

Advisory Opinion 2022-07

Issued on March 3, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **County Board of Education Member**, who is a physician and provides medical services through her private medical practice, asks whether she may perform mandatory physical examinations for school bus drivers in the County.

Facts Relied Upon By the Commission

The Requester is a doctor of osteopathic medicine and the sole owner of a medical practice incorporated as a domestic for-profit limited liability company. She is a new member of a County Board of Education (BOE). The County BOE requires its school bus drivers to have annual medical examinations as a condition of employment. See [State Legislative Rule](#) - W. Va. Code R. § 126-92-17.2.j. (establishing rules for school bus transportation). Accordingly, the County BOE adopted a policy which states that bus drivers:

[M]ust pass a physical examination from a medical examiner certified by the Federal Motor Carrier Safety Administration (FMCSA). The term "medical examiner" is defined as doctor of medicine, doctor of osteopathy, physician assistant, advanced practice nurse, and doctor of chiropractic.

The BOE employs around 20 bus drivers at any given time. The BOE does not have a contract with any particular medical examiner to perform the physicals. The bus drivers instead choose a qualified medical provider to perform the physical examination, and the BOE pays the medical provider directly or reimburses the employee for the cost of the physical.

The Requester's medical practice is located within a mile of the County's bus garage and is the only local private practice.¹ Over the years, most, but not all, of the bus drivers have chosen the Requester to perform their physicals. The Requester also performs physical examinations for bus drivers employed in an adjacent county. Because the Requester has performed these physicals with such regularity, the BOE has a purchasing order process in place to pay her practice directly \$100 per examination. This process is not in place with other medical providers, however, the BOE reimburses bus drivers who get their physicals elsewhere. The BOE votes to

¹ The Requester states that there is a federal health clinic in the local area, but she does not know whether it provides DOT medical examinations.

approve all monthly invoices to all vendors, including medical providers, as one agenda item.

Provisions Relied Upon By the Commission

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

(d) *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

.....

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

(a) 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

.....

(h) Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Advisory Opinion

The Ethics Commission has the authority to interpret both the Ethics Act and W. Va. Code § 61-10-15, which, as stated above, imposes restrictions against certain county officials, including board of education members, from having a pecuniary interest, either directly or indirectly, in the proceeds of any contract over which they exercise “voice, influence, or control.” Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

As a BOE member, therefore, the Requester is prohibited by W. Va. Code § 61-10-15 from having an interest in contracts over which the BOE may exercise voice, influence, or control. See [Advisory Opinion 2018-10](#) (citing *Jordan v. McCourt*, 135 W. Va. 79, 87, 62 S.E.2d 555, 560 (1950) in which the WV Supreme Court held that a board of education member had voice, influence, or control over board of education purchases made at a private company when the BOE member was the private company's president).

In [Advisory Opinion 2010-15](#), the Commission held that a BOE member may not be paid as a sports official for a county school, finding that a BOE member has voice, influence, or control over all school contracts that are paid for with county funds.² The Commission explained:

Each county school district is under the supervision and control of the County BOE. W. Va. Code § 18-5-1 et. seq. The BOE exercises control over school personnel, including coaches and the principals to whom they report. The Commission finds that an elected BOE Member may not contract with the County school system where he serves. . . as his position as a BOE Member gives him voice, influence and control over all contracts in the County School System.

The Ethics Commission has also found that county officials have voice, influence, or control over contracts in other situations in which the public official's board does not directly select the contractor or subcontractor who will be paid with county funds. For example, in [Advisory Opinion 2017-02](#), a county commissioner asked whether his company may bid on contracts to provide construction materials to private contractors to be used on county contracts. In essence, the commissioner was asking if his business could be a subcontractor on a county project. The contractor would be selected by the county's parks and recreation board and not the county commission, although the county commission appointed the parks board members. Further, the Ethics Commission recognized that the contractors, and not the parks board members, would independently decide from whom it would purchase the materials for the county contract. Even with this limited involvement by the county commission, the Ethics Commission held that the county commissioner may not, per W. Va. Code § 61-10-15, provide supplies to contractors to use on contracts with the county parks board.

The Ethics Commission also notes that the Legislature created an exception in W. Va. Code § 61-10-15 for spouses of county commissioners who are licensed medical providers to work at government agencies, but a similar exception does not exist for

² The Commission also held that the BOE member may officiate a sporting event in the county as a volunteer and may officiate for schools in another county for compensation.

county officials, including board of education members, who are licensed medical providers in private practice.³

Based on the plain language in W. Va. Code § 61-10-15 and prior Advisory Opinions, the Ethics Commission finds that the Board of Education exercises voice, influence, or control over the payments and contracts for school bus driver physical examinations. The Ethics Commission holds, therefore, that a County Board of Education member, who is a physician and provides medical services through her private medical practice, may not be paid by the BOE to perform mandatory physical examinations for school bus drivers in the County.

The Requester may continue to perform physical examinations of bus drivers employed in another county because the BOE on which she serves does not pay for those examinations. The Requester also asks whether she may continue to perform physical examinations for her County BOE's bus drivers if she does them for free. The Ethics Commission finds that, consistent with its holding in [Advisory Opinion 2010-15](#), the Requester may perform free physical examinations for bus drivers.

The Commission recognizes that the Requester's medical practice is the only local private medical practice. If the BOE believes it would suffer excessive cost, undue hardship, or other substantial interference with its operations, the BOE may request a contract exemption from the Commission. W. Va. Code § 61-10-15(h).

Finally, the Commission needs not analyze the prohibited contracts provision of the Ethics Act, at W. Va. Code § 6B-2-5(d), given that the stricter applicable provision prohibits the Requester from performing the physicals.

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.

³ The exception states: "(k) The provisions of subsection (a) of this section do not prevent or make unlawful the employment of the spouse of any member of a county commission as a licensed health care provider at government-owned hospitals or other government agencies who provide health care services: *Provided*, That the member of a county commission whose spouse is employed or to be employed may not: (1) Serve on the board for the government-owned hospital or other government agency who provides health care services where his or her spouse is employed or to be employed; (2) Vote on the appointment of members to the board for the government-owned hospital or other government agency who provides health care services where his or her spouse is employed or to be employed; or (3) Seek to influence the hiring or promotion of his or her spouse by the government-owned hospital or other government agency who provides health care services.

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
WV Ethics Commission