ADVISORY OPINION NO. 2012-32

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The Requester asks: (1) Whether a **State Legislator** may contract with a Regional Educational Service Agency (RESA); and, (2) Whether a **County BOE Bus Operator** may contract with RESA to provide training and certification to BOE bus drivers.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Member of the West Virginia Legislature. He is also employed by the County school system as a bus operator.

Before newly hired bus drivers may begin transporting students for the County school system, they must be trained and certified. Counties may either operate an in-house training and certification program, or contract with a Regional Education Association (RESA) to provide this service.

The Requester is certified to train and certify bus operators. He contracts with a RESA for this purpose. The RESA with which he currently contracts serves six (6) counties, including his own.

Previously, for a one year period, the Requester's County contracted with a RESA to tra;n and certify its new bus operators. The County Board of Education's (BOE) decision to contract with the local RESA was made by the BOE's Transportation Director, not the Requester. The Requester provided those training services and was paid by the RESA. He performed the duties outside of liis regular BOE hours.

Now, the Requester's County provides training and certification in-house.[1] As such, if the Requester continues contracting with a RESA, he will only be training and certifying new bus operators in other counties, not his own. He would perform this work outside of his regular BOE hours.

Every RESA is required to have one of the counties in its region serve as a fiscal agent. The Requester's County serves as the fiscal agent for the RESA with which he contracts. For the services the Requester provides to the RESA, he receives a Form 1099. The payments for the services he renders to RESA and the Form 1099 are generated by his

[1] Due to the fact that he is a certified trainer, the Requester, as part of his BOE job duties, has been tasked

with this responsibility. For example, in the summer when he is not operating a school bus, he may train and certify bus operators at that time.

County BOE in its capacity as the fiscal agent for the RESA; still, the funds in question are RESA funds.

Based upon his public positions, i.e. Legislator and BOE Bus Operator, he asks whether his contract with RESA is permissible.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads in relevant part:

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

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

> [N]o elected ... official ... or member of his or her immediate family ... may be a party to or have an interest in ... a contract which such official ... 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: *Provided, however,* That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body....

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

> (a) It is unlawfui 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... he or she may have any voice, influence or control...

ADVISORY OPINION

Legislator contracting with Regional Education Service Agency (RESA)

The West Virginia Department of Education (WVDE) is statutorily responsible for establishing multi-county Regional Education Service Agencies (RESAs). W.Va. Code § 18-2-26. The RESAs are regional agencies consisting of several counties. Each is governed by a Board of Directors compromised of: the county superintendent and a member of the board of education from each county school system within the region; one representative from the WVDE selected by the State Superintendent (ex-officio, non-voting member); one chief instructional leader who is not a superintendent; one school principal; and one teacher in the region. W. Va. C.S.R. § 126-72-3.4. There are eight regions in the State. W.Va. C.S.R. § 126-72-2.

the region. W. Va. Code R. § 126-72-3. There are eight regions in the State. W.Va. C.S.R. § 126-72-2.

There is nothing in the Ethics Act which prohibits a Legislator from contracting with a State agency or local government body. Specifically, the Ethics Act public contract provision provides that "nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body...." W.Va. Code§ 68-2-5(d). See *also* Title 15, Series 8. Based upon the plain language in the Ethics Act and related Legislative Rule, the Requester may contract with RESA. Of course he may not use his public position to obtain unfair advantage in securing the RESA contract. Additionally, he may not use his Legislative position to gain unfair advantage for the RESA by which he is employed. For example, he may not use his Legislative position to secure appropriations for the RESA or the BOE. See A.O. 2012-03 discussing these limitations as they apply to Members of the Legislature who hold other public positions or employment. He may not get paid during the Legislative Session unless he performs his duties under the contract. See A.O. 2012-23 wherein the Commission ruled that a Legislator who is also a municipal recorder must perform the duties to be compensated therefor.

BOE School Bus Operator contracting with RESA

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, a public contract over which their public positions give them control. In the present case, the Requester exercises no control over the decisions of the County BOEs to contract with RESAs to provide training and certification to their new bus operators. Additionally, it is the RESAs, not the Requester, which is responsible for selecting trainers. Since the Requester exercises no control over the contract in question, it does not violate the Ethics Act or W.Va. Code§ 61-10-15 for the Requester, as a BOE Bus Operator, to contract with a RESA to provide these services.

Limitations do apply. Specifically, he must perform his RESA duties on his own time; not during his BOE work hours. If he is permitted to perform these duties during his regularly scheduled BOE work hours and to make-up the time, then he should contact the Ethics Commission for advice as he may be required to file verified time records with the Ethics Commission. Title 158, Series 14.

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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson