ADVISORY OPINION 2016-18

Issued on December 1, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Prosecutor-elect** asks whether, once he becomes Prosecutor, he may consider his immediate predecessor for a contract position funded by a grant which his immediate predecessor assisted the county and a local nonprofit organization in obtaining.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Prosecutor-elect in the same county where he is currently employed as Chief Assistant Prosecutor. According to the Requester, the current Prosecutor was the co-sponsor, along with a local nonprofit organization ("nonprofit"), of an application for a United States Department of Justice grant. The Department of Justice awarded the grant to the nonprofit. The purpose of the grant is, in part, to provide funding to the county to hire a part-time special prosecutor to handle the backlog of child sexual assault cases in the county.[1]

The nonprofit has delegated the task of hiring a special prosecutor to the Prosecuting Attorney's Office. An attorney will be hired on a contract basis to serve in this position. The successful candidate will be paid by the county with grant funds administered by the nonprofit and distributed to the county for the purpose of funding the position.

The Prosecutor-elect, in his capacity as Chief Assistant Deputy, wrote the initial job description for the special prosecutor position. Another employee in the office, who works with victims and witnesses, assisted him with this task. The job description for the special prosecutor position was part of the grant application which the current Prosecutor co-sponsored.

The office has already advertised for the special prosecutor position. It posted a notice at the courthouse, and also advertised the position through the West Virginia State Bar and the West Virginia Prosecuting Attorneys Institute. The office received four resumes.

The current Prosecutor has not applied for the position. The Requester states that after the current Prosecutor's term of office expires, he hopes to consider him for the position. The Requester further states he is inquiring whether he may consider the outgoing prosecutor for the position based upon his own volition even without a request from the outgoing prosecutor.

[1] The nonprofit is also authorized to expend the grant money to contract with victim advocates and specialized investigators.

CODE 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 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...

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

> In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:
>
> (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

W.Va. Code§ 6B-2-5(d)(3) states, in relevant part:

> If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest...

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

> It is unlawful for ... 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 ... [an] officer ... , he or she may have any voice, influence or control...

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Both the Ethics Act, at W.Va. Code§§ 6B-2-5(b) and (d), and W.Va. Code§ 61-10-15, a criminal misdemeanor statute that applies to certain county officials and employees, prohibit public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them varying degrees of control.

The Commission must determine whether the Ethics Act or W.Va. Code§ 61-10-15 prohibit the outgoing Prosecutor from contracting with the Prosecuting Attorney's office to serve as a special prosecutor when the positon is funded by a grant which he helped to obtain. The Commission has previously considered similar questions. It has reached different conclusions based upon the application of the law to the specific facts presented.

In Advisory Opinion 1996-43, the Commission held an elected city council member may not designate himself to serve as the project director in a grant proposal which he drafted and signed in his official capacity as Deputy Mayor.

In Advisory Opinion 1999-31, the Commission held that a board of health may consider one of its members for the position of administrator if the board member first resigned her position. In its Opinion, the Commission noted that the board member had recused herself from discussions concerning the position. Further, the Commission imposed restrictions to ensure there was no favoritism in the hiring process.

In Advisory Opinion 2002-08 (Revised), the Commission held an elected board of education member may bid on board of education construction projects once her term of office ended, "even if she had, while on the Board, been involved in the decision to undertake the project being bid upon." The Commission did not consider if the more restrictive limitations in W.Va. Code § 61-10-15, which apply to certain county officials and employees, prohibited her from bidding on the projects.

In Advisory Opinion 2001-32, the Ethics Commission held a public school teacher may be employed to teach a remedial reading program during summer school funded by a grant she helped to obtain. The Commission qualified its Opinion as follows: "The opinion does not deal with those situations where individuals seek and obtain grants in their own name - grants to further their own work or to perform a specific task." *Id.*

In Advisory Opinion 2005-13, in contrast, the Commission ruled an elected Prosecutor may not receive additional compensation under a grant awarded to the county. The

Commission based its decisions upon the strict restrictions in W.Va. Code§ 61-10-15. It found the elected Prosecutor exercised voice, influence or control over the decision of the county relating to the additional compensation.

In Advisory Opinion 2013-15, the Ethics Commission held that the Requester, a County Commission, could not provide additional compensation to the Sheriff's Chief Law Enforcement Deputy (Chief Deputy) for performing additional job duties as the County's 911 Director. The Chief Deputy was the former Sheriff. The Ethics Commission concluded that W.Va. Code§ 61-10-15 prohibited the Chief Deputy (former Sheriff) from receiving additional compensation as he exercised voice, influence and control over the memorandum of understanding which formed the basis, in part, for his dual service as Chief Deputy and 911 Director.

In the present case, once the outgoing Prosecutor's term of office expires, he will have no authority over the final hiring decision. Nevertheless, the Ethics Commission finds while he was in public office he exercised "voice, influence or control" over a contract from which he may profit based upon the following facts. First, as Prosecutor, he participated in obtaining the grant which will fund the special prosecutor contract position. Second, the job position was prepared by his office and was part of the grant application.

Hence, the Commission finds the strict limitations in W.Va. Code§ 61-10-15 prohibit the Prosecutor's Office from hiring the outgoing Prosecutor to serve in a position funded by the grant money.[2] Due to involvement of the outgoing Prosecutor in the grant application process, the Commission also finds his employment in the position would constitute the knowing and intentional use of public office for his or her own private gain in violation of W.Va. Code§ 68-2-5(b).

In conclusion, the Prosecutor-elect, upon becoming Prosecutor, may not consider hiring the outgoing former Prosecutor to serve as a special prosecutor in a position funded by a grant the former Prosecutor assisted the county and a local nonprofit organization in obtaining.[3]

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[2] W.Va. Code § 61-10-15 is more restrictive than the Ethics Act in that it prohibits certain public officials at the county level from having a pecuniary interest in public contracts if they have "voice, influence or control" over the contracts. The West Virginia Supreme Court has held that this section:

> [I]mplements the public policy of this State, and its provisions are clear and unambiguous. Although harsh, its objects and purposes are salutary. The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 132 W. Va. 865,871, 53 S.E.2d 735, 739 (1949)

[3] As the Commission finds W.Va. Code§ 61-10-15 prohibits the outgoing Prosecutor from being hired under the grant, there is no need to analyze whether the Ethics Act, at W.Va. Code §6B-2-5(d}, restricts his employment in this position.

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 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 at W.Va. Code §§ 68-1-1 through 68-3-11, and W Va. §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/ Robert J. Wolfe, Chairperson
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