ADVISORY OPINION NO. 2014-09

Issued on March 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Candidate for County Board of Education** asks whether, if elected, he may work as a teacher for a multi-county Area Vocational Center that services his county.

FACTS RELIED UPON BY THE COMMISSION

The State Vocational Education Board is authorized to establish area multi-county vocational centers, pursuant to W. Va. Code§ 18-2B-1, *et seq.* Currently, there are 7 vocational centers throughout the State. The Vocational Center at issue also services two other counties. The Requester's County Board of Education (BOE) is the fiscal agent for the Vocational Center.

The Director of the Division of Vocational Education administers and supervises the area vocational educational programs. W. Va. Code § 18-2B-2. The State Vocational Education Board is authorized to delegate its authority to an Administrative Council. The Vocational Center at issue is governed by an Administrative Council. The Council is comprised of a BOE member and the superintendent of each of the three participating County School Systems and the Director of State Vocational Education Board.

The State created an appropriations fund known as the Area Vocational Education Program Fund for Secondary Education. The Administrative Council administers the appropriated funds as well as any gifts or grants made to the fund by any governmental subdivision of the state. The participating County BOEs contribute a mandatory local share to the Vocational Center. The contributions are based upon the percentage of students enrolled in each county.

The Requester states that, if elected to the BOE and employed by the Vocational Center, he would not represent his County's Board of Education on the Vocational Administrative Council.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or public employee may not knowingly or 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....

W. Va. Code§ 6B-2-5(d)(1) provides, in 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 § 6B-2-5U) reads, in relevant part:

> (1) 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§ 6B-1-3(b) reads, in relevant part:

> "Business" means any entity through which business for-profit is conducted including a corporation, partnership, proprietorship, franchise, association, organization or self-employed individual.

Further, W. Va. Code § 68-2-50) reads, in relevant part:

> Public officials... may not vote on a matter:
>
> (A) In which they ... or a business with which they ... [are] associated have a financial interest. ...
>
> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

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

> (a) It is unlawful for any ... county ... 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

There is nothing in the Ethics Act which prohibits a BOE member from employment with the Vocational Center. Specifically, the Ethics Act public contract provision provides 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(d). Based upon the plain language in the Ethics, a BOE member **may** be employed by a Vocational Center that serves his or her county. *See* Advisory Opinion 2012-32.

Additionally, the Ethics Act would not prohibit the Requester from voting on any matter related to the Vocational Center with which he is employed. The Requester does not have a financial interest in the funding for the Vocational Center even as an employee. The Ethics Act only prohibits public servants from having an interest in a "business" with which he is associated. W. Va. Code§ 6B-2-5U). In Advisory Opinion 2014-02, the Commission made clear that based upon W. Va. Code § 6B-1-3(b) which defines business as "any entity through which business for-profit is conducted.....", governmental agencies, such as Vocational Centers, are not businesses for purposes of the Ethics Act. Further, the only connection between the Board of Education and the Administrative Council as to employment decisions of the Advisory Council is a common member, someone other than the Requester. The common member does not have a financial relationship with the Requester. Therefore, the Requester may vote on any matter related to the Vocational Center.

The stricter standard contained in W. Va. Code§ 61-10-15 must now be considered. W. Va. Code§ 61-10-15 prohibits a county BOE member from becoming pecuniarily interested, directly or indirectly, in the proceeds of any contract if as a members/he may have any voice, influence or control. Unlike the Ethics Act, W. Va. Code§ 61-10-15 does not have an employment exception. Even under this higher safeguard of having merely voice, influence or control over the Vocational Advisory Council's employment decisions, however, the Requester would **not** have the requisite control to invoke the prohibitions in W. Va. Code§ 61-10-15. Only the particular representative serving from the Requester's BOE on the Administrative Council would have any voice as to these employment decisions.

The Requester's BOE, while serving as the fiscal agent for the Vocational Center, only serves as a pass through for state funding. The Commission recognized in Advisory Opinion 2012-32 that even when a public agency, e.g., a Regional Educational Service Agency (RESA), has a County BOE as its fiscal agent; the funds are still the public agency's funds. The Commission stated,

> Every RESA is required to have one of the counties in its region serve as a fiscal agent. The Requester's County serves as the fiscal agent for the RESA with which he contracts. For the services the Requester provides to the RESA, he

receives a Form 1099. The payments for the services he renders to RESA and the Form 1099 are generated by his County BOE in its capacity as the fiscal agent for the RESA; still, the funds in question are RESA funds.

This conclusion is consistent with past Advisory Opinions where a degree of separation existed between a BOE and an entity funded, in part, by the BOE. In Advisory Opinion 96-44, for example, the Commission ruled that neither the Ethics Act nor W. Va. Code § 61-10-15 prohibited a BOE Member's business from selling a shell building to the local athletic booster organization, even though the BOE would have to approve the placement of the building on school property. Noting that the transaction constituted a contract between the BOE member's private business and the booster organization, the Commission concluded that the BOE's limited action was more akin to accepting a gift than monitoring the execution of a contract. In reaching its decision, the Commission noted that "the payment for the purchase will be made by the athletic boosters organization with its own funds which are not provided by, or subject to the control of, the board or any member of the central administrative office." Likewise here, the BOE, while providing mandatory funding to the Vocational Center, does not influence the hiring decisions of the Vocational Center.

Further, in 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's to contract with the center.

Conditions apply here. If elected, the Requester may not use his position on the BOE to obtain a position with the Vocational Center or promote raises or other benefits to himself or other Vocational Center employees. The Requester may not serve on the Administrative Council for the Vocational Center. In the unlikely event that the Requester's BOE voluntarily appropriates any funds to the Vocational Center, such

funds may not be used to fund the position held by the Requester. *See* Advisory Opinion 2012-13 for similar restrictions.

Further, if he performs any duty as BOE member during work hours, e.g. attending a meeting or conducting a site inspection, he may not be paid for the hours he is away from his job with the Vocational Center. The Requester may not use any public resources, including BOE staff, to perform his private work.

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the 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, et seq., 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 other public agencies unless and until it is Amended or revoked or the law is changed.

/s/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson