

Advisory Opinion 2022-19

Issued on October 6, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **State Board Member** who has an ownership interest in for-profit educational institutions asks whether he may vote to approve and license programs at other educational institutions when his educational institutions offer the same degree program.

Facts Relied Upon by the Commission

The Requester has recently been appointed to serve as a member of a State Board that regulates a profession. The State Board's duties include approving and licensing associate degree and baccalaureate programs provided by educational institutions to persons in the profession regulated by the State Board. Persons who practice in the field in West Virginia must first receive a license from the State Board, and one licensure requirement is that a person must have a degree from an accredited educational program which is also approved by the State Board.

The Requester has an ownership interest that is greater than 10% in for-profit educational institutions that provide seven associate degree programs in the regulated profession at various locations throughout the state. The State Board approves and licenses the program at the Requester's educational institutions, and the Requester states that he will recuse himself from any discussion or vote concerning the approval or licensure of such programs at his institutions.

There are 24 educational institutions in the state that offer associate degree and/or baccalaureate programs that are approved and licensed by the State Board on which the Requester serves.¹ A general breakdown of the programs offered by the 24 educational institutions is as follows:

- 4 have both associate degree and baccalaureate programs,
- 8 have only baccalaureate programs, and
- 12 have only associate degree programs.

The Requester states that only his educational institutions and one other educational institution offer associate degree programs in more than a single location or within a single region i.e., at locations roughly sixty-miles or less apart. In most instances the educational institutions offer the programs at one location or within a single region of the state.

¹ Educational institutions may have more than one program licensed by the board.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(j) provides in pertinent part:

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member 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.

.....

(2) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses;

.....

(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. The recusal shall also be reflected in the meeting minutes.

W. Va. Code § 6B-2-5(k) provides:

No public official or employee may participate within the scope of his or her duties as a public official or employee, except through ministerial functions as defined in §6B-1-3 of this code, in any license or rate-making proceeding that directly affects the license or rates of any person, partnership, trust, business trust, corporation, or association in which the public official or employee or his or her immediate family owns or controls more than 10 percent. No public official or public employee may participate within the scope of his or her duties as a public official or public employee, except through ministerial functions as defined §6B-1-3 of this code, in any license or rate-making proceeding that directly affects the license or rates of any person to whom the public official or public employee or his or her

immediate family, or a partnership, trust, business trust, corporation or association of which the public official or employee, or his or her immediate family, owns or controls more than 10 percent, has sold goods or services totaling more than \$1,000 during the preceding year, unless the public official or public employee has filed a written statement acknowledging such sale with the public agency and the statement is entered in any public record of the agency's proceedings. This subsection shall not be construed to require the disclosure of clients of attorneys or of patients or clients of persons licensed pursuant to §30-3-1 et seq., §30-8-1 et seq., §30-14-1 et seq., §30-14A-1 et seq., §30-15-1 et seq., §30-16-1 et seq., §30-20-1 et seq., §30-21-1 et seq., or §30-31-1 et seq. of this code.

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It is clear that the Requester may not vote on matters affecting licenses issued by the board to the educational institutions in which he has an ownership interest. The Ethics Commission must determine now whether the Requester may deliberate and vote on approving and licensing programs offered by educational institutions other than educational institutions in which he has an ownership interest.

Voting provisions

The voting provisions in the West Virginia Ethics Act, at W. Va. Code § 6B-2-5(j)(1)(A), state, in relevant part, that a public official, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member 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.

.....

This voting prohibition has an exception that allows a public official to vote when he or his business is "affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses." W. Va. Code § 6B-2-5(j)(2)(A). This exception further states that "[a] class shall consist of not fewer than five similarly situated persons or businesses." *Id.*

In Advisory Opinion 2000-10, the Commission addressed the question of whether a member of a state commission could vote on licensing matters which affect his or her own licensure. The Commission stated that the Ethics Act clearly prohibited the state commission member from voting to approve his or her own license. The Commission

next examined whether the member may vote on the licensure of a current or potential competitor.

In Advisory Opinion 2000-10, there were forty licenses at issue. The Commission held that “action to issue additional licenses would reduce the value of the existing licenses and action to terminate existing licenses would enhance the value of those that remain. Therefore, the Ethics Commission finds that such matters directly affect the licenses of those Commissioners who hold licenses and rules that they may not take part in discussions or vote on such matters.”²

In Advisory Opinion 2017-22, the Ethics Commission held that a board member may not vote on awarding grants because he had a financial interest in the grant awards. The financial interest existed because the board member’s spouse received a finder’s fee from some of the applicants for assisting them with their grant applications. The member’s spouse’s compensation was contingent on the board approving the grants. The board received approximately 10 grant applications per year but only awarded approximately three grants from the pool of applicants. Hence, the Ethics Commission reasoned that the board member had a financial interest in votes of the board on whether to award a grant because of the small pool of applicants and his spouse’s finder fee agreement with some of those applicants.

In the instant case, the Requester must abide by the voting restrictions in the Ethics Act because he is “associated” with a business because his ownership interest exceeds five percent.³ The Requester’s educational institutions are unique in that they offer ten associate degree programs in seven locations spread throughout the state. Only one other educational institution offers associate degree programs in more than one location or in more than one region of the state. Therefore, the class of educational institutions with a similar financial interest to that of the Requester’s educational institution in the approval and licensure of programs throughout the state is at most two. Accordingly, the Ethics Commission finds that the class exception in W. Va. Code § 6B-2-5(j)(2)(A) does not apply to the Requester, and the Requester may not vote.

The Ethics Commission holds that the Requester may not participate in or vote on licensing and approving programs at educational institutions that have or seek to have the same program or programs as the Requester’s educational institutions. He must recuse himself from the discussions and votes. For his 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. The recusal shall also be reflected in the meeting minutes.

² This Opinion was issued prior to an amendment to the Ethics Act which incorporated express voting restrictions. 2008. PUBLIC OFFICERS AND EMPLOYEES—ETHICAL STANDARDS, 2008 West Virginia Laws Ch. 106 (H.B. 4524). Nevertheless, the Ethics Commission finds the analysis relevant to the question before it.

³ W. Va. Code § 6B-2-5(j)(1)(A)

Restrictions on participating in licensing and ratemaking activities

The Ethics Act, at W. Va. Code § 6B-2-5(k), states that a public official may not participate in “any license or rate-making proceeding that directly affects the license or rates of any... business... in which the public official... owns or controls more than 10 percent.” The Requester has more than a 10 percent ownership interest in educational institutions that have programs licensed by the board on which he serves.

The Ethics Commission also finds that W. Va. Code § 6B-2-5(k) prohibits the Requester from participating in decisions of the State Board to approve programs and licenses at educational institutions that have or seek to have the same program or programs as the Requester’s educational institutions.

The Commission also takes this opportunity to partially overrule Advisory Opinion 2013-30. That opinion held, in part, that a member of a state commission that regulated live dog and horse racing could not serve on the state commission because he was the owner or part-owner of a racehorse and, therefore, the Ethics Act, at W. Va. Code § 6B-2-5(k), would prohibit him from obtaining a license for himself or horses he owned from the state commission. The Ethics Commission finds this holding is wrong because W. Va. Code § 6B-2-5(k) only prohibits board members from participating in certain matters relating to licensing, e.g., matters that affect them uniquely, but does not bar them from being licensed by the board on which they serve. This conclusion is also consistent with the Ethics Commission holding in Advisory Opinion 2012-41 in which the Ethics Commission held that a licensed septic tank cleaner may serve on a board of health that issued licenses to septic tank cleaners and that he may participate in matters that do not uniquely affect him.

Last, the Requester asks if participating or voting on matters relating to licensure or approval of programs at educational institutions could expose him to sanctions by the Ethics Commission or to a criminal prosecution. It appears he is seeking guidance on the Advisory Opinion process.

The Ethics Act provides: “A person subject to the provisions of this chapter may rely upon the published guidelines or an advisory opinion of the commission, and any person acting in good faith reliance on any such guideline or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.” W. Va. Code § 6B-2-3a.

The 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 the Opinion invalid, This Advisory Opinion is limited to questions arising under the Ethics Act, at W. Vas. code §§ 6B-1-1 through 6B-3-11 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 public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission