

Advisory Opinion 2021-11

Issued on June 3, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **City** asks whether businesses owned by City Council members or City employees are eligible to receive small business grants awarded by the City.

Facts Relied Upon by the Commission

A City Council created a Small Business Grant program (“Program”) from funds the City obtained in a litigation settlement. Local businesses may apply to receive a grant through the Program, but no business automatically receives a grant award.

The Mayor formed a Scoring Committee to evaluate Program applications. The Mayor’s Office appoints the Scoring Committee members which consists of three City Council members, the City’s Chamber of Commerce Executive Director, and the City’s Convention and Visitor’s Bureau President. Grants are awarded through the Program and Scoring Committee to local businesses based on a scoring rubric.

Once the Scoring Committee scores the applications and makes its decision on grant awards, the grant recipients are publicly announced. City Council does not vote on approving the grant awards.

Businesses may qualify for a grant award under the Program by agreeing to complete projects for their businesses relating to broadband connectivity, marketing, advertising, demolition projects, or the construction of exterior and interior surfaces. The City requires that project work be started within six months of a grant award and completed within one year. Grant funds are only issued by the City once the approved projects have been completed and upon review and approval by the City’s Office of Economic and Community Development. Grant recipients must also match any award amount by 25 percent.

The Requester also asks whether the analysis under the Ethics Act would change if the City’s Chamber of Commerce distributes the grant monies. Under that scenario, the Scoring Committee would still score the applicants and announce the grant awards in the same manner described above, but the grant money would be held by and distributed through the Chamber of Commerce.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) states:

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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. ...

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

(1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control.

...

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code R. § 158-8-4 states, in relevant part:

Public officials or public employees 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.

Advisory Opinion

Pursuant to W. Va. Code § 6B-2-5(d)(1), a public official or public employee or business with which a public official or public employee is associated may not have more than a limited interest in the profits or benefits of a public contract¹ over which he or she has

¹ Consideration is a necessary element to create a valid contract. *Young v. Young*, 808 S.E.2d 631, 636 (W. Va. 2017). The West Virginia Supreme Court has held that “[c]onsideration is a broad term; we have stated that ‘[a] valuable consideration may consist either in some right, interest, profit or benefit accruing

direct authority or control. This prohibition contains an exception for part-time **appointed** public officials, but there is no exception for part-time **elected** officials such as elected city council members.

It is irrefutable that a business owned by a City Council member or employee has a financial interest in receiving a grant through the City.² The Ethics Commission also finds that the City Council members exercise control over the administration of the grants because the City Council members and Mayor, by Code, are the governing body and administrative authority of the municipality. W. Va. Code § 8-3-2.³

The Ethics Commission must nevertheless determine whether the grant awards are public contracts for purposes of the restrictions in the Ethics Act. In Advisory Opinion 1998-24, the Ethics Commission held that a city council member may receive a loan administered by the city's housing department to benefit low-income residents. The Ethics Commission found that the city council member's position gave "her the degree of control contemplated by [W. Va. Code § 6B-2-5(d)(1)]." The Ethics Commission determined, however, "that the Legislature did not intend the prohibition to apply to this situation." For its finding in Advisory Opinion 1998-24, the Ethics Commission cited Advisory Opinion 1998-07 in which the Commission held that the restrictions in W. Va. Code § 61-10-15, which are similar to those in W. Va. Code § 6B-2-5(d)(1), were not intended to deny county officials benefits available to the general public.

The Ethics Commission finds that the Program is analogous to the loan program in Advisory Opinion 1998-24. The Ethics Commission finds that because the Program is available to the general public, it is not the type of public contract the Legislature intended to prohibit. All small businesses should be allowed the opportunity to participate in programs created by local government for the purpose of stimulating and encouraging economic development within the community. The Ethics Commission has consistently found that economic development initiatives are legitimate public policy goals that should be given weight. See Advisory Opinion 2013-31; Advisory Opinion 2005-04; Advisory Opinion 1995-28.

Therefore, the Ethics Commission holds that a City Council member's business may receive a grant awarded under the Program. City Council members are

to the one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other." *Id.* at 636 [internal citation omitted]. Grants awarded under the Program are contracts under W. Va. Code § 6B-2-5(d)(1) because the grant recipients bear the responsibility to match 25% of the funds and must use the funds for a specific project within a specific period of time.

² A public official or public employee who owns a business is "associated" with that business, as the term is defined in W. Va. Code § 6B-2-5(d)(1) and W. Va. Code R. § 158-8-4.

³ In Advisory Opinion 2015-05, the Ethics Commission held that a city council member may continue her lease agreement with the city building commission if she did not serve on the city building commission or participate in the appointment of members to serve on the building commission. In that case, the building commission functioned independent of the city and was managed by an appointed board. Further, W. Va. Code § 8-33-1, specifically authorizes municipalities to create municipal building commissions, which are public corporations. The Ethics Commission assumes, for purposes of this Opinion, that the city housing department in Advisory Opinion 1998-07 was not a separate legal entity/public corporation which operated independent of the city.

cautioned, however, that it would be a violation of the Ethics Act's prohibition against the use of office for private gain, if a City Council member were to use his or her position on City Council to influence Program awards or to obtain preferential treatment, terms, conditions, or other consideration not available to the general public.

City employees

City employees generally do not have direct authority or control over all municipal contracts by virtue of their employment with the City. *But* see W. Va. Code R. § 158-8-2 (city managers have direct authority or control over city contracts) and Advisory Opinion 1990-135 (city attorney's business may not contract with city because he has authority or control over city contracts). Furthermore, there is no indication that City employees are eligible to serve on the Scoring Committee as constituted. **Therefore, City employees may apply for and receive grants awarded under the Program.**

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission