

## **Advisory Opinion 2021-21**

**Issued on November 4, 2021, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A County **Board of Education Member** who owns a construction company asks whether he must recuse himself from matters affecting the financial interests of his private customers.

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

A County Board of Education (“BOE”) member owns a construction company, and one of his customers is a private corporation that owns and operates a sports, recreation, wellness, and events complex (“Recreation Complex” or “Complex”).

The BOE also has a financial relationship with the Recreation Complex. The BOE owns several parcels of land in the Recreation Complex which the BOE uses for an elementary school and an alternative education campus. The BOE also leases a parcel in the complex, under a lease purchase agreement, which is used as a transportation garage/office. The BOE also pays the Recreation Complex to use various athletic facilities at the Complex and for the maintenance of common areas.

The BOE member’s construction company has previously contracted with the Recreation Complex to construct one or more buildings at the Complex and has a current contract to build an addition to an existing privately-owned facility at the Complex. The BOE member’s construction company also does projects on other buildings and facilities in the Complex that are owned by private companies and investors.

The BOE member’s company is not a contractor or subcontractor on any project funded wholly or in part by the BOE. Nevertheless, because the BOE member privately contracts with the Recreation Complex, he seeks guidance on voting on BOE matters relating to the Recreation Complex and other private customers that come before the BOE.

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

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

*Interests in public contracts.* - (1) 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 . . .

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.

W. Va. Code § 61-10-15(a) states in pertinent 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**

County officials, including BOE members, may not have a pecuniary interest in any public contract over which they may have direct authority or any voice, influence or control. W. Va. Code §§ 6B-2-5(d) and 61-10-15(a). The Ethics Act also prohibits a county official from voting on a matter that the official or a business with which the official is associated has a financial interest. W. Va. Code § 6B-2-5(j).

### *Prohibited interest in public contract*

In the instant situation, the BOE member does not have a financial interest in the contracts between the BOE and the Recreation Complex because the BOE member does not perform work for the Recreation Complex, as a contractor or subcontractor, on projects which are funded wholly or in part by the BOE. Accordingly, neither West Virginia Code §§ 6B-2-5(d) or 61-10-15(a) are applicable to the current factual scenario.

**The Ethics Commission finds that the BOE member's company may continue to contract with the Recreation Complex for construction projects that are not funded wholly or in part by the BOE.**

### *Voting*

The Ethics Commission must determine whether the voting restrictions in the Ethics Act, at W. Va. Code § 6B-2-5(j), require the BOE member to recuse himself from voting on matters affecting the financial interests of the Recreation Complex. The relevant provision in the voting restrictions states:

(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.

The Ethics Commission will first consider whether the BOE member or his business is "associated" with the Recreation Complex owner for purposes of the voting restrictions. If so, then the member of the BOE must recuse himself from any discussion and vote on matters which affect the Recreation Complex's contracts with the BOE.

The term "associated" with a business is defined by W. Va. Code § 6B-2-5(j) as "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.” When the meaning of a term is defined clearly and unambiguously by statute, the West Virginia Ethics Commission will simply apply the statutory language. See Advisory Opinion 2021-08 (discussing rules of statutory interpretation). The statutory language enumerates an exclusive list of the ways in which an individual may be “associated” with a business.<sup>1</sup>

The application of the statutory definition of “associated” with a business is simple in the instant case. The BOE member does not have an ownership interest in the Recreation Complex nor is he a director or officer of it. The BOE member, through his construction company, has and continues to do business with the Recreation Complex. However, he does so as an independent contractor rather than as an employee or as a compensated agent<sup>2</sup>. **Accordingly, the Ethics Commission finds that neither the BOE member nor his construction company is associated with the Recreation Complex as defined by W. Va. Code § 6B-2-5(j).**

Next, the Ethics Commission will consider whether the BOE member has a financial interest in the Recreation Complex by virtue of the Complex being a customer of his construction company. The Ethics Commission considered this question in Advisory Opinion 2017-14 in relation to a county commissioner who manufactured and sold construction materials to private customers/contractors that did business with the county. The Ethics Commission held in Advisory Opinion 2017-14 that the county commissioner may vote on matters concerning county contractors who are also his private customers because the county commissioner did not have a financial interest in the contracts between his customers and the county commission for which he was not a contractor or subcontractor.<sup>3</sup>

The Ethics Act does not define what constitutes a financial interest for purposes of the voting restrictions. The Ethics Commission considered this issue in Advisory Opinion 2013-18 in which it held that the voting restrictions in the Act did not prohibit a county commissioner from voting on a matter relating to an insurance company of which he was a customer because the connection was too remote to constitute a financial interest. The holding of the Ethics Commission in Advisory Opinion 2013-18 is consistent with the following legal treatise statement: “Under a provision governing mandatory abstention from city council voting, ‘special private gain’ described by a

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<sup>1</sup> “In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” *Webster Cnty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021)

<sup>2</sup> The term “agent” is not defined by the statute. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” Syllabus Point 1, *Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)” *Fountain Place Cinema 8 Llc v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (W. Va. 2011) Accordingly, “agent” is defined as “A person authorized by another to act for him, or entrusted with another’s business.” *Agent*, Black’s Law Dictionary (5th ed. 1979);

<sup>3</sup> The Opinion makes clear that the county commissioner may not sell materials or supplies to his customers for use on county projects as addressed in Advisory Opinions 2017-02, 2017-10, and 2017-11.

voting conflict statute almost always, if not always, refers to [a] financial interest of a public official that is directly enhanced by the vote in question. n. 5 To constitute a prohibited voting conflict, the possibility of gain to a council member must be direct and immediate, not merely remote and speculative. n. 6.” 62 C.J.S. Municipal Corporations § 286.

The Commission also notes that the Ethics Act specifically prohibits voting on matters concerning a public official's customers in only one section of the voting provision: W. Va. Code § 6B-2-5(j)(1)(B) restricts public officials who are employed by financial institutions from voting on matters involving *customers* [emphasis added], but the Act does not have similar voting restrictions for customers in other business sectors, e.g., construction, medical, or an auto repair business.<sup>4</sup> In Advisory Opinion 2021-08, the Commission held: “The Ethics Act and the Legislative Rule contain the express and limited instances when recusal is required. It is the duty of the Commission to apply the provisions of the Act and Rule.” The Ethics Commission further held in 2021-08 that the Ethics Act does not prohibit “voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision (W. Va. Code § 6B-2-5(e), or a potential violation of the private gain provision. (W. Va. Code § 6B-2-5(b)(1)).”

Based upon the plain language in the Ethics Act and prior Advisory Opinions, the Ethics Commission holds that the mere possibility of gain to the BOE member when voting on matters affecting his customers is too remote to be a financial interest for purposes of the voting restrictions in the Ethics Act. **The Ethics Commission holds, therefore, that the BOE member may vote on matters affecting the financial interests of the Recreation Complex and other customers of his business.**

Finally, it is noted that Advisory Opinion 2005-12 indicates that a public official's current business relationship with a customer requires recusal from voting on any matter concerning the business customer, even if the private business relationship is unrelated to matters before the governmental body on which the official serves. Advisory Opinion 2005-12 was issued under a previous version of the West Virginia Ethics Act and a Legislative Rule which has been repealed.<sup>5</sup> **Accordingly, to the extent Advisory**

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<sup>4</sup> The full provision, at W. Va. Code § 6B-2-5(j)(1)(B), states:

If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: *Provided*, That this limitation only applies if the total amount of the loan or loans exceeds \$15,000.”

<sup>5</sup> The Ethics Act was amended in 2008. PUBLIC OFFICERS AND EMPLOYEES—ETHICAL STANDARDS, 2008 West Virginia Laws Ch. 106 (H.B. 4524). One change made to the Act was the inclusion of voting restrictions. The Bill Title states that one purpose of H.B. 4524 is to provide “standards

**Opinion 2005-12 requires recusal by a public official from any matter involving a customer, it is expressly overruled. Advisory Opinion 2012-07 is also overruled to the extent it states that a mayor may not vote on a matter involving a current customer.**

*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.<sup>6</sup>*

*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

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for determining when public officials may or may not vote on matters involving a for profit or not for profit business, including financial institutions, with whom either they or an immediate family member are (sic) associated . . . .” Id. Subsequent to the passage of H. B. 4524, the Legislature repealed W. Va.Code R. § 158-9-1 through 158-9-2 which previously governed voting by public officials and was cited in Advisory Opinion 2005-12.

<sup>6</sup> For example, the West Virginia Supreme Court, in a per curiam opinion relating to quasi-judicial proceedings, held that “where an adjudicator possesses the possibility of a disqualifying bias such that the proceedings, themselves, would appear to be constitutionally infirm, the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he/she is due, *i.e.*, a hearing before an impartial tribunal.” Rissler v. Jefferson Cty. Bd. of Zoning Appeals, 225 W. Va. 346, 353, 693 S.E.2d 321, 328 (2010) (per curiam).