

Advisory Opinion 2022-05

Issued on February 3, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **potential candidate for County Commission** asks whether he may continue to serve as a municipal judge in the same county if elected.

Facts Relied Upon by the Commission

The Requester serves as a Municipal Judge for a Town. The Town Council appoints the Municipal Judge.

The Requester may become a candidate for the County Commission. The Town in which he serves as a Municipal Judge is in the same county. To the best of the Requester's knowledge, the County does not provide any funding to the Town.

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) states in pertinent part:

Interests in public contracts. - (1) In addition to the provisions of §61-10-15 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*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body:

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

Limitations on Voting. - (1) Public officials ... 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.

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

It is unlawful 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, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control:

Advisory Opinion

Ethics Act

The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). This prohibition contains a specific exception for employment by a governmental body that states: “nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.” *Id.*

Generally, no provision in the Ethics Act prohibits a public official from holding another public office or having other public employment. In Advisory Opinion 1990-130, the Ethics Commission held that it would not violate the Ethics Act for a county commissioner to be employed as a water treatment operator for a city in the same county in which he served as a county commissioner. In Advisory Opinion 2012-51, the Ethics Commission held that an assistant attorney general may serve as an elected city council member.

The Ethics Commission finds that, pursuant to the plain language in the Ethics Act and its prior Opinions, the Ethics Act does not prohibit a county commissioner from being employed as a municipal judge in the same county.

W. Va. Code § 61-10-15

If elected as a county commissioner, the Requester would be subject to W. Va. Code § 61-10-15, which prohibits county commissioners and other county officials from having an interest in contracts, including employment contracts, over which they exercise voice, influence, or control. The Ethics Commission must determine whether the County Commission in the instant case exercises the requisite “voice, influence, or control” over the Town’s employment contracts so as to preclude the Requester from being employed as the Town’s Municipal Judge if he is elected to the County Commission.

The Commission has consistently stated in past Advisory Opinions that two factors to consider when determining whether a county public official may exercise voice, influence, or control over his or her employment contract are through a county board's 1) power to make appointments to boards or commissions who employ a public official, and/or 2) appropriations of funding to such boards or commissions. Advisory Opinion 2018-05.¹ Both factors will now be considered.

In the present case, the Town is governed by elected officials. The County Commission does not, therefore, appoint the Town’s governing body or employees. Moreover, to the best of the Requester’s knowledge, the County Commission does not provide funding to the Town.

The Ethics Commission finds that the County Commission does not exercise voice, influence, or control over the Town’s employment contracts because the County Commission does not appoint Town officials or employees or appropriate money to the Town. **Therefore, W. Va. Code § 61-10-15(a) does not prohibit the Requester from serving as a county commissioner and municipal judge in the same county.**

This finding is consistent with Advisory Opinion 2014-23, in which the Ethics Commission held that a county commissioner may be a board of education employee in the same county. Similarly, in Advisory Opinion 2021-18, the Ethics Commission held that a county commissioner may be employed by a community and technical college because the county commission does not appoint the college’s board members or appropriate money to it.

Therefore, the Ethics Commission finds that for purposes of the Ethics Act and W. Va. Code § 61-10-15(a), a county commissioner may serve as a municipal judge in the same county.

¹ See *also* Advisory Opinion 2021-10 (discussing the test and finding that a county commissioner may not be employed by a convention and visitors bureau (CVB) because the county commission provided a significant amount of funding to the CVB).

While nothing in the Ethics Act prohibits the Requester from simultaneously serving as a county commissioner and a municipal judge, the Ethics Commission has no jurisdiction to rule whether other laws prohibit it. Public employees seeking to hold public office should also consult with their agency's attorney to ensure that no personnel policies of their agency, State laws, or federal laws restrict their political activities.²

The Ethics Act prohibits public employees from performing campaign activities during public work hours and prohibits the use of public resources to subsidize an election campaign. See W. Va. Code § 6B-2-5(b); see also W. Va. Code R. §§ 158-6-4 and 158-6-5. The Requester must perform his county commission duties on his own time and not during his city work hours unless he takes annual leave or unpaid leave or otherwise complies with W. Va. Code § 6B-2-5(l) and W. Va. Code R. §§ 158-14-1 through 158-14-6.

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 the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, 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

² The Requester may also want to determine whether the doctrine of incompatibility restricts his service in both positions. This doctrine stands for the proposition that “incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both.” State ex rel. Thomas v. Wysong, 125 W. Va. 369, 24 S.E.2d 463, 466 (1943). See Advisory Opinion 2012-51 (discussing the doctrine of incompatibility).