

## Advisory Opinion 2023-08

Issued on September 7, 2023, by

The West Virginia Ethics Commission

### Opinion Sought

A **City Sanitary Board** asks whether it may allow an employee or his parents to participate in the Board's Biosolids Program and whether it may upgrade a biosolids storage area on the employee's parents' property.

### Facts Relied Upon by the Commission

A City Sanitary Board ("Sanitary Board" or "Board") is governed by three members. By City Code, the Board members consist of the City Manager and two other persons appointed by City Council. The Sanitary Board hires a Utility Manager to oversee the day-to-day operations of the Sanitary Board.

One function of the Sanitary Board is to collect, treat, and dispose of waste. The Sanitary Board has a permit from the West Virginia Department of Environmental Protection ("DEP") authorizing the Sanitary Board to have a Biosolids Land Application Program ("Biosolids Program"). The Requester states that the Sanitary Board complies with the United States Environmental Protection Agency ("EPA") and DEP rules in administering the program.

The EPA describes uses for biosolids on its website, as follows:

Land application involves the spreading of biosolids on the soil surface or incorporating or injecting biosolids into the soil. Biosolids land application occurs at various sites including agricultural lands, forests, mine reclamation sites, and other disturbed lands, parks, and golf courses. Composted and treated biosolids are used frequently by landscapers and nurseries and by homeowners for lawns and home gardens. Land application has been practiced for decades and continues to be the most common method for using biosolids. Biosolids serve as a soil enrichment and can supplement or replace commercial fertilizers.<sup>1</sup>

The EPA website also states that: "The terms 'biosolids' and 'sewage sludge' are often used interchangeably."<sup>2</sup>

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<sup>1</sup> U.S. Environmental Protection Agency. Retrieved August 7, 2023, from <https://www.epa.gov/biosolids/land-application-biosolids>.

<sup>2</sup> U.S. Environmental Protection Agency. Retrieved August 7, 2023, from <https://www.epa.gov/biosolids/basic-information-about-biosolids#basics>

The Sanitary Board, as part of its Biosolids Program, contracts with local property owners to dispose of and store sewage sludge on their property. The Requester states that this program results in significant monetary savings to the Sanitary Board because disposing of the biosolids on local properties costs less than disposing of them in landfills.

At present, seven farms participate in this program. A Sanitary Board employee's parents own one of the participating farms ("Parents' Farm"). The parents signed a Biosolids Landowner Agreement with the Sanitary Board in 1995 to participate in the program. In 1998, the parents then conveyed two tracts of their farm to their sons, one of whom is employed by the Sanitary Board. These two tracts connect to the Parents' Farm and are hereinafter designated as the "Sons' Farm."

The Sanitary Board did not have the employee or his brother, the owners of the Sons' Farm, sign an additional Biosolids Landowner Agreement after the tracts of land were conveyed to them in 1998. The Sanitary Board, however, allows the Sons' Farm to participate in the Biosolids Program under the terms of the 1995 Biosolids Landowner Agreement signed by the parents. The Sanitary Board disposes of biosolids on both farms pursuant to the 1995 Agreement, and the Sanitary Board states that it has the necessary permits to use those properties for biosolids disposal. The Sanitary Board also stores biosolids on the Parents' Farm but not on the Sons' Farm.

The Sanitary Board purchases gravel for use on the intra-farm roads on participants' properties. The gravel is spread by the property owner or a contractor hired by the Sanitary Board. The Sanitary Board provides the gravel because Sanitary Board vehicles must be able to safely and consistently access the properties to spread or store the biosolids.

The Sanitary Board also purchases lime for participants' properties. The lime is necessary to maintain the proper acidity level in the soil as required by sound land management practices and state and federal laws governing the disposal of biosolids. Both the parents and Board employee receive gravel and lime as program participants.

The Sanitary Board employee, who is a co-owner of the Sons' Farm, has no job responsibilities relating to the Sanitary Board's Biosolids Program or its decisions to provide lime or gravel for participants' properties. The son, instead, is responsible for the Sanitary Board's Stormwater Management Program. He reports to the Board's Utility Manager.

The Sanitary Board's Wastewater Plant Superintendent oversees the Board's solid waste facility and the Biosolids Program. The Wastewater Plant Superintendent also reports to the Utility Manager. He is not under the supervision of the son.

The Sanitary Board also states that it wants to upgrade a storage area on the Parents' Farm. The upgrade would involve enlarging an existing concrete slab on the Parents' Farm used for sludge storage. The estimated cost of the project is less than \$20,000. The Sanitary Board estimates that the project will result in a net benefit of approximately

\$116,000 to the Sanitary Board based upon savings in landfill fees minus the upgrade cost. The Sanitary Board states that the Parents' Farm is the only property which is easily accessible by the Sanitary Board for biosolid deliveries in severe weather conditions. The Sanitary Board states that the son has no responsibilities relating to the decision of the Sanitary Board to upgrade the property and will not be involved in any decisions related to the upgrade.

The Sanitary Board states that to the best of its knowledge, there is no financial relationship between the Sanitary Board employee and his parents.

### **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. 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.

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*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: *Provided*, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body . . . 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.

### **Advisory Opinion**

The Ethics Act prohibits public officials, public employees, or businesses with which a public official or public employee 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)(1). The Biosolids Program Agreement, under which the Sanitary Board employee and his brother receive biosolids, lime, and gravel from the Sanitary Board, is a public contract. The Ethics Commission must determine, therefore, whether the Sanitary Board employee has direct authority or control over the public contract for purposes of triggering the public contract restrictions in the Act.

In [Advisory Opinion 1998-29](#), the Commission ruled that a town employee who performs only clerical work may contract with the town to prepare police activity reports on her own time because she did not exercise control over the town contract.

In [Advisory Opinion 2021-11](#), the Commission stated that “[c]ity employees generally do not have direct authority or control over all municipal contracts by virtue of their employment with the [c]ity.”<sup>3</sup>

In this case, the Sanitary Board employee does not have direct authority or control over the Sanitary Board’s Biosolids Program, Biosolids Landowner Agreements, or the Board’s decisions to distribute biosolids, lime, and gravel to program participants. **The Ethics Commission finds, therefore, that the Sanitary Board employee may participate in the Biosolids Program, be a party to a Biosolids Landowner Agreement, and receive lime and gravel for his property from the Sanitary Board under the same terms and conditions as other Biosolids Program participants.**<sup>4</sup>

Next, the Requester asks whether the parents of a Sanitary Board employee may participate in the Biosolids Program. In [Advisory Opinion 2016-12](#), the Ethics Commission ruled that a county may purchase a building from the county prosecutor’s mother-in-law. In [Advisory Opinion 2021-08](#), the Commission held that a Board of Education (“BOE”) member need not recuse herself from updates on a lawsuit filed against the BOE by a sibling, who is a former employee of the BOE, when there is no financial relationship between the siblings and the lawsuit does not relate to the sibling’s prior employment with the BOE.

The key factor in the instant case is that the son exercises no direct authority or control over the Sanitary Board’s Biosolids Program. Hence, the public contract restrictions in the Ethics Act do not prohibit him or his parents from contracting with the Sanitary Board to participate in the Biosolids Program. **The Ethics Commission finds that the**

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<sup>3</sup> The Commission noted that there are some city employees whose authority gives them the requisite authority to trigger the public contract restrictions. See W. Va. Code R. § 158-8-2 (city managers have direct authority or control over city contracts) and [Advisory Opinion 1990-135](#) (city attorney’s business may not contract with city because he has authority or control over city contracts).

<sup>4</sup> The Ethics Commission also held in [Advisory Opinion 2021-21](#) that City Council members may apply for and receive grants from the City’s Small Business Grant program, even though they may have direct authority and control over the program, because the grant is not the type of contract the Legislature intended the Ethics Act to prohibit. This reasoning might apply to the Biosolids Program administered by the Sanitary Board, but it is not necessary to analyze this rule of law because the Sanitary Board employee does not have direct authority or control over the Biosolids Program.

**Sanitary Board employee's parents may participate in the Sanitary Board's Biosolids Program.**

Last, the Sanitary Board asks whether it may use public funds to improve the parents' property for the purpose of storing biosolids. The Sanitary Board estimates that upgrading the storage area on the property will save the Sanitary Board hundreds of thousands of dollars. The parents' son, who is a Sanitary Board employee, has no direct authority or control over the Board's decision to upgrade the property.

In [Advisory Opinion 2020-14](#), the Commission ruled that a sheriff's office may use public funds to install a fence at a K-9 handler's private residence for security and liability purposes if there is an overriding public benefit to the expenditure.

In [Advisory Opinion 2021-23](#), the Ethics Commission held that if the County Commission determines that building the proposed waterline extension project benefits the County by promoting tourism or economic development, then using American Rescue Plan funds for the project would not violate the Ethics Act even if the developer may uniquely benefit from the project.

**Based on the Ethics Act and prior Advisory Opinions, the Ethics Commission holds that the Sanitary Board may use public funds to improve private property owned by the parents of a Sanitary Board employee if the Sanitary Board determines that there is an overriding public benefit to the Sanitary Board.**

*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.*

  
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Terry L. Walker, Acting Chairperson  
West Virginia Ethics Commission