

Advisory Opinion 2019-23

Issued on September 5, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **County Airport Authority member** asks whether he may continue his employment with a hotel that uses the airport's services, serve on the board of the Chamber of Commerce, and vote on the creation of an Airport Convention and Visitors Bureau.

Facts Relied Upon by the Commission

The Requester serves on the Board of a County Airport Authority ("Authority"). He is a full-time employee of a large hotel ("Hotel") in the region. The Hotel is a tourist attraction in the state. The Hotel and its customers use the air travel services the Authority provides to the public.

The Requester also serves on the Board of a Chamber of Commerce ("Chamber") in the same county. The Chamber is a non-profit organization and not a public body.

The Requester asks whether he is permitted to simultaneously serve on the boards of the Authority and Chamber and continue his employment with the Hotel. He also asks whether as a member of the Authority he may vote on the creation of an Airport Convention and Visitors Bureau ("CVB"), which may increase the hotel occupancy taxes.

Provisions Relied Upon by the Commission

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 § 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

W. Va. Code § 6B-2-5(j) states, 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.

(2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses. . . .

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Employment with Hotel

No provision of the Ethics Act prohibits the Requester from continuing his employment with the Hotel merely because it uses or benefits from the public services provided by the Authority. The relevant provision of the Act, at W. Va. Code § 6B-2-5(h), prohibits full-time public employees from employment in the private sector in some circumstances. This provision, however, does not apply to the Requester because he is not a full-time public employee.¹

Service on Chamber of Commerce

The Requester also asks whether his service on the board of the Chamber prohibits him from serving on the board of the Authority. In Advisory Opinion 2017-22, the Requester asked if he was eligible to serve on a public body. The Commission stated that it has “no authority to make this determination The Ethics Act does not generally prescribe who is eligible to serve on a public body or subcommittee. The Ethics Act does, however, impose limitations on the board member’s participation in matters in which he has a financial interest.”

¹ Neither of the relevant prohibited contracting provisions, at W. Va. Code § 6B-2-5(d)(1) or W. Va. Code § 61-10-15(a)(which applies to certain county officials), is triggered because there are no facts to suggest that any contracts exist between the Authority and the Hotel or the Authority and the Chamber.

Therefore, the Ethics Commission holds that the Ethics Act does not prohibit the Requester from simultaneously serving on the boards of the Airport Authority and the Chamber of Commerce while maintaining his employment with the Hotel.

Voting

The Requester also asks whether he may vote on the Authority's creation of a CVB.

Although the Ethics Act does not prohibit the Requester's service on the boards or employment with the Hotel, the Act prohibits him from participating in and voting on matters in which he, an immediate family member, or a business with which he or an immediate family member is associated have a financial interest. "Business with which he is 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. W. Va. Code § 6B-2-5(j)(1)(A).

Based on the cited definition and restrictions in the Act governing voting, if the Hotel has a financial interest in matters that come before the Airport Authority, then the Requester must recuse himself since he is employed by the Hotel.

The Requester asserts that a new CVB may ultimately result in an increase in the hotel occupancy tax and that therefore the Hotel may have a financial interest in the matter. The Ethics Commission must determine whether the Hotel has a financial interest in the creation of the CVB for purposes of the voting restrictions in the Ethics Act.

The Airport Authority's county currently imposes a three percent hotel occupancy tax and already has one CVB.² The state's hotel occupancy statute provides that a county commission may impose up to a six percent tax for the use or occupancy of a hotel room and must appropriate at least 50 percent of the net proceeds of the tax to the CVBs in the county.³ While a county commission may elect to increase the tax rate to six percent, the creation of another CVB in a county would not require a county commission to raise the occupancy tax rate. A county commission alone has the discretion of whether to raise the occupancy tax regardless of the existence of one or more CVBs. W. Va. Code § 7-18-2(c).

In Advisory Opinion 2013-18, the Ethics Commission found that a county commissioner did not have a financial interest in an insurance firm of which he was a customer because any perceived interest, such as a rate decrease, was wholly speculative and too remote to be considered even an indirect financial interest. Therefore, the commissioner was not prohibited from voting on the selection of the county's insurance

² "The tax shall be imposed on the consumer and shall be collected by the hotel operator as part of the consideration paid for the occupancy of a hotel room." W. Va. Code § 7-18-1.

³ W. Va. Code § 7-18-2 and W. Va. Code 7-18-14.

provider. In the instant situation, any financial effect on the Hotel resulting from a new CVB is likewise found to be speculative and remote.

The Ethics Commission therefore holds that the Hotel's financial interest in the Airport Authority's potential vote to create a Convention and Visitors Bureau is too speculative to prohibit the Requester from voting.

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.

/s/ Lawrence J. Tweel
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West Virginia Ethics Commission