

# Advisory Opinion 2021-12

Issued on June 3, 2021, by

The West Virginia Ethics Commission

## Opinion Sought

**Municipal officials** ask whether they must recuse themselves from participating in matters involving an emergency services organization to which the municipality makes annual appropriations when the officials are uncompensated members and stockholders of the organization, and, in one case, an officer and board member.

## Facts Relied Upon by the Commission

The Requesters are the elected officials of a municipality, including the Mayor, the City Recorder, and Council Members. Annually, the City Council votes to authorize funding to support an organization that provides the municipality with various emergency services such as fire and rescue services. The amount of the funding is subject to change at the discretion of the municipality from year-to-year. For a time, the level of funding remained at the same amount, but several years ago the municipality reduced the appropriations to the organization by 50 percent. The decrease in funding was also a controversial issue in the most recent municipal election.

Five of the municipal officials seeking this Opinion have ties to the organization that provides emergency services to the municipality. These five are volunteer members and stockholders of the organization. In addition, the Mayor is an officer and sits on the board of directors of the organization.<sup>1</sup> Volunteer members of the organization provide firefighting and related services to the organization and the community. The municipal officials do not receive compensation as (volunteer) members or stockholders of the organization. Similarly, the Mayor is not compensated for his service as an officer or board member for the organization.

In many ways, the organization resembles a nonprofit corporation. For example, there are no stock dividends, and the organization has a nonprofit designation with the Internal Revenue Service. Its members, board of directors, and stockholders also consider it to be a nonprofit, however, the organization was incorporated with, and is listed by, the West Virginia Secretary of State's Office as a for-profit business corporation.

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<sup>1</sup> Some of the municipal officials also have kinship relationships with people associated with the organization. However, none of these relationships meets the definition of "immediate family" and do not affect the issue at hand.

## **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-1-3 provides, in relevant part:

(b) “Business” means any entity through which business for-profit is conducted including a corporation, partnership, proprietorship, franchise, association, organization, or self-employed individual.

...  
(d) “Employee” means any person in the service of another under any contract of hire, whether express or implied, oral, or written, where the employer or an agent of the employer or a public official has the right or power to control and direct such person in the material details of how work is to be performed and who is not responsible for the making of policy nor for recommending official action.

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

(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.

...  
(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, or a compensated officer or board member of, the nonprofit: Provided, That if the public official or immediate family member is an uncompensated officer or board member of the nonprofit, then the public official shall publicly disclose such relationship prior to a vote on the appropriations of public moneys or award of contract to the nonprofit: Provided, however, That for purposes of this paragraph, public disclosure shall mean disclosure of the public official’s, or his or her immediate family member’s, relationship to the nonprofit (i) on the agenda item relating to the appropriation or award contract, if known at time of agenda, (ii) by the public official at the meeting prior to the vote, and (iii) in the minutes of the meeting.

...  
(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. The recusal shall also be reflected in the meeting minutes.

### **Advisory Opinion**

The Commission must determine whether the elected municipal officials must recuse themselves from the deliberation and vote on a financial appropriation to an organization of which they are uncompensated members and stockholders and, in one case, an officer and a member of the board of directors. Whether an organization with which a public official is associated is a for-profit or nonprofit corporation makes a difference when determining whether the official, for purposes of the Ethics Act, must recuse himself/herself from any deliberation and decision affecting the financial interest of the organization.

Although the information provided by the Requester is conflicting regarding whether it is a for-profit or nonprofit entity<sup>2</sup>, the Ethics Commission finds that because the organization is registered as a for-profit corporation with the Secretary of State, it meets the definition of “business” in W. Va. Code 6B-1-3(b) which defines business as “... any entity through which business for-profit is conducted including a corporation ...”.

Therefore, the financial interests of the organization are imputed to any public officials who are “associated” with the organization, even if they are uncompensated, obligating such officials to recuse themselves pursuant to the voting restrictions in the Ethics Act at W. Va. Code 6B-2-5(J)(1)(A). The Act defines association with a business as being 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.” *Id.* Applying this definition to the Mayor, he is both an officer and a member of the board of directors. Accordingly, he is associated with the organization. See Advisory Opinion 2010-21 (holding that the spouse of a county superintendent was “associated” with a private business by virtue of serving on the corporation’s board of directors.)

The other four municipal officials are members of the organization and stockholders. Members of the organization perform the work of the organization on a voluntary basis without pay. They fight fires, provide rescue services, and perform other related tasks. The volunteer members do not fall within the definition of employee in the Ethics Act which defines the term “employee,” in relevant part as: “any person in the service of another under any *contract of hire*, whether express or implied....” W. Va. Code § 6B-1-3(d).

As the municipal officials do not meet the definition of “employee” of the organization for purposes of applying the Ethics Act, this leaves only their status as stockholders in the

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<sup>2</sup> No implication is hereby intended to the effect that the Requester was in any way disingenuous. To the contrary, he appears to have presented the matter exactly “as it is.”

corporation as a reason for requiring recusal and that depends upon the amount of stock each individual holds.

**The Ethics Commission holds that, as the organization is incorporated as a for-profit corporation, W. Va. Code § 6B-2-5(j) requires the Mayor of the municipality to recuse himself, in the manner prescribed by W. Va. Code § 6B-2-5(j)(3) and W. Va. Code R. § 158-8-5, from any deliberation and decision concerning appropriations made by the municipality to the organization.**

**Recusal is also required by the other municipal officials who hold five percent or more of the outstanding stock of that class of the organization.<sup>3</sup>**

If it comes to light that the organization is or becomes a nonprofit corporation, the municipal officials will be bound by W. Va. Code § 6B-2-5(j)(1)(D), which provides that "... if the public official or immediate family member is an *uncompensated* officer or board member of the nonprofit, then the public official shall publicly disclose such relationship prior to a vote on the appropriations of public moneys or award of contract to the nonprofit." The financial interest of a nonprofit corporation may not be imputed to an unpaid officer or unpaid member of the board of directors.<sup>4</sup>

*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

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<sup>3</sup> The Requesters provided a copy of the City Ordinance that requires recusal in situations in which officials have certain ties to an organization. Public bodies subject to the Ethics Act are not prohibited from enacting stricter standards to govern the conduct of their affairs. W. Va. Code R. § 158-6-10. The Ethics Commission is not, however, empowered to interpret and construe the ordinances of local municipalities. W. Va. Code § 6B-2-3(a)

<sup>4</sup> The Requesters also inquire about the applicability of the public contract restrictions in the Ethics Act, at W. Va. Code § 6B-2-5(d). W. Va. Code § 6B-2-5(d) is not applicable because the municipal officials are uncompensated and have no financial interest in the organization.