

Advisory Opinion 2022-06

Issued on February 3, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether a County Board of Health member, specifically the President, may also serve on the board of a nonprofit hospital/health system when the only other county health system is not represented on the Board.

Facts Relied Upon by the Commission

A County Commission appoints the board members of a county board of health (“BOH”). W. Va. Code § 16-2-7. W. Va. Code § 16-2-9(d) states that board of health members “may receive compensation,” and leaves the determination up to each county health board whether to provide such compensation for service. According to the Requester, the County BOH does not provide compensation to its members.

The County Commission appointed a local business person to the BOH. He is currently serving as the President of the BOH. He is not an employee, contractor, or other compensated agent of the BOH.

The BOH president was recently appointed, in his private capacity, to serve on the board of directors of a local nonprofit hospital/health system. The BOH President does not receive compensation from the hospital for serving on its board. He is not an employee, contractor, or other compensated agent of the hospital. Therefore, the board member has no personal financial relationship with the hospital/health system or the BOH.

There is one other hospital/health system in the County. A member of this other hospital/health system is not represented on the BOH. The Requester believes that the BOH does not make appropriations to the hospitals and is not a party to any contracts with the nonprofit hospital/health systems.¹

¹ Therefore, the prohibited contracts provisions, W. Va. Code §§ 6B-2-5(d)(1) and § 61-10-15(a), are not implicated because there are no contracts between the BOH and the nonprofit hospital. Furthermore, the BOH President has no financial interests in the nonprofit hospital’s contracts because he is an unpaid board member who does not financially benefit from the hospital’s contracts or income.

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

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) 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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

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

(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

have direct authority to enter into, or over which he or she may have control
Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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 a member . . . he or she may have any voice, influence or control

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.

.....

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by, or a compensated officer or board member of, the nonprofit: Provided, That if the public official or immediate family member is an uncompensated officer or board member of the nonprofit, then the public official shall publicly disclose such relationship prior to a vote on the appropriations of public moneys or award of contract to the nonprofit: Provided, however, That for purposes of this paragraph, public disclosure shall mean disclosure of the public official's, or his or her immediate family member's, relationship to the nonprofit (i) on the agenda item relating to the appropriation or award contract, if known at time of agenda, (ii) by the public official at the meeting prior to the vote, and (iii) in the minutes of the meeting.

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Opinion

Conflict of interest

The Requester asks if there exists a conflict of interest under the Ethics Act for a member of the BOH, specifically the President, to be a member of the board of directors of a nonprofit hospital/health system when the only other health system in the County is not represented on the BOH. The President of the BOH has no financial interest in either the BOH or the hospital because he does not receive compensation from or contract with either.

In Advisory Opinion 2017-22, the requester asked if he was eligible to serve on a public board that approved appropriation requests. The Commission stated that “[t]he Ethics Act does not generally prescribe who is eligible to serve on a public body or subcommittee [T]he Commission has no authority to make this determination” The Commission noted, however, that the Ethics Act does impose limitations on a board member’s participation in matters in which they have a financial interest. *Id.*; see also Advisory Opinion 2019-23 (holding that the Ethics Act does not prohibit the requester from simultaneously serving on the boards of an airport authority and the (nonprofit) chamber of commerce.)

Public officials, including members of BOH, are subject to the private gain provision in the Act, at W. Va. Code § 6B-2-5(b)(1), and the confidentiality provision, at W. Va. Code § 6B-2-5(e). In Advisory Opinion 2021-08, the Commission found that possible

violations of these provisions or the appearance of impropriety do not render a person ineligible to serve on a public board under the Ethics Act. “While there may be a fiduciary duty elsewhere in the law, the Legislature did not incorporate a fiduciary duty into the Ethics Act’s provisions or related Legislative Rule. And violations of the Act’s confidentiality and private gain provisions both require an actual breach rather than mere potential violations.” *Id.*

The Ethics Commission holds that the Ethics Act does not prohibit a member of the Board of Health, including the President, from being an unpaid member of the board of directors of a nonprofit hospital/health system when the only other health system in the County is not represented on the Board of Health.

Voting

The Requester believes that the BOH does not make appropriations to either of the nonprofit hospitals/health systems in the county and that the BOH is not a party to any contracts with the nonprofit hospital/health systems. If this changes, W. Va. Code § 6B-2-5(j)(1)(D), as discussed in Advisory Opinion 2021-12, will be applicable. The Commission stated that public officials who also serve on the board of a nonprofit “will be bound by W. Va. Code § 6B-2-5(j)(1)(D), which provides that “if the public official or immediate family member is an *uncompensated* officer or board member of the nonprofit, then the public official shall publicly disclose such relationship prior to a vote on the appropriations of public moneys or award of contract to the nonprofit.” Further, the Commission found that “[t]he financial interest of a nonprofit corporation may not be imputed to an unpaid officer or unpaid member of the board of directors.” Advisory Opinion 2021-12.

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