Advisory Opinion 2017-04

Issued on March 2, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A Potential Candidate for County Commission asks whether, if she becomes an elected County Commissioner, she may continue her employment as the director of a public library which receives some funding from the County Commission.

Facts Relied Upon By the Commission

The Requester serves as the director of a public library. The name of the library includes the designation "county public library;" however, a municipality and not the county created the library.[1]

The library has a board of directors comprised of five members. The municipality appoints four of the members, and the board of education appoints one. The library's board of directors is responsible for hiring the public library's director.

The library's budget for this fiscal year is $55,645. The sources and amounts of funding are: board of education - $23,000; state of West Virginia - $18,000; local private grant - $5,645; municipality which created the library - $5,000, and county commission in county where library situated - $4,000.

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:

[1] County commissions, municipalities or boards of educations have statutory authority to establish, maintain or support a public library. W.Va. Code§§ 10-1-1 through 10-1-2.

> [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 ...

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Both the Ethics Act, at W.Va. Code§§ 6B-2-5(b) and (d), and W.Va. Code§ 61-10-15, a criminal misdemeanor statute that applies to certain county officials and employees, prohibit public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them varying degrees of control.

The Commission must determine whether the Ethics Act or W.Va. Code § 61-10-15 prohibit the library director from continuing to be employed in that position if she becomes an elected county commissioner in the same county. The Ethics Act does not prohibit employment with public bodies.

Analysis under W.Va. Code§ 61-10-15

If elected as a county commissioner, the Requester would be subject to the strict limitations in W.Va. Code § 61-10-15 which prohibit county commissioners and other county officials from having an interest in contracts over which they exercise voice, influence or control. The Ethics Commission has held "an elected county official's power to appoint constitutes 'voice, influence or control' over public contracts administered by the board or authority over which the county official has appointment power." Advisory Opinion 2011-02. For example, the Ethics Commission has held that a county commissioner may not be employed by a county solid waste authority because the county commission appoints the solid waste authority members. Advisory Opinion 2013-41.

In the present case, the county commission does not appoint any of the public library's board members. Instead, the municipality which created the public library and the board of education appoints the library's board members.

As the county commission does not have appointment power over the public library's board, the Ethics Commission must determine if the county commission's appropriation

of money to the public library gives it voice, influence or control over the public library's contracts. The application of W.Va. Code § 61-10-15 is less clear when a county commission or other county agency, *e.g.,* board of education, does not exercise appointment power but only provides financial support.

In Advisory Opinion 2014-23, the Ethics Commission held that a county commissioner may be employed by a county board of education in the same county. The Opinion states "the county commission receives various funding requests from both the BOE and the numerous schools therein for specific school projects." The Opinion further states that the county commission does not approve the BOE budget, hire its personnel or appoint its board. There is no information in the Opinion about the amount of money normally given by the county commission to the board of education or public schools in the county. Presumably any appropriations made would have constituted a *de minimis* amount of the board of education's total budget. The Ethics Commission, in its analysis of W.Va. Code § 61-10-15, concluded in the Opinion that the county commission did not exercise voice, influence or control over the board of education's contracts.

In Advisory Opinion 2011-02, the Ethics Commission held a county council member may bid on a contract being let by a conservation district The Commission reasoned that the county council did not exercise voice, influence or control over the contract as conservation district members are elected. The Opinion stated that the county council had allocated $2,700 toward the conservation district's budget but that the project on which the Requester wanted to bid was not being funded by county funds. Further, while not noted in the Opinion, presumably the $2,700 represented a *de minimis* amount of the conservation district's total budget. The Ethics Commission limited its holding to the facts presented and further held the Opinion did not "authorize the employment of County Commissioners or County Council Members, their spouses or dependents by Conservation Districts in the County where they serve."

In Advisory Opinion 2014-09, the Commission provided an overview of some past Opinions where the Commission held that in certain instances county or school board officials could accept employment or contract with entities funded by the county public agency on which they served. The Commission stated:

> [I]n Advisory Opinion 99-34, a County Commissioner asked whether he was permitted to accept a job with a non-profit corporation for which the County Commission provided $15,000 annually. There the Commission held, "The Ethics Commission finds that 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.
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> In two opinions concerning potential BOE Members, the candidates were employed respectively as Principal of a private school within the county and as Director of a private day care center within the county. The Commission held that even though the BOE provided support to their respective

> employers, these were not the type of transactions governed by W.Va. Code§ 61-10-15 or the Ethics Act's prohibition against private interests in public contracts. *See* Advisory Opinions 2001-30 and 2004-02.
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> Similarly, in Advisory Opinion 2001-28, a BOE Member asked whether his private company was permitted to bid on projects proposed by a behavioral health center to which the County Commission annually contributed $15,000 to its $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's to contract with the center.

Id. at p. 4.

The Ethics Commission must determine if the appropriation of $4,000 by the County Commission to the public library constitutes voice, influence or control over the employment contracts of the public library. The appropriation from the county to the library constitutes approximately 7 percent of the library's $55,645 budget.

The West Virginia Supreme Court has held that W.Va. Code§ 61-10-15:

> [I]mplements the public policy of this State, and its provisions are clear and unambiguous. Although harsh, its objects and purposes are salutary. The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 132 W. Va. 865, 871, 53 S.E.2d 735, 739 (1949).

The Ethics Commission finds that, as the County Commission's appropriation to the public library constitutes approximately 7 percent of the public library's $55,645 budget, the appropriation of the money constitutes the exercise of voice, influence and control over the public library's contracts. The purpose of W.Va. Code§ 61-10-15 is to protect public funds. Based upon the facts presented, past Advisory Opinions, the common law and the public purpose of the statute, the Commission finds the Requester, if elected as County Commissioner, may not continue to be employed by the public library if the public library continues to receive public funding from the County Commission.

Analysis under the Ethics Act

There is no need to address the Ethics Act's prohibition on public contracts since the Ethics Commission has determined that the Requester's proposed conduct is prohibited by W.Va. Code§ 61-10-15.[2]

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 §§ 68-1-1 through 68-3-11, and W Va. § 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 other public agencies unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe, Chairperson
Robert J. Wolfe, Chairperson

[2] The Ethics Commission has previously held that the appropriation of public funds by a county commission to a public agency or nonprofit organization does not constitute direct authority or control for purposes of creating a prohibited interest in a public contract pursuant to the Ethics Act. *See* W.Va. Code § 6B-2-5(d), Advisory Opinion 2011-02 and Advisory Opinion 2013-41. Further, the Ethics Act expressly exempts employment contracts from the public contract limitations. *Id.*