

## Advisory Opinion 2023-12

Issued on September 7, 2023, by

The West Virginia Ethics Commission

### Opinion Sought

A **County Commission candidate** asks whether he may continue his employment with a nonprofit that receives appropriations from the County if he becomes a County Commissioner.

### Facts Relied Upon by the Commission

A County Commission has a vacancy due to the resignation of one of its Commissioners. The County's political party executive committee has selected three candidates for the County Commission to consider for appointment to the position<sup>1</sup> and the Requester is one of the candidates. Because the County Commission has appropriated money to the Requester's employer, he seeks guidance on whether he is eligible to be a candidate for the position and whether he may continue his current employment if selected.

The Requester is the Executive Director of a nonprofit ("Nonprofit") whose member organizations consist of various churches and faith-based organizations. Each member organization may appoint two persons to represent that organization at the Nonprofit's meetings. The appointed representatives approve the Nonprofit's budget and elect its board of directors. The board of directors hires the Executive Director who is responsible for the day-to-day operations of the Nonprofit. The County Commission is not a member organization and does not appoint or have authority to appoint any of the Nonprofit's board members.

The Nonprofit's fiscal year is July 1 to June 30, and it is funded through donations, grants, and gifts. It also receives an annual appropriation from the County Commission.

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<sup>1</sup> The relevant Code provision, W. Va. Code § 3-10-7, states:

(a) Any vacancy in the office of county commissioner or clerk of county commission shall be filled by appointment by the county commission. The appointee must be a person of the same political party with which the person holding the office immediately preceding the vacancy was affiliated at the time the vacancy occurred: *Provided*, that at the time of appointment, the appointee must have been a member of that political party for at least sixty days prior to the occurrence of the vacancy.

(b) If a quorum of the county commission fails to make an appointment within 30 days, the county executive committee of the same political party with which the person holding the office preceding the vacancy was affiliated at the time the vacancy occurred, shall submit a list of three legally qualified persons to fill the vacancy.

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The following is an overview of the County’s appropriations to the Nonprofit for the last four fiscal years and the percentage of the County’s appropriations to the Nonprofit’s total revenues for each fiscal year:

	FY 2021	FY 2022	FY 2023	FY 2024
County Commission Appropriation	\$9,000	\$20,000	\$80,000	\$100,000
Nonprofit Revenue	\$478,333	\$1,010,892	\$1,157,755	Not available
Percentage of Appropriation to Revenue	2%	2%	7%	Not available

The 2024 data for the Nonprofit’s revenues is unavailable as the fiscal year does not end until June 30, 2024. The Requester estimates that the County’s funding will constitute approximately seven percent or less of the total revenues for fiscal year 2024.

The Requester states that if he is selected to serve on the County Commission, he will recuse himself from voting on appropriations to his Nonprofit employer. The Requester states that the County’s appropriation is not directly used to fund his salary.

**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)(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*, That nothing herein

shall be construed to prevent or make unlawful the employment of any person with any governmental body . . . .

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

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... [an] officer... he or she may have any voice, influence or control . . . .

### **Advisory Opinion**

Neither the Ethics Act nor W. Va. Code § 61-10-15 prescribes who is eligible to serve on a public body. If the Requester becomes a county commissioner, however, he must comply with the restrictions in these laws, including the applicable public contract restrictions that prohibit the Requester from being a party to, or having a financial interest in, public contracts over which his public position gives him varying degrees of control subject to limited exceptions.<sup>2</sup> [Advisory Opinion 2017-22](#) and [Advisory Opinion 2022-09](#).

The Ethics Act allows a public official to be employed by a nonprofit that receives appropriations from a government agency for which he or she serves as a public official. See [Advisory Opinion 2011-02](#) (discussing the distinctions between the Ethics Act and W. Va. Code § 61-10-15). W. Va. Code § 61-10-15 contains stricter prohibitions than the Ethics Act. The Commission must therefore address whether the more stringent and comprehensive provisions contained in W. Va. Code § 61-10-15 prohibits the Requester from employment by a nonprofit that receives appropriations from the County Commission.

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials who become pecuniarily interested in the proceeds of a contract, including employment contracts, over which the official *may exercise voice, influence or control*. (emphasis added).<sup>3</sup> The Commission acknowledged in [Advisory Opinion 2019-12](#) 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 Commission must now determine whether the Requester, if he becomes a County Commissioner, may have “voice, influence or control” over the Nonprofits’s employment contracts under W. Va. Code § 61-10-15, thereby prohibiting his employment with the Nonprofit while serving as a County Commissioner if the Nonprofit continues to receive

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<sup>2</sup> The restrictions also apply to public employees. W. Va. Code § 61-10-15 governs certain county officials and employees.

<sup>3</sup> See [Advisory Opinion 2017-04](#) (discussing the application of the restrictions to employment contracts).

appropriations from the Commission. The Ethics Commission has consistently stated in past Advisory Opinions, e.g., [Advisory Opinion 2018-05](#), that two factors to consider in whether a county public official may exercise voice, influence or control over his or her employment contract with another entity are through a county agency's 1) power to make appointments to boards or commissions who employ a public official, and/or 2) appropriations to such boards or commissions.

The County Commission does not appoint the Nonprofit's board members. Therefore, the only factor the Commission must consider is whether the County Commission's appropriations to the Nonprofit may constitute the exercise of voice, influence or control over the Nonprofit's contracts.

In [Advisory Opinion 2001-28](#), a board of education ("BOE") member asked whether his private company may bid on a behavioral health center's projects when the BOE annually contributed \$15,000 to the center's \$10,000,000 budget. Acknowledging that the BOE had no supervision or oversight of the behavioral health center, the Commission concluded that it would not violate either the Ethics Act or W. Va. Code § 61-10-15 for the BOE member to contract with the center. Presumably, the relatively small contribution, at less than one percent of the center's budget, was insufficient to bar the contract. See also [Advisory Opinion 2018-05](#) (holding that a contribution of less than one percent was insufficient to prohibit a BOE member from working with the WVU Extension Service).

In contrast, in [Advisory Opinion 2017-04](#), the Ethics Commission held that a county commissioner may not work as the director of a city library that received county appropriations constituting approximately seven percent of the public library's \$55,645 budget if the library continued to receive public funding from the county commission. The Ethics Commission found that the appropriation of money, without any appointment power, was significant enough to constitute the exercise of voice, influence and control over the public library's contracts. In [Advisory Opinion 2021-10](#), the Ethics Commission held that a county commissioner may not be employed by a CVB to which that county commission appropriated 43 percent of the CVB's budget.<sup>4</sup>

The Ethics Commission has not clearly established a bright-line rule under W. Va. Code § 61-10-15 for when an appropriation by a county agency to a nonprofit or other government agency is sufficient to constitute the exercise of voice, influence or control over the contracts of that entity. To give clear guidance on this issue, the Ethics Commission finds that the appropriation of a county agency to a nonprofit or government agency constituting seven percent or more of the nonprofit or government agency's revenues for the fiscal year in which they receive the funds constitutes the exercise of voice, influence or control. The Ethics Commission therefore reaffirms its holding in [Advisory Opinion 2017-04](#).

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<sup>4</sup> The Commission also considered whether the mandate that county commissions contribute 50% of its hotel tax proceeds to CVBs changed the legal conclusion and determined that under the facts presented, it did not.

**The Ethics Commission holds, therefore, that a county commission's appropriation to a nonprofit agency constituting less than seven percent of the nonprofit's fiscal year revenues does not constitute the exercise of voice, influence, or control pursuant to W. Va. Code § 61-10-15.<sup>5</sup> The Ethics Commission further holds that the appropriations to the nonprofit from the county commission may not be used to directly fund the county commissioner's employment position with the nonprofit.**

In the present case, the analysis does not stop here, however, because the Requester was not on the County Commission when the County Commission appropriated funds to his nonprofit employer. The Ethics Commission finds that appropriations to a nonprofit or government employer that predate a candidate's election or appointment to a county office do not put him or her in violation of W. Va. Code § 61-10-15 when and if he or she assumes office. This conclusion is consistent with past Ethics Commission rulings regarding contracts that predate a public official taking office. See [Advisory Opinion 2000-16](#) (A BOE may continue its existing contract with a BOE member to maintain a tv satellite system he installed before becoming a member, so long as there is no modification of the contract's terms and conditions); [Advisory Opinion 2002-11](#), and [Advisory Opinion 2017-18](#) (discussing a building lease that predates a cabinet secretary's appointment).

**The Ethics Commission holds that the County Commission's past contributions, even if they had been seven percent or more of the Nonprofit's revenues, will not be considered for purposes of W. Va. Code § 61-10-15 if the Requester now becomes a County Commissioner and remains employed by the Nonprofit because they predate his appointment to public office.** The Requester, nominating body, and County Commission must weigh the uncertainty of whether the County Commission will make a future contribution of at least seven percent to the Nonprofit in deciding whether the Requester should fill the vacancy.

If the Requester is selected to serve on the County Commission, he must, as he recognizes, recuse himself from voting on appropriations to his Nonprofit employer. W. Va. Code § 6B-2-5(j).

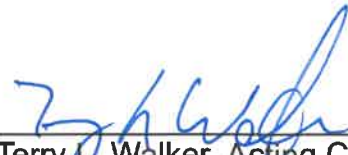
*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid.*

*This Advisory Opinion is limited to questions arising under the Ethics Act at W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to*

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<sup>5</sup> The Ethics Commission also finds that this holding would not apply in situations where the appropriation goes directly to pay for the public official's salary with the private entity.

*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 other public agencies 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