

## **Advisory Opinion 2019-12**

**Issued on May 2, 2019, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

An **Assistant Prosecuting Attorney** asks whether he may privately contract with the Board of Education in the same county to provide legal services.

### **Facts Relied Upon by the Commission**

The Requester is a part-time assistant prosecuting attorney and maintains his own private civil practice. The Requester asks whether he may represent the local Board of Education as private counsel and continue to work as an assistant prosecuting attorney in the same county in which the Board of Education is located. The Requester would charge the Board of Education on an hourly basis for time spent working on legal matters on its behalf.

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

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

In addition to the provisions of §61-10-15 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: . . . Provided, however, That nothing herein shall be construed to 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 § 61-10-15(a) states:

It is unlawful for 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**

Both the Ethics Act and W. Va. Code § 61-10-15 limit or prohibit certain county public officials from having a pecuniary interest in public contracts over which they exercise control.

### **The Ethics Act**

The Ethics Act provides that “no elected or appointed public official . . . 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.” W. Va. Code § 6B-2-5(d)(1). The Ethics Act’s public contract provision, however, contains an exception permitting part-time appointed public officials to contract with public agencies with which they are associated provided the official does not participate in the review of the contract or the decision-making process. *Id.*

The Ethics Commission has previously determined that a part-time assistant prosecuting attorney is considered a part-time appointed public official and is thus eligible for the exception. Advisory Opinion 2010-24. Accordingly, the Ethics Act does not prohibit the Requester from entering into a contract with the Board of Education so long as he “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)(1).

### **W. Va. Code § 61-10-15**

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials who become pecuniarily interested in the proceeds of a public contract over which the official may exercise voice, influence or control. Additionally, unlike the Ethics Act, this statute does not contain an exception for part-time appointed officials.

As an assistant prosecuting attorney, the Requester is a county official subject to W. Va. Code § 61-10-15. See Advisory Opinion 2010-24 (finding that an assistant prosecutor takes an oath of office, and the position is specifically created by statute); W. Va. Code § 7-7-8 (“Any attorney so appointed shall be classified as an assistant prosecuting attorney and shall take the same oath and may perform the same duties as his principal.”).

The Requester also has a direct pecuniary interest in contracting with the Board of Education to provide legal services. The Ethics Commission must thus determine whether the Requester may have any voice, influence or control over Board of Education contracts such that they would be prohibited under W. Va. Code § 61-10-15. The Commission notes that a county official does not have to actually exercise any influence to trigger the statute, but may have voice, influence or control simply by virtue of the position held. *Syl. pt. 2, State v. Neary*, 365 S.E.2d 395, 179 W. Va. 115 (1987).

The Requester asks the Commission to consider W. Va. Code § 18-5-13(l), which provides that a county board of education may, “[a]t the county board's discretion, employ, contract with or otherwise engage legal counsel in lieu of using the services of the prosecuting attorney to advise, attend to, bring, prosecute or defend, as the case may be, any matters, actions, suits and proceedings in which the county board is interested.” The Requester additionally cites *Longwell v. Bd. of Educ. of Cty. of Marshall*, wherein the Supreme Court of Appeals of West Virginia held: “When a county board of education is in need of legal services, it may exercise its own discretion in determining whether to utilize the services of the county prosecuting attorney, who has a duty to represent it under W. Va. Code § 7-4-1 (1971) (Repl.Vol.2000), or to hire its own legal counsel pursuant to West Virginia Code § 18-5-13(l) (2002) (Supp.2002).” Syl. pt. 4, 583 S.E.2d 109, 213 W. Va. 486 (2003).

While both W. Va. Code § 18-5-13(l) and *Longwell* provide that a board of education has discretion in whether to utilize the county prosecuting attorney or to hire its own legal counsel, they do not address whether an assistant prosecuting attorney may privately perform such legal services. **The Ethics Commission has previously concluded that W. Va. Code § 61-10-15 prohibits a part-time assistant prosecutor from contracting with a county board of education.** Advisory Opinion 2010-24. While the Opinion did not address W. Va. Code § 18-5-13(l) or *Longwell*, the Commission finds that the Opinion was nonetheless correct.

First, the Ethics Commission has found that a county prosecutor, by statute, renders legal advice to a county school system and that the “duty to render legal advice constitutes the exercise of voice, influence or control over county school system contracts.” Advisory Opinion 2013-08 (citing W. Va. Code § 7-4-1) (“The prosecuting attorney shall . . . advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which . . . any county board of education is interested.”). *Longwell* itself provides that “[u]nquestionably, county prosecutors in West Virginia have a duty to represent the various boards of education.” 583 S.E.2d at 112, 213 W. Va. at 489; W. Va. Code 7-4-1.<sup>1</sup>

Moreover, the Ethics Commission has previously held for purposes of W. Va. Code § 61-10-15 that “[a]n assistant prosecuting attorney has the same statutory duties as an elected prosecutor” and “[t]herefore . . . has the same voice, influence and control over county contracts as a prosecutor.” Advisory Opinion 2016-08 (citing W. Va. Code § 7-7-8). The Ethics Commission’s decision in this regard is in line with the Supreme Court’s discussion in *Carr v. Lambert* wherein the Court addressed the issue of whether the position of assistant prosecuting attorney is a public office, rendering an assistant prosecutor ineligible to serve on a county board of education. 367 S.E.2d 225, 179 W. Va. 277 (1988), *holding modified by State v. Macri*, 487 S.E.2d 891, 199 W. Va. 696 (1996). In determining that the position of assistant prosecuting attorney is a public office,

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<sup>1</sup> Chief Justice Starcher suggested in his concurrence “that the prosecuting attorney's role in our county governance scheme, which includes the statutory duty to represent the board of education, gives the prosecuting attorney's office at a minimum the right to be ‘in the loop’—when the county board of education is involved in litigation.” *Longwell*, 583 S.E.2d at 116, 213 W. Va. at 493, (Starcher, C.J., concurring).

the Court stated that “[p]ursuant to W. Va. Code, 7–7–8 [1987], an assistant prosecuting attorney is clothed with the same powers and duties as his principal.” *Id.* at 227, 179 W. Va. at 279; *cf. Macri*, 487 S.E.2d at 898, 199 W. Va. at 703 (“Likewise, in West Virginia, we found a conflict of interest may arise if an assistant prosecuting attorney serves as a member of a BOE because one of the duties of a prosecuting attorney is to represent the BOE in all matters.”).

**Consistent with its previous Advisory Opinions, the Ethics Commission finds that the Requester, as a part-time assistant prosecutor, may have voice, influence or control over the contracts of the Board of Education as required by the duties of his office. W. Va. Code § 61-10-15 therefore prohibits the Requester from privately contracting with the Board of Education in the same county to provide legal services.**

*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.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

## **Advisory Opinion 2019-13**

**Issued on May 3, 2019, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

An **Officer of a State Agency** asks whether he may use his personal rewards cards when purchasing gasoline with a state-issued credit card and keep the bonus points for his personal use.

### **Facts Relied Upon by the Commission**

The State's Fleet Management Office ("FMO") is responsible for maintaining all state vehicles. The FMO has a contract with Automatic Rentals Inc. for the State's vehicle maintenance and fuel credit card program (also referred to as the "universal fleet card program"). Automatic Rentals Inc. produces a list of authorized retailers, e.g., gas stations, to serve as fuel retailers in the state's universal fleet card program. According to the FMO, most fuel retailers in the United States participate in the State's fuel credit card program.

Many fuel retailers offer rewards programs in which purchases of fuel or merchandise earn reward points that are accumulated by an account holder. These points may be redeemed for discounts on merchandise and future fuel purchases. Many state employees who use the State's fuel credit card for state-related travel are personal members of the retailers' rewards programs. According to the FMO, the State is not a member of any gasoline rewards programs and the personal use by employees of reward points associated with the fuel used for state-related uses would not create additional costs to the State.

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

W. Va. Code § 6B-2-5(b) states, 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.

(2) Notwithstanding the general prohibition against use of office for private gain, public officials and public employees may use bonus points acquired through participation in frequent traveler programs while traveling on official government business: *Provided*, That the official's or employee's participation in such program, or acquisition of such points, does not result in additional costs to the government.

### **Advisory Opinion**

The Legislature, in 2008, added subsection (2) to the private gain provision of the Ethics Act, at W. Va. Code § 6B-2-5(b). Prior to the 2008 amendment, the Ethics Commission had issued a series of Advisory Opinions prohibiting government employees from using rewards or bonus points earned while on state travel.<sup>1</sup> Advisory Opinion 1998-14 summarized this line of Opinions as follows:

The Commission has consistently held that promotional benefits resulting from official travel expenditures, such as airline or motel bonus points, belong to the public and may be used only for official purposes. These benefits, like other public resources, may not be converted to the personal use and private gain of public servants, regardless of what a private company may permit its employees to do.

As for personal bonus points earned from the State's gasoline purchases, in particular, Advisory Opinion 1990-118 states:

The Commission finds that it would be a violation of the Ethics Act for the Delegate to receive bonus points for the portions of the purchase of gasoline which would be reimbursed with State funds (.20 per mile). The Legislator may receive bonus points for private expenses which are not reimbursed with State funds. The value of any points accumulated and not paid for by the State belong to the individual.

Since 2008, however, W. Va. Code § 6B-2-5(b)(2) has allowed public officials and employees to use bonus points acquired through participation in "frequent traveler programs" while traveling on official government business if the use does not result in additional costs to the government. The personal use of reward points would not create additional cost to the government.

The question here is whether a gasoline retailer's rewards program qualifies as a "frequent traveler program" as used in the W. Va. Code § 6B-2-5(b)(2). The Commission recognizes that not all gasoline purchases are made while a public official or employee is travelling out of town. Traveler is defined as "one that goes on a trip or journey ...." <https://www.merriam-webster.com/dictionary/traveler>. One definition of travel is "to move or undergo transmission from one place to another" <https://www.merriam-webster.com/dictionary/travel>. The Commission finds that the intent of the 2008

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<sup>1</sup> See Advisory Opinions 1990-64, 1990-100, 1990-105, 1990-118, 1990-132 and 98-14.

amendment to the private gain provision was to read the word “traveler” broadly to include both local travel and out-of-town travel.

**The Ethics Commission holds, therefore, that, pursuant to W. Va. Code § 6B-2-5(b)(2), the Requester may use his personal rewards cards when purchasing gasoline with a state-issued fuel credit card and keep the points for his personal use.**

*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 2019-14**

**Issued on May 2, 2019, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **City Police Officer** asks whether he may include pictures of himself in uniform in his campaign material.

### **Facts Relied Upon by the Commission**

The Requester is employed by a city as a police officer. The City gives the police officers a clothing allowance to buy uniforms, and the police officers get to keep their uniforms when they retire from or leave their City employment.

The Requester is exploring a run for county sheriff in the next election. During his candidacy, he would still be employed by the City as a police officer.

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

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. 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 R. § 158-6-5 states, in relevant part:

5.2. Improper Use- Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

### **Advisory Opinion**

The Ethics Act, at W. Va. Code § 6B-2-5(b)(1), prohibits public officials from knowingly and intentionally using their public office for their own or another person's private gain.



This Code section excepts from this prohibition the incidental use of public resources “for personal or business purposes resulting in *de minimis* private gain ....”

The Commission has on limited occasions addressed private gain relative to political activities. First, in Advisory Opinion 1995-34 (revised), the Commission held that an incumbent public official may use his public title to endorse a candidate. The Commission reasoned:

Endorsing candidates for office who share that goal can be considered a part of the First Amendment rights of an officeholder. In addition, although the official endorsement of an incumbent public official may have substantial ‘political’ value, such an endorsement does not create the type of private gain contemplated by the Act’s prohibition against the use of office for private gain.

Further, in Advisory Opinion 2012-15, the Commission held that, for the same reasons set forth in Advisory Opinion 1995-34 (revised), an elected county sheriff may use his public job title to endorse his chief deputy or any other candidate for public office through newspaper advertisements or radio announcements. The Commission was not asked and did not address whether he may wear his uniform in newspaper advertisements containing his endorsements.

In Advisory Opinion 1998-09, the Commission addressed whether an elected sheriff could engage in a limited amount of campaign-related activities while using his cruiser. The Commission noted that the sheriff drove his vehicle, presumably in uniform, for “personal travel within his county, so he can monitor and direct his agency’s police activities and react to crimes committed in his presence.” The Commission held that, as there was an overriding public benefit to the use of the patrol car for personal travel, it legitimized the use of the cruiser for a limited amount of campaign activities during the sheriff’s “normal daily duties.” The Commission held that “‘glad-handing’ while out and about in the patrol car” was not a violation, but that the sheriff could not, however, use his official vehicle to canvass streets for support or to transport campaign signs, supporters or other candidates. Therefore, the Commission permitted the sheriff to use a limited amount of public resources for campaigning because he was always on duty.

In Advisory Opinion 2016-11, the Ethics Commission held that a state legislator may, with private funds, purchase business cards that replicate his state-issued business card on one side and have his campaign information on the other. The Commission ruled, in relevant part, “that using the design and format of the business card in this manner is an incidental use of public resources resulting in *de minimis* private gain.”

Some other jurisdictions have addressed whether police officers may wear their uniforms for campaign activities. The Seattle Ethics and Elections Commission ruled that a police officer could not wear his uniform in campaign advertising. The Seattle Ethics and Elections Commission reasoned:

The SPD uniform, however, is a facility of a public office that may not be used to assist a candidate, or to promote or oppose a ballot issue. Even though the officers purchase their own uniforms, they do so with City funds, a department allowance. The uniform is a part of the equipment issued by the City to police officers to perform their duties. Officers may wear the uniform only under circumstances approved by the department.<sup>1</sup>

The New York State Board of Elections made a contrary finding when it held that a “sheriff or other police officer campaigning for election can appear in uniform in the political communications of their own campaign for election.” N.Y State Bd. Of Elections, 2015 Opinion #1.

The Ethics Commission must determine, based upon the plain language of the Act and its own precedent, whether police officers may be pictured in their uniforms in their own campaign material. The Commission has historically held that law enforcement officers must exercise caution in using the authority of their office for outside activities. For example, the Commission’s Legislative Rule governing charitable solicitations imposes limitations on the use of titles and uniforms by law enforcement officers in soliciting for charity “due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers.” W. Va. Code R. § 158-7-8.1. The Rule states: “Except as otherwise provided for in these rules, law enforcement officers may not solicit for charity while in uniform but may show identification upon request.” W. Va. Code R. § 158-7-8.4.

The Commission finds that the Requester’s police uniform conveys the endorsement of his police agency. This would result in the type of private gain the Act is intended to prohibit. **The Commission holds that the Requester may not include pictures of himself in uniform in his campaign material.**

*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.*

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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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<sup>1</sup> RE: Request for Elections Advisory Opinion No. 95-2A-0302-1, Use of Title, 1995 WL 870081, at \*2.