

Advisory Opinion 2019-03

Issued on March 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **County School Superintendent** asks whether teachers may prearrange relatives to substitute teach in their absence or place relatives on a preferred list of substitutes for their classroom.

Facts Relied Upon by the Commission

The Requester's school system utilizes an automated system that manages teacher absences and substitute job assignments. When a teacher creates an absence in the system, it searches and contacts a substitute for the job based on a general rotation list. The Requester states, however, that the system allows teachers to prearrange a substitute without the system calling the general list of available substitutes. The system also allows a teacher to make a preferred list of substitutes for the system to call before it calls the general list of available substitutes.

The Requester asks whether teachers utilizing the system may prearrange relatives to substitute teach in their absence or place relatives on a preferred list of substitutes for their classroom. The Requester states that teachers are not required to prearrange a substitute or make a preferred list and that others have the authority to make these decisions. The Requester states that school principals, a central office staff member and the Requester also have the authority to select substitutes should the need arise.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(m) provides:

“Relative” means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

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

(1) 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. 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.

. . . .

(4) A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: Provided, That as used in this subdivision, "employment or working conditions" shall only apply to government employment: Provided, however, That government employment includes only those governmental entities specified in subsection (a) of this section.

W. Va. Code R. § 158-6-3 provides, in relevant part:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

. . . .

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.


Advisory Opinion

The Ethics Act prohibits public officials or public employees from showing favoritism or granting patronage in the employment or working conditions of their relatives.¹ W. Va. Code § 6B-2-4(b)(4). To this end, the Ethics Commission's Legislative Rule regarding nepotism provides that "[t]o the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides." W. Va. Code R. § 158-6-3.5.a. "If he or she is one of several people with the authority to make these decisions, others with authority *shall* make the decisions." *Id.* (emphasis added).

The Commission finds that teachers prearranging a substitute to cover their classroom and making a preferred list of substitutes constitute decisions affecting the employment and working conditions of those substitutes. Moreover, there are others with the authority to make these decisions, such as school principals. **The Ethics Commission therefore holds that teachers prearranging relatives to substitute and/or placing relatives on a preferred list of substitutes violates the Ethics Act's nepotism provisions at W. Va. Code § 6B-2-4(b)(4) and W. Va. Code R. § 158-6-3.5.a. when there are others with the authority to make these decisions.**

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, at 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

¹ A relative is defined as a "spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law." W. Va. Code § 6B-1-3(m).

Advisory Opinion 2019-04

Issued on March 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A City which purchases equipment and supplies for a volunteer fire department ("VFD") asks whether it may make the purchases from a business owned by a person who serves as the Fire Chief for both the City and the VFD.

Facts Relied Upon by the Commission

The Requester has an ordinance that establishes a fire department and creates the office of Fire Chief who is responsible for overseeing the Department's members, property and equipment. The City Council appoints the City's Fire Chief on an annual basis and, as authorized by the City's charter, pays him a salary of \$400 per year. He is insured by the City's workers' compensation and liability insurance coverage. The Fire Chief is not required to work a set number of hours per week or to keep set office hours, and the City considers him to be a part-time appointed public official. The City's Fire Department has no other employees.

The City's charter states that the City shall provide fire protection services through a volunteer fire department ("VFD"). The charter also provides that the VFD shall be under the direction and control of the City Council and, although the VFD elects its officers and Fire Chief, they must be approved by City Council. To support the VFD, the City charges and collects a fire service fee. The City deposits the fire service fee in a City bank account.

The VFD is a separate legal entity which has been incorporated as a nonprofit organization. The VFD uses its own fire facilities, equipment and apparatus. The City does not own much firefighting equipment but instead relies upon the VFD to provide fire services.

Pursuant to the City's charter and ordinance and the VFD's by-laws, both the City's Fire Department and the VFD have the same Fire Chief. The VFD's Fire Chief is responsible for overseeing all VFD members and equipment. The VFD's by-laws do not provide for any compensation for the Fire Chief position.

The VFD's Treasurer is responsible for all VFD funds and its bank accounts. All VFD expenditures must be approved by the members of the VFD Board. At present, if the VFD wants the City to purchase services or supplies for the VFD, then the VFD submits the invoice for the purchase to the City for consideration by City Council. If the City Council approves the purchase, then the City directly pays the vendor from its fire service

fee bank account. The prior practice was for the VFD to pay the vendors directly from the VFD's bank account and seek reimbursements from the City.

The Fire Chief owns a business that sells fire equipment and supplies. The VFD has made purchases from the Fire Chief's business and then received reimbursement from the City. The Requester states that it believes the Fire Chief has participated in discussions and votes of the VFD Board relating to the purchases.

Provisions Relied Upon by the Commission

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

(j) "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

(k) "Public official" means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating, or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person. The term "public official" includes a public servant volunteer.

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

Persons subject to section. -- The provisions of this section apply to all public officials and public employees, whether full or part-time and whether compensated or not, in state, county, municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.

W. Va. Code § 6B-2-5(b) states, 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(d)(1) states, in relevant part:

[N]o 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 Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

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 § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

Advisory Opinion

Public officials and public employees in state, county and municipal government are subject to the restrictions in the West Virginia Ethics Act against having an interest in public contracts over which they exercise authority or control. W. Va. Code §§ 6B-2-5(a) and 6B-2-5(d). For purposes of analyzing the application of the Act to the purchases in question, the Ethics Commission will first consider whether the Fire Chief is subject to the Act.

The Requester has an ordinance creating the office of Fire Chief. The Fire Chief is appointed by the City Council and, as provided by charter, receives an annual salary of \$400 from the City.

The City's Fire Chief is responsible for the oversight of employees and equipment of the City's Fire Department and he is responsible for providing fire protection to the City and

the surrounding areas. Pursuant to the City's charter and ordinance, the City's Fire Chief is also responsible for serving as the Fire Chief to a VFD.

Based upon the relevant facts, the Ethics Commission finds that the Requester's Fire Chief is subject to the Ethics Act in his public capacity as the Fire Chief for the City.

Because the Fire Chief is subject to the Act, both he and the City must abide by the restrictions in the Ethics Act which prohibit public officials from being a party to certain public contracts over which they have authority and control and in which they have a financial interest. While the general rule is that public officials may not have a financial interest in contracts under their authority or control, there is an exception in the Act for *part-time appointed* officials who have not participated in the review or evaluation of the contract. W. Va. Code § 6B-2-5(d).

The Commission must determine whether the Fire Chief exercises authority or control over equipment and supplies purchased by or through the City for use by the City or the VFD. The Fire Chief is responsible for overseeing the personnel and equipment for both the Requester's Fire Department and the VFD. The Commission finds, therefore, that he exercises authority or control over decisions of the City to purchase equipment or supplies for use by the City or the VFD to provide fire protection to the City.

In order to analyze the public contract restrictions in the Act, the Commission must also consider whether the Fire Chief is a part-time appointed official or a public employee. In Advisory Opinion 2017-16, the Ethics Commission held that a state agency's section chiefs were public officials for purposes of the Ethics Act because the position of section chief was created by law, filled by appointment, and the duties were established by West Virginia Code.

In the present case, the Fire Chief's position is created by law, filled by appointment, and his duties are established by the City's ordinance and charter. The Fire Chief is not required to work a set number of hours per week, and the Requester does not consider him to be a full-time worker.

The Ethics Commission finds that the Fire Chief, in his public capacity as the Fire Chief for the City, is a part-time appointed public official.

Pursuant to the City's charter and ordinance, and the VFD's by-laws, the same person serves as the City's Fire Chief and the VFD's Fire Chief and is responsible for overseeing the property and equipment for both entities. A part-time appointed public official may, however, contract with his or her government agency if "he or she has not participated in the review or evaluation thereof" and "has been recused from deciding or evaluating" the contract. W. Va. Code § 6B-2-5(d). The Requester states that it believes that the Fire Chief has been involved in the VFD's decisions to make purchases from his private business, and that the City paid for these purchases.

The Ethics Commission holds that the City may make purchases from the Fire Chief's private business if it is willing and able to remove him from participating in decisions involving the purchase of equipment or supplies for the City Fire Department and/or the VFD. The private gain provision prohibits City officials and employees from showing favoritism to the Fire Chief's business. Even if he removes himself from purchasing decisions, his business cannot be preferred.

The Ethics Commission further holds that the Ethics Act prohibits the City from making purchases from the Fire Chief's business, either directly or through a reimbursement request from the VFD, in instances where he had been involved in the purchasing decisions because the part-time appointed official exception would not apply.

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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

Advisory Opinion 2019-06

Issued on March 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether all three of its members may serve as three of the five members of a County Parks and Recreation Authority.

Facts Relied Upon by the Commission

The County Parks and Recreation Authority (“Authority”) is a five-member board appointed by the Requester. The Requester controls the funding of the Authority by providing the Authority’s budgetary funds along with funds for special projects throughout the year. The County Commission asks whether all three of its members may serve on the Authority. They would serve without compensation or benefits.

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:

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, 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...is a[n] employee

W. Va. Code § 61-10-15(a) provides in relevant part:

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 . . .

Advisory Opinion

The Ethics Commission has previously determined that “[t]here is nothing in the Ethics Act or W. Va. Code § 61-10-15 which prohibits a Member of a County Commission from serving on a County Board.” Advisory Opinion 2012-47 (finding that a County Commissioner may serve as a voting member of a County Ambulance Authority). The Ethics Commission reasoned in that Opinion that “County Commissioners normally serve on county boards as a means for a County Commission to monitor and observe the workings of its boards[,]” and “County Commissions have a vested interest in the success of its boards and commissions.” *Id.* The Ethics Commission further concluded that County Commissioners may vote in their capacity as County Commissioners on matters affecting the county boards on which they serve. *Id.* “Commissioners who serve on these boards, which are subunits of county government, do not, for purposes of the voting provisions in the Ethics Act, have a financial relationship which prohibits them, in their capacity as county commissioners, from voting on matters affecting the boards.” *Id.* While the County Commissioners here will not receive benefits or compensation for their service on the Authority, in Advisory Opinion 2012-47 the Ethics Commission stated that “[t]his same conclusion follows even if they receive nominal compensation for their service on a county board.” *Id.*

The Ethics Commission therefore holds that neither the Ethics Act nor W. Va. Code § 61-10-15 prohibits three members of the County Commission from serving as three of the five members of the County Parks and Recreation Authority.

While the Ethics Act does not prohibit County Commissioners from serving on county boards, at times other laws may limit their service. Specifically, the common law doctrine against self-appointment stands for the proposition that “[w]hen a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some other than self is always contemplated.” 41 W. Va. Op. Att’y Gen. 209 (1946). As such, any County Commission or City Council considering appointing one of its own members to a board or commission when the statute does not expressly permit self-appointment should consult with its attorney on whether the proposed appointment is permissible -- especially when the appointment is to a compensated position.

Finally, the Ethics Commission encourages the Requester to review Open Meetings Advisory Opinion 2011-06, wherein the Ethics Commission’s Committee on Open Governmental Meetings determined that a quorum of County Commissioners may serve on a county body only if both bodies notice the meeting.

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, at 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

Advisory Opinion 2019-07

Issued on March 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether it may appoint one of its members to serve on a County Emergency Services Authority.

Facts Relied Upon by the Commission

The County Emergency Services Authority (“Authority”) was created by a special act of the West Virginia Legislature and operates through its own adopted bylaws, rules and regulations for the management of emergency services. The County Commission appoints three members to the Authority, and a city within the county appoints two members. Any member of the Authority is eligible for reappointment, and the County Commission may remove any member for cause. The County Commission provides budgetary funds to the Authority as well as funds for special projects.

According to the special act, “each member of the [A]uthority shall be compensated monthly by the governing body which appointed such member in an amount to be fixed by such governing body.” The County Commission states that Authority members are paid a \$200 fee for each meeting. The Authority has monthly meetings and one annual meeting scheduled through the end of 2019.

Provisions Relied Upon by the Commission

W. Va. Code § 61-10-15(a) provides in relevant part:

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 . . .

Advisory Opinion

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials, including county commissioners, who are pecuniarily interested, either directly or indirectly, in the proceeds of any contract or service over which they exercise “voice,

influence, or control.” The Ethics Commission has determined in past Advisory Opinions that county officials are deemed to exercise voice, influence or control through their power to make appointments to boards or commissions and/or through appropriations of funding to such boards or commissions. Advisory Opinion 2018-05.

In Advisory Opinion 2012-47, the Ethics Commission determined that “[t]here is nothing in the Ethics Act or W. Va. Code § 61-10-15 which prohibits a Member of a County Commission from serving on a County Board.” Finding that a County Commissioner may serve as a voting member of a County Ambulance Authority, the Ethics Commission reasoned therein that “County Commissioners normally serve on county boards as a means for a County Commission to monitor and observe the workings of its boards[,]” and “County Commissions have a vested interest in the success of its boards and commissions.”

While the Authority Board members in Advisory Opinion 2012-47 were eligible to receive \$20 per meeting in an amount not to exceed \$600 in a fiscal year, the Ethics Commission nonetheless stated that “[t]his same conclusion follows even if they receive *nominal* compensation for their service on a county board.” *Id.* (*emphasis added*). In Advisory Opinion 2001-24, the Ethics Commission held that neither the Ethics Act nor W. Va. Code § 61-10-15 prohibited a county commissioner from serving on a public transit authority and accepting the compensation for serving when the compensation was set by statute at \$50 per meeting.

The facts here differ from the facts presented in Advisory Opinions 2012-47 and 2001-24 in two important respects. First, the County Commissioner here would be compensated significantly more for serving on the Emergency Services Authority than the situation presented in A.O. 2012-47. The Ethics Commission finds that \$200 per meeting is more than “nominal” compensation for serving on a county board. Second, under the special act establishing the Emergency Services Authority, the County Commission directly compensates the members it appoints and has full discretion to set the amount of that compensation.

The Ethics Commission therefore holds that W. Va. Code § 61-10-15 prohibits the County Commission from appointing one of its own members to the County Emergency Services Authority when that member would receive more than nominal compensation for serving on the Authority.

The Ethics Commission notes that its holding does not apply to situations where the law expressly requires a county commissioner to serve on a board. For example, W. Va. Code § 8-29A-2(b) expressly requires that one member of a county airport authority to be a member of the county commission. The Ethics Commission also notes, as reflected in Advisory Opinion 2019-06 issued today, that neither the Ethics Act nor W. Va. Code § 61-10-15 prohibits a County Commissioner’s service on a county board when he or she receives no benefits or compensation for such service.

Additionally, other laws may limit a county commissioner's appointment. Specifically, the common law doctrine against self-appointment stands for the proposition that "[w]hen a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some [one] other than self is always contemplated." 41 W. Va. Op. Att'y Gen. 209 (1946). As such, any County Commission or City Council considering appointing one of its own members to a board or commission when the statute does not expressly permit self-appointment should consult with its attorney on whether the proposed appointment is permissible especially when the appointment is to a compensated position.

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, at 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission