ADVISORY OPINION NO. 2014-23

Issued on November 13, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

County Commissioners who are employed or whose spouses are employed by the Board of Education ask whether they may vote on funding requests made by the Board of Education for specific projects.

FACTS RELIED UPON BY THE COMMISSION

The Requesters have different financial relationships with the county Board of Education (BOE). Commissioner A has a spouse who is employed as a part-time cook. Commissioner B retired from the BOE and is now a substitute teacher. Commissioner C is a retired school teacher, is now serving as a substitute teacher and has a spouse who is employed as a full-time teacher.

The Requesters state that the county commission receives various funding requests from both the BOE and the numerous schools therein for specific school projects.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads, 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.

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

> [n]o elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such 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 make unlawful the employment of any person with any governmental body.

W. Va. Code § 6B-2-5U) reads in relevant part:

> U) *Limitations on Voting.*
>
> (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.

(II) A public official may vote:

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.

W. Va. Code§ 61-10-15 provides, in pertinent part:

(a) 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: Provided, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county.

ADVISORY OPINION

As a preface to the question presented, the Commission notes that neither the Ethics Act nor W. Va. Code§ 61-10-15 prohibit the employment of a spouse of a county commissioner by the BOE. W. Va. Code§ 6B-2-5(d)(1) does not prohibit any employment with a governmental body, and W. Va. Code§ 61-10-15 specifically allows for a *spouse* of a county commissioner to be employed by the BOE.

However, whether a county commissioner himself or herself may be employed by the BOE[1] has not previously been addressed by the Commission. The Commission must analyze the application of W. Va. Code§ 61-10-15, which prohibits covered persons, including county commissioners, from having a personal financial interest, directly or indirectly, in public contracts over which their public positions give them voice, influence

1 In SBAO 2014-03, the Commission held that for purposes of W. Va. Code§ 8-5-1a, substitute service personnel are employees of the county.

or control.

The Ethics Commission previously found that W. Va. Code§ 61-10-15 prohibits county commissioners (or their spouses) from being employed by the county ambulance authority (Advisory Opinion 2013-41); the county assessor's office (Advisory Opinion 2012-11); the county clerk's office (Advisory Opinion 2012-26); the sheriff's office (Advisory Opinion 07-03); the county public service district (Advisory Opinion 96-23); and, a county hospital (Advisory Opinion 96-23.)

In Advisory Opinion 2013-41, the Commission found that employment with the county ambulance authority was prohibited because the county commission appoints the members and has authority to make contributions to the ambulance authority. In Advisory Opinion 2012-11, the Commission found that employment with the assessor's office is prohibited because the county commission approves the assessor's budget, although the assessor's office is an independent office, and the county commission must approve the selection of the assessor's employees. In Advisory Opinion 96-23, the Commission found that the county commission's power to appoint all members of the board of trustees of the county hospital gave the county commission voice, influence or control over the employment contracts of the county hospital.

The relationship between the county commission and the BOE, however, is more limited. For example, the county commission does not approve the budget or the hiring of personnel for the BOE. W. Va. Code § 18-9-3. The county commission does not have the power to appoint BOE members or to fill vacancies. W. Va. Code§ 18-5-1, *et seq.* Therefore, the Commission holds that the county commissioners do not exercise voice, influence or control over the BOE, and therefore, may be employed by the BOE underW. Va. Code§ 61-10-15.

Next, we will consider the question presented by the Requesters: The County Commissioners who are employed by or retired from the BOE or whose spouses are employed by the BOE ask whether they may vote on funding requests made by the BOE for specific school projects.

In Advisory Opinion 2014-02, a State board asked whether its members who were employed by a municipality may vote on a request by the municipality to participate in a pilot program which may result in financial gains to the municipality. The Commission held as follows:

> W. Va. Code§ 6B-2-5U)(1)(A) prohibits public servants from voting on a matter in which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. For purposes of the Ethics Act, W. Va. Code§ 6B-1-3(b) defines business as "any entity through which business for-profit is conducted ..... " The definition does not include a governing body. Advisory Opinion 2013-47. Therefore, the public servants described herein do not have financial interests in the applications of municipalities. In conclusion, the Ethics Act does not prohibit the State Board members from serving on the State Board or from voting on the applications submitted by municipalities with which they have a relationship.

In Advisory Opinion 2013-47, town council members who were employed by the BOE asked whether they may vote on issues concerning property deeded to the BOE by the town. The Commission found that "the Ethics Act does not prohibit a public official from voting on a matter in which his or her public employer has a financial interest."[2]

In conclusion, the Commission holds that BOE employees and retirees and their spouses may serve as county commissioners under the Ethics Act and W. Va. Code § 61-10-15. Further, the county commissioners may vote on funding requests made by the BOE for specific projects.

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 § 68-1-1, 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 § 68-2-3, 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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman

2 Additionally, in Advisory Opinion 2013-47, the Commission held that retired employees have no prohibited financial interest in the BOE as defined by W. Va. Code§ 6B-2-5U)(1)(A). Therefore, the Requesters there were not prohibited from voting on a property transfer request made by the BOE.