has designated the Board Member to be its spokesperson and representative before the PSC. [1] Additionally, according to PSC records, the Board Member has publicly testified and provided documentary evidence in opposition to the Utility Company. As part of his most recent testimony, the Board Member questioned the transparency of the Utility Company's finances and the allocation of costs.

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[1] The Board Member was not on the PSD during the first rate increase request or during the certification of convenience and necessity matter. However, he was a member of the PSD during the latest rate matter which still remains pending. There is no evidence that the Board Member has identified himself as acting on behalf of the PSD at any time.

Recently, the PSC initiated a general investigation against the Utility Company. Aside from investigating matters related to the repeated rate increases, one of the purposes stated for initiating the general investigation was to "request information about future possibilities of private-public agreements."

The Requester's PSD currently maintains a private-public agreement with the Utility Company to provide services to a portion of the county. The Agreement does not cover the Board Member's subdivision or home. However, since one of the PSC's stated purposes is to request information related to private-public agreements, the Requester's PSD desired to intervene in the general investigation matter pending before the PSC.

When the issue to intervene came before the PSD, there was a question whether the Board Member should recuse himself in light of his participation in the related matters against the Utility Company. Out of an abundance of caution, the Board Member recused himself from the item and did not participate or vote. The two remaining board members voted for the PSD to intervene in the PSC general investigation.

Notwithstanding, the Requester asks whether the Board Member may participate in future matters relating to the general investigation in his capacity as a PSD board member.

In support of allowing participation, the Requester notes that the Board Member did not become a board member of the PSD until December 2009. The Requester further notes that the Board Member is one of many homeowners involved in the rate matter, and is similarly situated with more than five persons or homes. Finally, the Requester notes that the Board Member has participated in the other PSC matters in his private capacity as a member of the HOA. He has not represented or participated as a member of the PSD.[2] The Board Member is willing to recuse himself from participation in HOA matters relating to the general investigation.

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(j) reads in relevant part:

[2] According to PSC records, the Requester's PSD did not intervene in any of the prior rate increases sought by the Utility Company.

(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.

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code § 6B-1-2(d).

Under the West Virginia Ethics Act, a public official may not vote on a matter in which they or an immediate family member have a financial interest. W.Va. Code § 6B-2-5(j)(1)(A). However, the Act provides an exception if the person is "affected as a member of, and to no greater extent than any other member of ... class of persons or class of businesses." W.Va. Code § 6B-2-5(j)(II)(A). The Act further defines "class" as "not fewer than five similarly situated persons or businesses." Id.

Given the numerous customers of the Utility Company, as well as the number of homes in the HOA, there is no dispute that the Board Member will be affected as a member of, and no greater extent than, a class of individuals and homeowners.

Accordingly, under W.Va. Code § 6B-2-5(j), the Board Member would be allowed to vote and participate on matters relating to the Utility Company, even though he has a financial interest as a customer, so long as it is not specific to him or his family.

While the inquiry typically would end here, the Commission is troubled by the overall involvement of the Board Member in this matter, as well as the potential for private gain as a result of the PSD intervention in the proceeding.

Both prior to and during his term on the PSD, the Board Member has represented himself and fellow homeowners in opposing the Utility Company. The HOA and multiple other homeowner associations have jointly hired counsel to represent them in this matter. As a member of the HOA, the Board Member is responsible for paying his *pro rata* share of the legal fees.

Additionally, as the HOA spokesperson and representative who has publicly testified against the Utility Company, the Board Member has taken a larger than normal advocacy position against the Utility Company. While he has not been personally compensated, his advocacy effort has been paid for and directed by the HOA members and HOA board of directors, of which he is an officer.

In this new general investigation proceeding, there is an appearance that the Board Member could be using the PSD to bring suit in the District's name, with the District's attorney, and at public taxpayer's expense, instead of having to once again pay for an attorney to represent him and his fellow HOA members. If this were the case, then it could constitute use of public office for private gain. [3]

While the Commission is not making this specific finding against the Board Member, the Commission does believe that the Board Member's personal interests are too intertwined with the other legal proceedings to allow him to participate, deliberate, direct PSD counsel, and/or vote on the PSD intervention in the general investigation matter. Accordingly, the Commission hereby finds that the Board Member must recuse himself from any and all involvement with the PSD's intervention legal proceeding.

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[3] There is nothing in the record before the Commission to suggest that this is the intent or purpose of the PSD intervention. Instead, the PSD appears to have a legitimate interest in its private-public agreement with the Utility Company. Hence, the PSD intervention has a rational basis separate and apart from the Board Member's personal and private interest. Further, the Board Member has expressed a willingness to recuse himself from the HOA matters relating to the general investigation if necessary.

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 recuse himself from discussing or voting on the issue.

Nothing in the Ethics Act prohibits the PSD from pursuing its intervention in the general investigation matter before the PSC and to protect its interest. The only restriction is that the Board Member must recuse himself. Similarly, the Board Member may continue to pursue his personal/ private intervention and interests against the Utility Company as a citizen, customer, homeowner, and/or officer of the HOA. He may not, however, act in his official capacity or use his title as a PSD Board Member while pursuing his private interests.

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. Due to the unique nature of the question presented, this opinion is limited to the facts and circumstances stated herein, and may not be relied on as precedent.

R. Kemp Morton, Chairperson