ADVISORY OPINION NO. 2012-13

Issued On April 12, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of a County Board of Education** (BOE) asks whether he may contract with a Public University to supervise University students during their placement in public schools in the county where he serves.

FACTS RELIED UPON BY THE COMMISSION

Last year the BOE and a Public University signed a "Contractual Arrangement for the Placement of Teacher Candidates and Other School Professionals" (Agreement). The document, however, uses the term "Agreement" throughout, and there is no evidence that either party pays the other pursuant thereto.

The Requester formerly worked for the BOE and, among other assignments, monitored and supervised language arts programs in grades K-12. More than six months after the BOE and the University signed the Agreement, the University's Director of Clinical Experiences contacted the Requester and proposed employing him part-time to supervise seven students who were placed in an elementary classroom for 75 hours of classroom experience, three of whom were placed in a school in the Requester's county. According to the terms of the part-time employment contract, the Requester would receive $175 per student, or a total of $1,225.

According to the Requester, the Director stated that if she could not find anyone else with the required background and expertise, seven to twelve students would have to be re-assigned to another county. Additionally, the Director has contacted the Requester about supervising some of the student teachers in the fall.

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) states, in relevant part:

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... public official ... 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....

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

> (1) Public officials ... may not vote on a matter:
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> > (A) In which they ... or a business with which they ... [are] associated have a financial interest. ...
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> (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.

Finally, W. Va. Code§ 61-10-15(a) makes it unlawful for any member of a county board to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract if as a members/he may have any voice, influence or control.

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In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code§ 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service...." W. Va. Code§ 6B-1-2(c).

The Ethics Act's prohibition against use of office for private gain was designed to steer public servants away from inherently questionable situations. This prohibition is intended to prevent not only actual impropriety, but also situations that give the appearance of impropriety.

Under the terms of the Agreement, the BOE and University are jointly responsible for the supervision of the clinical students. Additionally, the Agreement requires the University to "select the specific placements of clinical students with the advice and consent of a representative of the" BOE.

The Ethics Act prohibits public servants from using their public positions for their own financial benefit. Here, the Requester is qualified for the position he seeks to fill. Further, the University's Director approached him over six months after the Agreement was signed. Finally, if the Requester is unable to supervise the students, those students will have to be transferred to another county.

There is no evidence that the Requester used his public position to secure a part-time employment contract with the University.

Both the Ethics Act and W. Va. Code§ 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in the profits or benefits, or proceeds of a contract over which their public positions give them control. Thus, if the Agreement constitutes a public contract subject to the Ethics Act and W. Va. Code§ 61-10-15, then the Requester's proposed part-time employment contract with the University could be construed as a sub-contract thereof. Sub-contracts are subject to the same prohibitions contained in the Ethics Act and in W. Va. Code§ 61-10-15.[1] *See* Advisory Opinions 94-22 and 95-44.

A review of the Commission's previous advisory opinions will assist in determining whether the Agreement constitutes a public contract as contemplated by the Ethics Act and W. Va. Code§ 61-10-15.

In Advisory Opinion 96-44, 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 reasoned:

> First, the decision to make the purchase is solely within the discretion of the boosters organization. Second, there is no evidence of any attempt by the school board member to initiate the decision to purchase the building. Finally, 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.

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. The Ethics Commission distinguished this situation from one where a County Commissioner's employer sells goods or services to the County Commission, and concluded, "[T]he 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."

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.

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[1] W. Va. Code§ 6B-2-5(d)(1) expressly states that the prohibition does not apply to "the employment of any person with any governmental body". Thus, even if the Commission had found that the Agreement constitutes a public contract, the Ethics Act does not prohibit the Requester's part-time employment by the University. Further, W. Va. Code§ 61-10-15(e) also exempts employees, under certain conditions.

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.

Here, although the legal document that binds the BOE and the University is named "Contractual Arrangement for the Placement of Teacher Candidates and Other School Professionals", it operates as an Agreement or a Memorandum of Understanding. Indeed there are no "profits or benefits" or "proceeds" in which the Requester could have a financial interest since the University is not paying the BOE or vice versa. Instead, each public agency is entering into the Agreement due to the overriding benefit to each: the University has a place to provide its students practical classroom experience, and the BOE has college students who assist in the provision of quality education to students in the secondary school system.

As a result, the Commission finds that the Agreement between the BOE and the University does not constitute a public contract subject to the prohibitions of the Ethics Act and/orW. Va. Code§ 61-10-15. Therefore, the Requester's proposed part-time employment by the University is permissible so long as the Requester does not use any public resources, including BOE staff, to perform his private contractual duties. Further, to avoid any conflict of interest or the appearance of impropriety, the BOE shall select someone other than the Requester to fulfill the role of the BOE's representative as outlined in the Agreement.

Finally, although his part-time employment by the University is permissible, any issues that may arise concerning the Agreement will require the Requester to recuse himself from deliberation and voting on the matter. For recusal to be effective, he must excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his interests, and recusing himself from voting on the issue. W. Va. Code§ 6B-2-5U)(3). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the BOE member left the room during all consideration, discussion and vote on the item under consideration.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* 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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman