Advisory Opinion 2017-12

Issued on April 6, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commissioner** asks various questions about whether there is a conflict of interest for a board member or employee of a Parks and Recreation Commission to be a board member, employee or subcontractor of a Convention and Visitor's Bureau.

Facts Relied Upon by the Commission

The Legislature has authorized county commIss1ons to create county parks and recreation commissions for "the purpose of establishing, improving, developing, administering, operating and maintaining a county public parks and recreation system or public recreational facilities."[1] There is a County Parks and Recreation Commission (commonly referred to as "Parks Board") in the Requester's County whose members are appointed by the County Commission. The Parks Board members are not compensated.

In the same county, there is also a Convention and Visitor's Bureau ("CVS"). The CVS, as required by the West Virginia Code, is a nonprofit corporation. The purpose of CVBs is: "[T]o promote tourism and to attract conventions, conferences and visitors to the municipality, county or region in which such convention and visitor's bureau or visitor's and convention bureau is located or engaged in business within."[2] The CVS appoints its own members. The CVS members receive no compensation for their service on the board.

The County Commission provides more than $100,000 annually to each of these entities through the hotel and motel tax. The Requester states that state law requires county commissions to allocate at least 50 percent of the hotel motel tax to a CVS but may, in the discretion of the county, allocate more than 50 percent. State law authorizes, but does not require, a county commission to allocate a portion of its hotel motel tax to Parks Boards.

The Requester states the CVS and Parks Board compete for the hotel motel tax funding and that some of the funding from the County may be used to pay the salaries of the CVS employees. W.Va. Code§ 7-18-14.

The Requester states:

[1]W.Va. Code§ 7-11-1

[2]W.Va. Code§ 7-18-14.

> The operations of each group are separate however at times the goals of the organizations match. There may be times when an event within the County may involve participation by both groups. This brings up several questions in regards to who may sit on the Boards and whether or not the same people may be members or employees of both agencies without a conflict of interest.

The Parks Board and the CVB do not, *per se,* appropriate money to each other. The Parks Board, however, may, at times, provide in-kind contributions, such as the use of a Parks Board shelter for CVB events. At other times, the Parks Board may charge the CVB a fee for using the Parks Board's employees or facilities for an event. There are also times when the CVB may sponsor an event held by the Parks Board. The CVB's sponsorship may include a monetary donation or in-kind contribution dedicated to a specific event that supports the CVB's mission.

Provisions Relied Upon by the Commission

W.Va. Code§ 68-1-30) defines "public employee" as:

> [A]ny full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

W.Va. Code§ 6B-1-3(k) defines "public official" as:

> [A]ny person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person.

W.Va. Code§ 68-2-S(a) provides, in relevant part:

> *Persons subject to section.* -- The provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county, municipal governments and their respective boards, agencies, departments and commissions and in any other regional or local governmental agency, including county school boards.

W.Va. Code§ 68-2-S(b) provides:

(1) 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) provides, in relevant part:

In addition to the provisions of section fifteen, article ten, chapter sixty-one 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-2-5U) provides:

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

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

It is unlawful for any member of a county commission ... 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, ... he or she may have any voice, influence or control ....

Advisory Opinion

The Requester asks various questions about the application of the private gain and conflict of interest provisions in the Ethics Act and W.Va. Code § 61-10-15 given various relationships between the Parks Board and the CVB. Prior to addressing these questions, the Ethics Commission will first address whether the employees and board members of CVBs are subject to the Ethics Act.

Question No. 1: Is the CVB a government agency whose board members and employees are subject to the Ethics Act?

The Ethics Act only applies to employees and officials of governmental bodies; therefore, the Ethics Commission must determine whether a CVB is a government agency.

W.Va. Code§ 7-18-14 defines a convention and visitor's bureau as follows:

> *Convention and visitor's bureau and visitor's and convention bureau.* "Convention and visitor's bureau" and "visitor's and convention bureau" are interchangeable and either shall mean a nonstock, nonprofit corporation with a full-time staff working exclusively to promote tourism and to attract conventions, conferences and visitors to the municipality, county or region in which such convention and visitor's bureau or visitor's and convention bureau is located or engaged in business within.

This Code section expressly states that a CVB is a "nonstock, nonprofit corporation" and not a government agency. The Commission recognizes that the Legislature has provided funding for CVBs through the hotel occupancy tax. *Id.* At least 50% of the tax collected must be allocated to the CVB situated in the municipality or county. However, public funding does not convert a private, non-profit entity into a governmental body.

In Advisory Opinion 2010-09, the Ethics Commission considered if a county rescue service group, incorporated as a nonprofit corporation, was subject to the Ethics Act. The county rescue service group contracted with the county commission to provide emergency medical services. After its extensive consideration of the issue and review of past relevant Advisory Opinions, the Ethics Commission concluded the county rescue service group, a nonprofit entity, was not a governmental body and therefore not subject to the Ethics Act.

In conclusion, based upon the plain language in the Ethics Act, the Ethics Commission finds that board members and employees of a CVB, a nonprofit corporation, are not subject to the Ethics Act.[3]

This conclusion is also consistent with the decision of the Committee on Open Governmental Meetings where the Committee found that a CVB, a nonprofit corporation, was not subject to the Open Meetings Act. See Open Meetings Act Opinion 2008-07.

Question No. 2: May a member of a Parks Board be employed by a CVB?

County Parks Board members are subject to the Ethics Act. They are also subject to W.Va. Code § 61-10-15, a separate criminal statute, which imposes criminal penalties against certain county officials, including county Parks Board members, who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over

[3] The Ethics Commission also finds that as a nonprofit corporation, a CVB is not a county board or office whose members are subject to the W.Va. Code§ 61-10-15.

which they exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Ethics Commission must determine if the Parks Board member has, due to his employment with the CVB, a prohibited financial interest under W.Va. Code§ 61-10-15 arising from the interactions between the two entities, which include: (1) competing for funds from the County Commission that may be used to pay CVB's employees' salaries, (2) jointly funding public events that support the mission of both entities, and (3) CVB paying the Parks Board for using its employees or park facilities.

First, the Requester states: "There may be times when an event within the County may involve participation by both groups. Those events may require funding from both organizations for the same event." The Requester states in his request that "the decisions made by the PRC to fund certain projects that the CVB has an interest in may play a role in whether the CVB has funds for payroll and or subcontractor funding."

The Parks Board does not directly appropriate money from its budget to the CVS. Therefore, Parks Board funds could not be used to pay the salary of a CVB employee. The Ethics Commission answered this question in Advisory Opinion 2014-24:

> The next consideration is whether the board member's employment with the EDA prohibits him from serving on the board of the PSD when the PSD may also receive funding from the county commission. Neither the Ethics Act nor W.Va. Code§ 61-10-15 prohibit the Requester's employment with the EDA. W.Va. Code § 6B-2-5(d)(1) does not prohibit employment with any governmental body, and W.Va. Code§ 61-10-15 only applies in situations where a county board member exercises voice, influence or control over his or her agency's contracts. Since the PSD does not have any voice, influence or control over the EDA's contracts, the Requester may serve on the PSD board and be employed by the EDA.
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> Further, under the Ethics Act and W.Va. Code§ 61-10-15, the Requester may vote on matters concerning funding requests by the PSD to the county commission ....

Second, the Ethics Commission must determine if jointly funding events amounts to the exercise of voice, influence or control by the Parks Board over CVB contracts, including its employment contracts.[4] In analyzing whether a county official exercises voice, influence or control over his or her agency's contracts, factors the Commission has considered are: (1) The degree of supervision or oversight the public official's own agency is authorized to exercise over the other agency's activities, and (2) the extent to which the public official's agency provides financial support to the other agency. See Advisory Opinions 1999-26 and 1999-29.

[4] The Ethics Act's prohibited contracts provision, W.Va. Code§ 6B-2-5(d), does not apply to employment contracts; therefore, this analysis is limited to W.Va. Code§ 61-10-15.

In Advisory Opinion 1999-34, a county commissioner asked whether he was permitted to accept a job with a nonprofit corporation to which the commission provided $15,000 annually. The Ethics Commission held, "a County Commission's financial support of a nonprofit organization dedicated to activities advancing general public welfare is not the type of transaction governed by WV Code § 61-10-15 or the Ethics Act's prohibition against private interests in public contracts." **In the present case, the Ethics Commission finds that jointly funding events does not, for purposes of the Ethics Act orW.Va. Code§ 61-10-15, prohibit a Parks Board member from being employed by the CVB.**

The Ethics Commission finds that these types of in-kind contributions are not the type of financial transactions which trigger any of the prohibitions in the Ethics Act or W.Va. Code§ 61-10-15.[5] The fact that the two entities work together on projects, including the Parks Board providing some in-kind contributions, does not result in a financial interest which may be imputed to the volunteer Parks Board member who is also a CVB employee.

Third, the Commission will consider if the CVB's payment to the Parks Board for use of its employees or park facilities arises to a prohibited financial interest when a Parks Board member is a CVB employee. The Commission finds there is no prohibited financial interest because the Parks Board member receives no compensation. Hence, he or she does not profit from the contract when the CVB pays the Parks Board money. **Therefore, the Ethics Commission finds that CVB's payment to the Parks Board does not violate the Ethics Act or W.Va. Code§ 61-10-15.**

Limitations on voting by a Parks Board member who is employed by a CVB.

While a person may be employed by a CVB and serve on a Parks Board, there is a limitation on voting. He or she may not vote on "the appropriation of public moneys or the awarding of a contract to" the CVB. W.Va. Code § 68-2-50)(1)(0) (imposing restrictions on public officials who are employed by nonprofits). For recusal to be effective, it is necessary for the public official 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. *See* W.Va. Code§ 68-2-50).[6]

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[5] In contrast, if the Parks and Recreation Board provides funding to the CVB in the future, a different conclusion may follow as it relates to the application of W.Va. Code§ 61-10-15, which prohibits county officials, including county parks board members, from having an interest in a public contract over which they exercise voice, influence or control. *See* Advisory Opinion 2016-13 (reviewing Opinions where the Ethics Commission held that the appropriation of money by a county agency to public agency or nonprofit may, pursuant to W.Va. Code§ 61-10-15, prohibit a county official from being employed by the agency or nonprofit which receives the appropriation or funding). If the Parks Board provides funding to the CVB in the future, then the affected member should contact the Ethics Commission for further advice.

[6] The Ethics Act does not prohibit a public agency from imposing stricter limitations than the Ethics Act. See Advisory Opinion 2005-14. If the Parks Board believes it is a conflict of interest for its employees to serve on the CVB board, then, under the Act, it may impose a restriction on this volunteer activity.

In conclusion, nothing in the Ethics Act or W.Va. Code § 61-10-15 prohibit an employee of a CVB from serving on a Parks Board that does not appropriate money to the CVB. If the CVB pays the Parks Board for its facilities or services, then the CVB employee must recuse him or herself from voting as a Parks Board member on this issue and may not receive a commission or bonus from the contract for services.

Question No. 3: May a subcontractor of the CVB serve on the Parks Board?

The Requester provides no facts relating to the type of work the subcontractor performs for the CVB. In general, the same rules of law discussed in response to Question No. 2 would apply.

Question No. 4: May an employee of the Parks Board serve on the CVB Board?

The Parks Board is a public agency; however, nothing in the Ethics Act or W.Va. Code§ 61-10-15 prohibits public employees from serving on the boards of, or volunteering for, nonprofit entities when there is no compensation for the volunteer activity. Public employees must normally conduct their volunteer activities on their own time and may not use public resources. *See* Advisory Opinion 2013-33 (finding an elected state official may serve as the secretary of a local Masonic Lodge).[7]

Question No. 5: May a person serve on both the Parks Board and the CVB Board?

Neither the CVB Board Members nor the Parks Board members receive any compensation for their service. In Advisory Opinion 2014-25, the Ethics Commission held that a board chairperson of a county economic authority may also serve as the board chairperson of a county public service district. The Commission cited various Advisory Opinions where it held that uncompensated members of nonprofit organizations generally do not have a prohibited financial interest in transactions between a public body on which they serve and a nonprofit for which they are a board member or a common member.

Regarding voting, the Ethics Commission has held that a public official may vote to appropriate funds to a nonprofit organization on which they or their family members serve as uncompensated board members or officers. *See* Advisory Opinion 2011-12.

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[7] The Ethics Commission finds that if a public agency authorizes an employee to serve on the board of a nonprofit corporation with which the public agency has a working relationship, the public agency may authorize the public employee to attend the meetings of the nonprofit corporation during his or her public work hours. Public agencies may only allow this if it determines the use of its employee's time for this purpose serves to further the mission and duties of the public agency. In these circumstances, if there is no compensation for a public employee serving on a nonprofit board, the Commission finds it constitutes "[t]he performance of usual and customary duties associated with the office or position or the advance of public policy goals or constituent services ... "W.Va. Code§ 6B-2-5(b). If a public employee serving on a nonprofit board is asked to use his or her job title, public funds or time to conduct fundraising for the nonprofit, then he or she should contact the Ethics Commission for further advice.

In conclusion, there is nothing in the Ethics Act or W.Va. Code§ 61-10-15 which prohibits an appointed Parks Board member from serving as an uncompensated member of a CVB board.

Question No. 6: May a person serve as the President of the Parks Board and the CVB at the same time?

As set forth in response to Question No. 5, there is nothing in the Ethics Act or W.Va. Code § 61-10-15 which prohibits an appointed Parks Board member from serving as an uncompensated member of a CVB. The analysis and conclusion is the same for persons who may serve as the president of a CVB board, so long as the person is not compensated for his or her service as president of the CVB Board. *See* Advisory Opinion 2011-17 (finding it did not expressly violate the Ethics Act for a member of a state licensing board to be an officer in a professional association)

In conclusion, there is nothing in the Ethics Act or W.Va. Code§ 61-10-15 which prohibits an appointed Parks Board member from serving as an uncompensated president of a CVB Board.

Question No. 7: May a person serve as the President of a Parks Board if they are also simultaneously serving as the President of a chamber of commerce board and a CVB Board?

Based upon the various provisions in the Ethics Act and related Advisory Opinions cited in response to questions 2 through 6, the Commission finds there is nothing, *per se,* in the Ethics Act or W.Va. Code§ 61-10-15 which prohibits the President of a chamber of commerce from also serving as the President of a Parks Board and as the President of a CVB. If the president of the chamber of commerce is compensated for his or her service on the chamber's board, and if the Parks Board provides any funding to the Chamber or contracts with the Chamber, then the affected member should contact the Ethics Commission for further advice as limitations may apply.

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 §§ 68-1-1 through 68-3-11, and W Va. Code § 61-10-15, and does not purport to interpret other laws or rules.

*In accordance with **W.**Va. Code § 68-2-3, 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, Chairperson
Robert J. Wolfe, Chairperson