

Advisory Opinion 2024-02

Issued on April 4, 2024, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission candidate** asks whether he may remain employed by a municipality in the same county if he is elected.

Facts Relied Upon by the Commission

The Requester is a county commission candidate. He is also an employee of a municipality in the same county. He has been an employee of the Municipality for approximately 15 years, and his current job title is human resources director.

According to the Municipality's finance director, the Municipality receives some funding from or through the County. For example, the Municipality receives funds from the Convention and Visitors Bureau ("CVB") located in the County. The CVB is a nonprofit funded by the hotel/motel tax that the County collects and distributes to the CVB as required by West Virginia Code §§ 7-18-1 through 15. The CVB then uses the hotel/motel tax revenues for various purposes, including the promotion of tourism. The CVB distributes some of the revenues, on a discretionary basis, to municipalities in the county, including the Municipality that employs the Requester.

The Municipality also receives discretionary funding from the County through property tax revenues and grants such as money from the American Rescue Plan Act. The Municipality's finance director estimates that the County's appropriations to the Municipality, including the appropriations from the CVB, constitute less than one percent of the Municipality's overall budget. Additionally, the County and Municipality have historically engaged in shared projects that have benefited both the County and Municipality, but the County does not appropriate money to the Municipality's general funds for the projects.

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 pertinent part:

In addition to the provisions of §61-10-15 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: *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body

W. Va. Code § 6B-2-5(j)(1) states, in relevant part:

Public officials ... 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

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

It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or 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 a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control

Advisory Opinion

Ethics Act

The Ethics Act prohibits a public servant or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). This prohibition, however, contains a specific exception allowing for employment with a governmental body, stating that “nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.” *Id.*

In [Advisory Opinion 2022-05](#), the Ethics Commission held that, under the Ethics Act, a municipal judge may serve on the county commission in the same county. The Commission stated in Advisory Opinion 2022-05 and other opinions that, generally, no provision in the Ethics Act prohibits a public official from holding another public office or having other public employment.

The Ethics Commission finds that, based on the plain language in the Ethics Act and Advisory Opinion 2022-05, the Ethics Act allows a county commissioner to simultaneously be employed by a municipality in the same county.

W. Va. Code § 61-10-15

If elected to the County Commission, the Requester would also be subject to W. Va. Code § 61-10-15, a criminal code provision that prohibits county officials, including county commissioners, from having an interest in contracts, including employment contracts, over which they exercise “voice, influence, or control.”

The Ethics Commission also analyzed W. Va. Code § 61-10-15 in Advisory Opinion 2022-05. The Commission noted that, historically, the Ethics Commission has considered two factors when determining whether a county official has voice, influence, or control over an employment contract. The factors are a county agency’s “1) power to make appointments to boards or commissions that employ a public official and/or 2) appropriations of funding to such boards or commissions.” *Id.* In Advisory Opinion 2022-05, the Ethics Commission held that because the county commission did not appoint the municipality’s officials or employees or provide funding to the municipality, W. Va. Code § 61-10-15 did not prohibit the county commissioner from also serving as a municipal judge in the same county.

The Municipality’s members are elected officials. Hence, the County Commission does not make appointments to the government agency that employs the Requester. It is only necessary for the Ethics Commission to analyze, therefore, whether the money the County gives to the Municipality bars the Requester from simultaneously being a municipal employee and a county commissioner.

In [Advisory Opinion 2023-12](#), the Ethics Commission found that “the appropriation of a county agency to a nonprofit or other government agency that consists of seven percent or more of the nonprofit or government agency’s revenue for the fiscal year in which they received the funds constitutes the exercise of voice, influence, or control.” Advisory Opinion 2023-12 also found that “appropriations to a nonprofit or government employer that predate a candidate’s election or appointment to a county office do not put him or her in violation of W. Va. Code § 61-10-15 when and if he or she assumes office.” According to the Municipality’s finance director, the County’s appropriations to the Municipality constitute less than one percent of the Municipality’s overall budget.

The Ethics Commission holds that because the County Commission does not appoint the Municipality's officials or employees or make appropriations constituting seven percent or more of the Municipality's budget, the County Commission does not currently exercise voice, influence, or control over the Municipality's contracts, including its employment contracts. The Ethics Commission finds, therefore, that it would not violate W. Va. Code § 61-10-15 for the Requester to simultaneously be a county commissioner and municipal employee for as long as the County's appropriations to his Municipal employer remain less than seven percent of the Municipality's budget. County appropriations may not be used to directly fund the Requester's municipal employment position.

While nothing in the Ethics Act prohibits the Requester from simultaneously serving as a county commissioner and a municipal employee, the Ethics Commission has no jurisdiction to rule whether other laws prohibit it. Public employees seeking to hold public office should also consult with their agency's attorney to ensure that no personnel policies of their agency, state laws, or federal laws restrict their political activities.

The Requester may also want to determine whether the doctrine of incompatibility restricts his service in both positions. This doctrine stands for the proposition that "incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both." *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 24 S.E.2d 463, 466 (1943). See [Advisory Opinion 2012-51](#) (discussing the doctrine of incompatibility).

The Ethics Act prohibits public employees from performing campaign activities during public work hours and prohibits the use of public resources to subsidize an election campaign. W. Va. Code § 6B-2-5(b) and W. Va. Code R. §§ 158-6-4 through 158-6-5 (2022). The Requester must perform his county commission duties on his own time and not during his municipal work hours unless he takes annual leave or unpaid leave or otherwise complies with W. Va. Code § 6B-2-5(l) and W. Va. Code R. §§ 158-14-1 through 158-14-6 (2009).

This Advisory Opinion is based on 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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission