

Advisory Opinion 2024-01

Issued on January 5, 2024, by

The West Virginia Ethics Commission

Opinion Sought

A **Prosecutor** asks whether the Ethics Act requires the Sheriff's Department in his county to remove itself from criminal investigations involving county officials or employees.

Facts Relied Upon by the Commission

The Requester states that the Sheriff's Department normally follows an unwritten policy of removing itself from criminal investigations, other than those of minor traffic violations, involving County officials or employees and asks another law enforcement agency to conduct such investigations. Similarly, the Prosecutor's Office has historically recused itself from any criminal prosecutions or investigations involving County officials or employees. The Requester states that the purpose of the unwritten policy is to avoid the appearance of, and possibility of, using criminal investigations and prosecutions for improper political reasons or retaliation against elected county officials or their employees. The Requester states that the ethical issue he is raising has policy implications that may affect more than his Office.

The Requester states that the Sheriff's Department is investigating one of the Requester's employees for something other than a minor traffic violation. The Prosecutor's Office employee who is under investigation has announced that he is running for sheriff. The current Sheriff is not seeking reelection because he is not eligible due to term limits, but the Requester asserts that some of the Sheriff's Department employees have met the Prosecutor Office employee's announcement with disfavor. The Requester states that there is also tension between the Sheriff, the Prosecutor, and the County Commissioners relating to a personnel matter involving a Sheriff's Office employee. The Requester indicates that the Sheriff's Department's investigation of his employee may be motivated by political factors.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) 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. 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.

Advisory Opinion

The Requester is concerned that if his County Sheriff's Department does not remove itself from criminal investigations involving other county officials or their employees, it will create the appearance of impropriety and a risk that such investigations will be used for improper political reasons or retaliation. The Ethics Commission must determine whether the plain language in the Ethics Act prohibits county sheriffs from conducting criminal investigations, other than for minor traffic violations, involving County officials or employees.

In [Advisory Opinion 2021-08](#), the Ethics Commission examined prior opinions of the Supreme Court of Appeals of West Virginia governing statutory construction to give guidance to a board of education member about whether she could vote on a matter involving a lawsuit filed by her brother against the board of education. The Commission stated:

In *Young v. State*, 241 W.Va. 489, 826 S.E.2d 346 (W. Va. 2019), the West Virginia Supreme Court of Appeals held, "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). We have long recognized that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such cases it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

Id. at 6. The Commission then stated that: "It is the duty of the Commission to apply the provisions of the Act and [the private gain] Rule. Neither the Act nor the Rule prohibits voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision (W. Va. Code § 6B-2-5(e)), or a potential violation of the private gain provision (W. Va. Code § 6B-2-5(b)(1))." The Commission further held that "[v]iolations of the Act's confidentiality and private gain provisions both require an actual breach rather than mere potential violations." Id. The Commission concluded, in [Advisory Opinion 2021-08](#), therefore, that the board of education member may vote on matters affecting her brother's lawsuit because no express provision in the Ethics Act prohibited her from doing so.

As in the above Opinion, the Ethics Commission has considered the plain language in the Ethics Act, including the private gain provision, to determine whether the Ethics Act requires a sheriff's department to recuse itself from criminal investigations involving county officials or employees. **The Ethics Commission finds that no provision in the**

Ethics Act prohibits a sheriff's department from conducting a criminal investigation involving other county officials or their employees.

If a person believes that a public official or employee has used his or her investigative or prosecutorial powers for improper political reasons or retaliation against elected county officials or their employees, then the affected person or others may file a complaint with the Ethics Commission. The Ethics Commission's Probable Cause Review Board and the Ethics Commission will determine, based upon the specific allegations and facts presented, whether there has been a violation of the Act's prohibition against the use of public office for one's own private gain or the private gain of another.¹

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 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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

¹ W. Va. Code § 6B-2-5(b) (private gain provision). W. Va. Code § 6B-2-3a and § 6B-2-4 (containing the requirements for filing a complaint with the Ethics Commission).