ADVISORY OPINION NO. 2014-24

Issued on November 13, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Executive Director** of a county **Economic Development Authority** asks if he may serve as a board member of a county **Public Service District** in the same county.[1]

FACTS RELIED UPON BY THE COMMISSION

County Public Service Districts and county Economic Development Authorities are public corporations created by county commissions and authorized by W. Va. Code §§16-13A-2 and 7-12-1.

A Public Service District (PSD) is created to provide water, storm water, and sewer services at a reasonable cost to persons who may not otherwise be able to obtain these services. W. Va. Code§ 16-13A-1. A county Economic Development Authority (EDA) is created to promote, develop and advance the business prosperity and economic welfare within a county. W. Va. Code§ 7-12-2.
The powers of a county PSD and of a county EDA are vested in and exercised by separate boards whose members are appointed by the county commission. W. Va. Code§§ 16-13A-3 and 7-12-3. Neither entity has the power to control the other or the county commission. The compensation for board members for a PSD is fixed by statute based upon the number of customers it serves. The salary for the Executive Director of the EDA is not fixed by statute.

The EDA and the PSD are not parties to any contracts together. The Requester states that around one half of the EDA budget comes from the county commission. While the PSD may receive funding from the county commission, it is primarily funded by the customers it serves.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (1) 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.... 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.

[1] Advisory Opinion 2014-25 rests largely on the same facts presented herein. The distinction here is that the Requester is an employee of one of the boards and a member of the other board, rather than a board member of both boards.

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W. Va. Code§ 6B-2-5(d)(1) reads, in relevant 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.**.. (emphasis added)

* * *

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

> (1) Public officials... may not vote on a matter:
>
> > (A) In which they... or a **business** with which they... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... 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. (emphasis added)

* * *

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

> It is unlawful for any member of a ... county or district board 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 **may have any voice, influence or control . . . .** (emphasis added)

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Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, taken together, prohibit county board members from having an interest in public contracts under their voice, influence, authority or control. Here, the EDA and the PSD do not have a contractual relationship. The only connection between the EDA and the PSD is that they were created by and may receive funds from the same county commission.

The Requester as a board member for the PSD does not have a financial interest in the PSD, and the financial interests of the PSD may not be imputed to him because the compensation for PSD board members is fixed by statute. See Advisory Opinion 2014-25 for a full analysis.

The next consideration is whether the board member's employment with the EDA prohibits him from serving on the board of the PSD when the PSD may also receive funding from the county commission. Neither the Ethics Act nor W. Va. Code§ 61-10-15 prohibit the Requester's employment with the EDA. W. Va. Code§ 6B-2-5(d)(1) does not prohibit employment with any governmental body, and W. Va. Code§ 61-10-15 only applies in situations where a county board member exercises voice, influence or control over his or her agency's contracts. Since the PSD does not have any voice, influence or control over the EDA's contracts, the Requester may serve on the PSD board and be employed by the EDA.

Further, under the Ethics Act and W. Va. Code§ 61-10-15, the Requester may vote on matters concerning funding requests by the PSD to the county commission.
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.

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."

In summary, the Ethics Commission holds that the Requester may be employed by the EDA and serve as a member of the board of the PSD under the Ethics Act and under W. Va. Code § 61-10-1S(a). Further, the Requester as a board member of the PSD may vote on matters concerning funding from the county commission to the PSD.

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