

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

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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 7-4-1.¹

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,

¹ 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.



Robert J. Wolfe, Chairperson
West Virginia Ethics Commission