

## Advisory Opinion 2020-12

Issued on September 3, 2020, by

The West Virginia Ethics Commission

### Opinion Sought

A **County Commissioner** asks whether the Ethics Act prohibits a county commissioner from participating as a member of the board of canvassers for an election when the county commissioner is also a candidate in the election.

### Facts Relied Upon By the Commission

The canvass is a proceeding required by law in which the materials, equipment, and results of an election are reviewed, corrected, and officially recorded prior to the certification of that election. W. Va. Code R. § 153-18-2.2.<sup>1</sup> West Virginia law requires county commissioners to serve as a board of canvassers and to keep “a complete record of all their proceedings in ascertaining and declaring the results of every election in their respective counties.” W. Va. Code § 3-6-9(a). All meetings of the commissioners sitting as a board of canvassers are required to be open to the public, and a quorum of the board must be present to conduct the canvass. W. Va. Code § 3-6-9(a)(4)-(5).

West Virginia law provides that “the ballots, pollbooks, registration records, tally sheets and certificates” shall be placed before the board of canvassers for examination. *Id.* Further, “[t]he board shall proceed to open each sealed package of ballots laid before them and, without unfolding them, count the number in each package and enter the number upon their record.” *Id.* “The ballots shall then be again sealed carefully in a new envelope and each member of the board shall write his or her name across the place where the envelope is sealed.” *Id.* Upon conclusion of the canvass, the board of canvassers declares and certifies the election results. W. Va. Code §§ 3-6-9 and 10.

The board of canvassers also presides over any demanded recounts. W. Va. Code § 3-6-9(b)-(h).

The Requester states that he has never missed a canvass in his years of service as a county commissioner and believes it to be one of the most critical constitutional duties of his office. The Requester further states that the duties are required by law and are necessary to help protect the integrity of the election process. The Requester acknowledges that West Virginia law contemplates recusal of a county commissioner during an election contest but asks whether the Ethics Act would require recusal during the initial canvass or a requested recount.

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<sup>1</sup> For a summary of canvass procedures, see West Virginia Secretary of State’s Office, Elections Division, *2020 Best Practices Guide For Canvass*, <https://sos.wv.gov/FormSearch/Elections/Informational/Canvassing%20Manual.pdf>.

## **Provisions Relied Upon By the Commission**

W. Va. Code § 6B-1-3(g) provides:

“Ministerial functions” means actions or functions performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, the individual’s own judgment as to the propriety of the action being taken.

W. Va. Code § 6B-2-5(j) provides, 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 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.

.....

(3) For a public official’s recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. The recusal shall also be reflected in the meeting minutes.

## **Advisory Opinion**

The Ethics Act prohibits public officials from participating in and voting on matters in which the official has a financial interest. W. Va. Code § 6B-2-5(j)(1)(A). Additionally, the Commission has “long held that public officials have a financial interest in their elected positions.” Advisory Opinion 2014-10 (citing Advisory Opinions 2012-37 and 2010-08). The Commission must determine here whether a county commissioner’s participation as a member of the board of canvassers for an election in which the commissioner is also a candidate constitutes participating and voting on matters in which the official has a financial interest, namely the commissioner’s elected position.

The West Virginia Supreme Court expounded upon the duties of the board of canvassers in *State ex rel. Thompson v. Frye*, 137 W. Va. 321, 71 S.E.2d 449 (1952):

The duty of the board of canvassers is to canvass the returns of the election and accurately ascertain the result thereof from said returns, and in doing so, the board is required first to ascertain whether or not the returns placed before them are, in fact, the returns of the said election, and that they are in proper form, and if not in proper form, to have them corrected so as to conform to the requirements of the law. They have the right to have the officers of the election and others summoned before them for these purposes and these purposes alone.

*Id.* at 337-38, 71 S.E.2d at 458 (quoting *State ex rel. Hatfield v. Farley*, 97 W. Va. 695, 126 S.E. 413 (1924)). “The board of canvassers is merely a body to canvass the returns of elections for public officers, acting simply on the certificates sent from voting precincts by certain officers holding the election, and recounting ballots when demand is made.” *Id.* (quoting *Brown v. Randolph County Court*, 45 W. Va. 827, 32 S.E. 165 (1899)).

Significantly, the West Virginia Supreme Court has delineated the duties of a canvassing board as chiefly ministerial. *Varney v. County Court of Mingo County*, 102 W. Va. 325, 135 S.E. 179 (1926) (“[The board’s] duties are ministerial, not judicial.”); see also *State ex rel. Clark v. Fitzpatrick*, 85 W. Va. 446, 102 S. E. 111 (1920) (“What is sought to be enforced by the present writs is the plain ministerial duty imposed upon the members of the council, sitting as a board of canvassers . . .”). The Supreme Court has acknowledged that a canvassing board exercises a limited degree of judgment and discretion in carrying out its duties, but not so much as to overcome its ministerial nature. *Brazie v. Fayette County Comm’rs*, 25 W.Va. 213, 222 (1884)(describing the canvassing board as having “no judicial powers except those of the most limited character, scarcely any more than those exercised by almost all ministerial bodies.”); see also *State v. Harden* 62 W.Va. 313, 58 S.E. 715, 739 (1907) disapproved of on other grounds by *Wiseman v. Calvert*, 134 W.Va. 303, 59 S.E.2d 445 (1950). In other words, the actions performed by county commissioners serving as a board of canvassers are exercised in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, a board member’s own judgment as to the propriety of the action being taken. W. Va. Code § 6B-1-3(g).

Additionally, and as alluded to by the Requester, the duties of county commissioners serving as a board of canvassers stand in contrast to the duties of county commissioners judging a subsequent election contest.

The Supreme Court illustrated the differences between the two in *Miller v. County Comm’n of Boone County*, 539 S.E.2d 770 (2000).

Cases construing the duties of a board of canvassers say in effect that the board may only consider matters apparent on the face of the ballot and matters apparent to the personal knowledge of election officers and officials and those casting ballots. In other words, only matters patent and

intrinsic to the ballot and counting procedures are proper subjects for review and determination by the board of canvassers. *State ex rel. Patrick v. County Court*, 152 W. Va. 592, 165 S.E.2d 822 (1969); *State ex rel. Ellis v. County Court*, 153 W. Va. 45, 167 S.E.2d 284 (1969), holding that the board of canvassers may not consider or determine cases of fraud, intimidation or illegality in an election, the eligibility of a candidate, or irregularities discoverable in the course of a recount which can be established only by evidence extrinsic to the election returns.

On the other hand, the county court sitting as an election contest court, may take evidence, consider and make determination of matters extrinsic to the election returns. Sitting as an election court in a contest pursuant to Code, 1931, 3-5-20, as amended, and Code, 1931, 3-7-7 and 8, as amended, *the election court may determine the legality of votes cast*. See *Terry v. Sencindiver*, supra [153 W. Va. 651, 171 S.E.2d 480 (1969)]; *State ex rel. Mahan v. Claypool*, 97 W. Va. 670, 125 S.E. 810 (1924); *Burke v. Supervisors of Monroe County*, 4 W. Va. 371 (1870).

*Id.* at 775 (emphasis added).

*Miller* also addressed the interrelationship between county commissioners conducting a recount as a canvassing board and judging an election contest. “[T]he limited function of an election recount to decide matters which can be resolved intrinsically from the plain face of the actual ballot serves to lay the basis for an election contest, because there are many irregularities and illegalities discoverable in the course of a recount that cannot be corrected in that proceeding.” *Id.* at 776 (internal quotes omitted). “Inherent in the recount procedure is the concept of fairness to all interested candidates in an election. The recount procedure is the only mechanism available in an election dispute which gives the interested candidates a chance to identify and define problematic votes, thereby establishing the parameters for an election contest.” *Id.*

“In contrast, the purpose of an election contest is to resolve those disputes emanating from an election which concern not only the actual votes cast, but also include such matters as the legality of the election and the qualification of the person elected.” *Miller*, 539 S.E.2d at 776. “Thus, unlike an election recount, a county commission, acting as a judge of an election contest, may take the testimony from subpoenaed witnesses as well as other relevant extrinsic evidence, before deciding the result of an election.” *Id.*

While the Ethics Commission “typically defers questions as to the propriety of an election process to the Secretary of State’s office, there are occasions when the handling of an election process could give rise to a violation of the Ethics Act.” Advisory Opinion 2010-08. “This is especially true when the proposed election procedure violates a law and results in a private gain to a public official.” *Id.*

For instance, in Advisory Opinion 2010-08, the Ethics Commission considered whether city officials could vote to extend their current office terms for an additional year. The

city sought to align future city elections with even numbered years in order to coincide with the primary election of the offices of the President of the United States and Governor of West Virginia. The Ethics Commission held that a public official's vote to extend the official's own current term of office beyond that statutorily or constitutionally prescribed, and thereby obtain extra compensation, constitutes a violation of the Ethics Act.

The instant situation, however, is decidedly different than that presented in Advisory Opinion 2010-08. The duties of a board of canvassers are required to be carried out in a prescribed manner. The canvassing board ascertains whether a ballot is proper and may only consider matters intrinsic to the plain face of the ballot. Significantly, the canvassing board carries out its duties without knowledge of a voter's identity or a voter's selections. If a voter is properly registered, voted in the correct precinct and the ballot otherwise conforms to the requirements of the law, the board of canvassers must count the ballot. State election law does not permit a canvassing board member to reject a legal vote, rendering such an act a criminal misdemeanor when the vote is known to be legal. W. Va. Code § 3-9-17.

Moreover, the Legislature, in the state's election code, has directly addressed the subject matter of when and to what extent a county commissioner may participate in an election canvass, recount and contest when the county commissioner is also a candidate in the election. While state law requires the board of canvassers to supervise a recount, it limits a county commissioner's participation in the recount if that county commissioner is also a candidate providing that "[n]o candidate or member of his or her immediate family may assist in the recount." W. Va. Code R. § 153-20-4.6.a; W. Va. Code R. § 153-20-6.1. When it comes to election contests, the Legislature further limited a county commissioner's participation providing that "a member of the county commission whose election is being contested may not participate in judging the election, qualifications and returns." W. Va. Code § 3-7-6.

Critically, the Legislature has provided no limitations for a county commissioner conducting an initial canvass as a canvassing board member.<sup>2</sup> The Ethics Commission

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<sup>2</sup> The Elections Division of the West Virginia Secretary of State's Office provided an instructive example regarding the operation of these provisions in its publication entitled *2020 Best Practices Guide for Recounts*:

A member of the board can still serve on the board even if the recount is for her/his office, but only in a supervisory role.

Example:

There is a recount in a county commission race, and the sitting commissioner was running for reelection. That commissioner may still serve in a supervisory role during the recount, but may not assist with the recount. However, if the election goes to a contest, that individual MUST recuse himself/herself.

West Virginia Secretary of State's Office, Elections Division, *2020 Best Practices Guide For Recounts*, <https://sos.wv.gov/FormSearch/Elections/Informational/Recount%20Manual.pdf>.

cannot ignore the Legislature's decision in this regard. "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." Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 327 S.E.2d 710 (1984). Moreover, the plain meaning of the word "vote" includes "the expression of one's preference or opinion." *Vote*, Black's Law Dictionary, (9<sup>th</sup> ed. 2009). The Ethics Commission is thus hard-pressed to conclude that a county commissioner runs afoul of the Act's voting prohibition when the Supreme Court has expressly declared that the duties of a canvassing board "are ministerial." *Varney*, supra.

**The Ethics Commission therefore declines to construe the Ethics Act's voting provision to prohibit county commissioners from carrying out a canvassing board's mandatory ministerial duties when the Legislature has declined to limit such participation in the state's election code. See Advisory Opinion 2019-07 ("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.").**

**The Ethics Commission therefore holds that the Ethics Act does not prohibit county commissioners from participating as a member of the board of canvassers for an election when the county commissioner is also a candidate in the election. The Ethics Commission's holding today is to be contrasted with county commissioners improperly judging an election contest or otherwise acting contrary to this state's election law. To be clear, there are occasions when the handling of an election process could give rise to a violation of the Ethics Act. The Ethics Commission's holding today concludes that simply carrying out the ministerial duties required of a board of canvassers does not give rise to such a violation.**

*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.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
WV Ethics Commission