

## Advisory Opinion 2018-05

Issued on March 1, 2018, by

The West Virginia Ethics Commission

### Opinion Sought

**A Potential Candidate for a County Board of Education** asks whether, if elected, she may continue her employment as an Outreach Instructor with the Cooperative Extension Service of West Virginia University, which receives some funding from the Board of Education.

### Facts Relied Upon by the Commission

The Requester is a Nutrition Outreach Instructor employed by the Cooperative Extension Service of West Virginia University ("WVU Extension Service").<sup>1</sup> The purpose of the Cooperative Extension Service is to promote the advancement of agriculture, home economics and forestry within the state and to promote general economic development and the improvement of cultural and social life in areas of the state. W. Va. Code § 18-11-8. The Requester would like to also serve on the Board of Education ("BOE") in the county where her local extension office is located. She provides nutrition outreach services in two other counties as well.

The WVU Extension Service pays the Requester's salary and benefits and other expenses with funding from a grant from the U.S. Department of Agriculture's Expanded Food and Nutrition Education Program ("EFNEP"). The BOE on which she may serve, provides some funding to the local extension office. This funding is not used for the Requester's salary, benefits or office expenses. The funding from the BOE instead is used for a clerical employee and office supplies and travel expenses for an Extension Agent in the office.

Pursuant to W. Va. Code § 19-8-1, each county in West Virginia must have a County Extension Service Committee ("County Extension Committee"), which must include "a member of the county board of education designated by the president of the county board of education." W. Va. Code § 19-8-1. The purpose of the County Extension Committees is to enter into a memorandum of agreement with the corresponding county commissions and boards of education for funding part of the salaries and expenses of county extension workers. *Id.* The Requester represents that she would not serve as the BOE's representative on the County Extension Committee.

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<sup>1</sup> The Legislature created the Cooperative Extension Service of West Virginia University in W. Va. Code § 18-11-8. WVU Extension Service is operated under the control of the West Virginia University Board of Governors. The Board of Governors must employ such county extension agents and other extension personnel as may be available from funds from federal, state or other sources.

The County Extension Committee in the county at issue entered into a memorandum of agreement for the current school year with the BOE and county commission. The agreement requires each entity to provide funding in the amount of \$26,664 to help support the extension office located in the county. The appropriation is made to WVU Extension and not to the local committee or to the local extension office. The Requester states that she does not believe that her employment position is contingent on the continuation of the local extension office.

The Requester and her supervisors estimate that WVU Extension's total funding for all its services it provides throughout the state is approximately \$25 million. West Virginia University provides approximately \$13 million; the federal government provides approximately \$5 million; county commissions and county BOEs together provide approximately \$5 million, and \$2 million comes from various grants and contracts. (The Requester is paid from the \$2 million from grants and contracts.)

### **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**

The Commission must determine whether the Ethics Act, at W. Va. Code §§ 6B-2-5(b) and (d), or W. Va. Code § 61-10-15 prohibits the Requester from continuing her job with WVU Extension Service if she becomes an elected county Board of Education member in one of the counties she serves.

## **Ethics Act**

The Ethics Act does not prohibit employment with public bodies. 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. Advisory Opinions 2011-02 and 2013-41. Further, the Ethics Act expressly exempts employment contracts from the public contract limitations. W. Va. Code § 6B-2-5(d).

## **W. Va. Code § 61-10-15**

If elected as a BOE member, the Requester would be subject to the strict limitations in W. Va. Code § 61-10-15 which prohibit BOE members and other county officials from having an interest in contracts over which they exercise voice, influence or control. The West Virginia Supreme Court of Appeals determined in *Cimino v. Board of Education*, 158 W. Va. 267, 210 S.E.2d 485 (1974), that the prohibitions in W. Va. Code § 61-10-15 are equally applicable to employment contracts.

The Commission has determined in past Advisory Opinions that two ways a county public official may exercise voice, influence or control over his or her employment contract are through a county board's 1) power to make appointment to boards or commissions who employ a public official, and/or 2) appropriations of funding to such boards or commissions. Both will now be considered.

## **Appointment power**

The Ethics Commission has held that for purposes of W. Va. Code § 61-10-15 an elected county official's power to appoint constitutes 'voice, influence or control' over public contracts administered by the board to which the appointment is made. In Advisory Opinion 2013-41, for example, the Ethics Commission held that a county commissioner could not be employed by a county ambulance authority because the county commission appointed all the authority's board members. The power to make these appointments resulted in the county commissioner having voice, influence or control over the authority's employment contracts, which would violate W. Va. Code § 61-10-15.

In the present case, the BOE President, and not the BOE selects the BOE's representative on the County Extension Committee.

**The Ethics Commission holds therefore that, if elected to the BOE, the Requester would not have sufficient voice, influence, or control over her employment contract with WVU Extension Service by virtue of the BOE President's power to appoint a member to the County Extension Committee provided that she does not serve as the BOE representative.**

## **Appropriations**

County BOEs make appropriations to WVU Extension Service through agreements with the County Extension Committees. The funding from each county is specifically earmarked for each county's local extension office. {The Respondent is not paid from the funding from the county.} The Commission has held, in prior Advisory Opinions that will be discussed herein, that W. Va. Code § 61-10-15 may prohibit county officials from employment with entities funded by the county agency on which they serve. The Ethics Commission therefore must determine whether the BOE's appropriation of money to WVU Extension gives the BOE voice, influence or control over the WVU Extension's employment contract with the Respondent.

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, in part, 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.

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.

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 to contract with the center.

*Id.* at p. 4.

Most recently, the Ethics Commission held in Advisory Opinion 2017-04:

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.

In the instant case, the Requester's salary and expenses are not paid with funding from the county BOE on which she would serve. The BOE appropriates less than one percent of the total funding to WVU Extension Service, the Respondent's employer.

**The Ethics Commission concludes that given the Board of Education's limited appropriations and lack of authority over WVU Extension Service, W. Va. Code § 61-10-15 would not prohibit the Requester from serving on the BOE and continuing her employment.**

*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 W Va. § 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 other public agencies unless and until it is amended or revoked or the law is changed.*

  
Robert J. Wolf, Chairperson  
West Virginia Ethics Commission