

Advisory Opinion 2018-10

Issued on November 1, 2018, by

The West Virginia Ethics Commission

Opinion Sought

A **County Board of Education Member** asks whether he may continue to be employed on a per diem basis by a staffing agency for a textbook company in other counties when the company markets textbooks and educational materials to the Requester's Board of Education.

Facts Relied Upon By the Commission

The Requester is a per diem employee of a staffing agency. One of the staffing agency's clients is a company that markets textbooks and educational materials to school systems in West Virginia, including the Board of Education on which the Requester serves. As an employee of the staffing agency, the Requester provides services to the textbook company. He delivers books, conducts training sessions, introduces speakers and speaks with superintendents and curriculum directors. The Requester states that he was interviewed by the company and directed by the company to get hired by the staffing agency. A sales representative from the company issues the Requester all of his work directives.

The Requester states that he no longer performs these services for the textbook company in the County in which he serves as a Board Member. The Requester's Board of Education has made purchases from the company and may make further purchases in the future. The Requester has also requested Board of Education officials and staff to notify him of any matters which will be considered by the Board involving the company so that he may recuse himself from voting on any such matters. The Requester states that he does not receive commissions or any other remuneration from company sales to the Board.

Provisions Relied Upon By the Commission

W. Va. Code § 6B-2-5(d) provides, 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

(2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

(B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

W. Va. Code R. § 158-8-2 provides:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 provides:

The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.

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.

W. Va. Code § 61-10-15 provides, in relevant part:

(a) It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control

....

(e) The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

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

- (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

Analysis under the Ethics Act

Public contract

The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d). Under W. Va. Code § 6B-2-5(d), public officials are "associated" with a business if they or an 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. W. Va. Code R. § 158-8-4. **The Ethics Commission holds that the Requester is not associated with the company or the staffing agency for purposes of W. Va. Code § 6B-2-5(d) because the Requester is not a director, officer or holder of stock of either the staffing agency or the textbook company.**

Analysis under W. Va. Code § 61-10-15

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials, including board of education members, who are pecuniarily interested, either directly or

indirectly, in the proceeds of a public contract over which they exercise “voice, influence, or control.” Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Ethics Commission will first determine whether the Requester has voice, influence or control over the contracts of the Board of Education and individual county schools. The Commission will then address whether the Requester has a direct or indirect pecuniary interest in the company’s contracts with the Board.

Voice, influence or control

The Commission finds that the Requester has “voice, influence or control” over the public contracts of the Board of Education. See *Jordan v. McCourt*, 135 W. Va. 79, 87, 62 S.E.2d 555, 560 (1950) (finding that a board of education member had voice, influence or control over a board of education contract with a private company where the member served as president). Additionally, the Commission has consistently held that board of education members have voice, influence or control over all contracts in a county school system. In Advisory Opinion 2010-15, the Ethics Commission explained:

Each county school district is under the supervision and control of the County BOE. W. Va. Code § 18-5-1 et. seq. The BOE exercises control over school personnel, including coaches and the principals to whom they report. The Commission finds that an elected BOE Member may not contract with the County school system where he serves ... as his position as a BOE Member gives him voice, influence and control over all contracts in the County School System.

Direct or indirect pecuniary interest

The Ethics Commission must now determine whether the Requester has either a direct or indirect pecuniary interest in the textbook company’s contracts with the Board of Education. The Commission has never addressed whether an employee of a staffing agency has a pecuniary interest in the public contracts of the company to which the employee provides services.

In Advisory Opinion 2012-02, the Commission considered whether a county commission could purchase property from a real estate business with which a county commissioner was associated. The county commissioner was a licensed real estate sales associate who had a business relationship with the real estate business. *Id.* The county commissioner was not an employee or owner of the real estate business and received no W-2 or 1099 from the business. *Id.* His only compensation from the real estate business was in the form of commissions he received on property sales for which he served as the listing agent. *Id.* Further, the county commissioner was not the listing agent for the property being purchased by the county commission, and he would not receive any compensation from the sale of the property. *Id.*

In its analysis of W. Va. Code § 61-10-15, the Commission found that the county commissioner met the exemption provided to public officials who are employees of a vendor or supplier. *Id.* The Commission stated, in relevant part:

In 2002 the Legislature amended this provision to exempt public officials who are employees of a vendor or supplier if the public official:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

Based upon the facts presented, the Commission finds that the five part test is met. See A.O. 2011-03. Hence, the County Commission may proceed to purchase the subject property.

Id.; W. Va. Code § 61-10-15(e).

Here, the Requester is not performing any services on behalf of the staffing agency for the textbook company in the Requester's county. The Requester does, however, continue to have a business relationship with the textbook company. The Requester continues to provide services for the company in other counties in West Virginia, and the company issues the Requester all his work directives. Nonetheless, as found in Advisory Opinion 2012-02, **the Commission finds that the Requester meets the exemption provided to public officials who are employees of a vendor or supplier.** W. Va. Code § 61-10-15(e).

The Requester is not a party to the contract between the Board and the textbook company. The Requester is not an owner, a shareholder, a director or an officer of either the staffing agency or the textbook company. The Requester receives no commission, bonus or other direct remuneration or thing of value by virtue of the company's contracts with the Board. Finally, the Requester has taken steps to ensure that he neither participates in the deliberations or awarding of contracts to the company nor approves or otherwise authorizes the payment for any services performed or supplies furnished under Board contracts with the company.

Accordingly, the Ethics Commission holds that so long as the five-part test in W. Va. Code § 61-10-15(e) continues to be met, the Requester may continue to be employed on a per diem basis by the staffing agency for the textbook company in other counties when that company markets textbooks and educational materials to the Requester's Board of Education. The Commission reminds the Requester that he may not use his position to influence the Board's decisions regarding the company, including communicating with his fellow Board members or staff.

If a matter relating to the company comes before the Board of Education, then the Requester must recuse himself from all discussions and votes on such matter. W. Va. Code § 61-10-15(e)(4). For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. Additionally, the minutes of the meeting must reflect the basis for the recusal and that he left the room during all consideration, discussion and vote on the item(s) under consideration. W. Va. Code § 6B-2-5(j)(3).

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 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 public servants and other persons unless and until it is amended or revoked or the law is changed.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission