ADVISORY OPINION 2016-08

Issued on May 5, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks whether it is permissible to lease space in a county building to a part-time assistant prosecutor for his private law practice.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that the part-time assistant prosecutor would pay the same amount of rent as the other tenant in the county building. The assistant prosecutor would pay all utilities, insurance and other expenses related to the portion of the building he would lease. The county would not provide furniture, office equipment or any other personal property to the assistant prosecutor.

PROVISIONS RELIED UPON BY THE COMMISSION

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

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one 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, however,* That nothing herein shall be construed to ... prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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

> (a) It is unlawful for any member of a ... 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.

(h) Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

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The Ethics Act, at W.Va. Code § 6B-2-5(d), and a criminal misdemeanor statute, at W.Va. Code § 61-10-15, limit or prohibit certain county public officials from having a pecuniary interest in public contracts over which they exercise control.

Ethics Act

The Ethics Act allows "part-time appointed public officials" to have contracts with the public agencies, such as county commissions and Boards of Education ("BOE"), with which they are associated. W.Va. Code§ 6B-2-5(d)(1). In Advisory Opinion 2010-24, the Ethics Commission determined that an assistant prosecuting attorney was a "part-time appointed official" for purposes of the Act. The Commission permitted the BOE to purchase property from a part-time prosecutor "so long as he does not participate in the review or evaluation thereof, and does not participate in the decision-making process." Likewise, in the instant situation, the Ethics Act does not prohibit the Respondent from leasing county property to the part-time appointed assistant prosecutor subject to the same restrictions.

W.Va. Code§ 61-10-15

W.Va. Code§ 61-10-15, unlike the Ethics Act, does not contain an exception for part-time appointed officials. This statute also is more restrictive than the Ethics Act in that it prohibits certain public officials from having a pecuniary interest in public contracts if they have "voice, influence or control" over the contracts.

In Advisory Opinion 2010-24, the Commission determined that a part-time appointed assistant prosecutor is a county official who exercises control over county board of

education contracts pursuant to W.Va. Code§ 61-10-15. In Advisory Opinions 99-07, 2000-31 and 2005-13, the Commission determined that a prosecutor's statutory responsibilities as counsel for the county commission vest in him the required degree of "voice, influence and control" over county commission contracts.[1] Due to the prosecutor's degree of control, the Ethics Commission prohibited the county from leasing office space from the prosecutor.

In Advisory Opinion 2000-31, the Ethics Commission held that W.Va. Code§ 61-10-15 prohibited a part-time elected prosecutor, due to his voice, influence and control over county contracts, from providing private legal services to a development agency that the county had contracted with to administer a grant for disaster relief for floodplain areas.

The present situation is somewhat distinguishable from the above Advisory Opinions intwo ways. It involves a part-time **assistant** prosecutor, rather than an elected prosecutor. Moreover, it involves the assistant prosecutor leasing space **from the county** rather than **to the county.**

An assistant prosecuting attorney has the same statutory duties as an elected prosecutor.[2] Therefore, an assistant prosecuting attorney has the same voice, influence and control over county contracts as a prosecutor. Further, in Advisory Opinion 2012-45, the Commission held that a private attorney who was also employed by the County Commission as the County Attorney provided a broad range of services and was comparable to a prosecuting attorney and therefore had "voice" and "influence" over all county contracts for purposes of W.Va. Code § 61-10-15.[3] The Advisory Opinion prohibited the County Attorney from serving as a project coordinator for a building project. Using similar reasoning, an assistant prosecuting attorney also has the requisite voice, influence and control over county contracts.

In evaluating the fact that the assistant prosecutor in the instant situation is the lessee rather than the lessor of the building, the Ethics Commission finds that the plain language of W.Va. Code § 61-10-15 prohibits the assistant prosecutor from being "pecuniarily interested, directly or indirectly, in the proceeds of any contract." Therefore, regardless of whether the assistant prosecutor is a lessor or a lessee, the building lease is a contract to which the limitations of W.Va. Code§ 61-10-15 apply.

The Ethics Commission holds that the assistant prosecutor has voice, influence and control over county commission contracts and as a lessee has a pecuniary

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[1] The statute states, "It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the state, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested." W.Va. Code§ 7-4-1

[2] Assistant prosecutors are appointed by the prosecutor and take the same oath and may perform the same duties as the prosecutor. W.Va. Code§ 7-7-8

[3] "Nonetheless, although his responsibilities are similar to that of a prosecuting attorney, a [County Attorney] is not a county office for purposes of W.Va. Code§ 61-10-15 ... Thus, the Requester is not subject to the stricter provisions ofW.Va. Code§ 61-10-15." However, Advisory Opinion 2012-45 concluded that the Ethics Act prohibited the County Attorney from serving as a county project manager.

interest in the amount of rent he or she would pay the county commission. Therefore, W.Va. Code § 61-10-15 prohibits the part-time assistant prosecutor from leasing a county building for his private law practice.

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 ***W.****Va. Code§ 61-10-15 and the Ethics Act, at* ***W*** *Va. Code§ 68-1-1 through W Va. Code§ 68-2-10, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.*

/s/ Robert J. Wolfe, Chairperson
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