

Advisory Opinion 2021-08

Issued on May 6, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Board of Education Member** asks whether she must recuse herself from participating in updates about a lawsuit filed against the Board by her brother and a related lawsuit in which her brother will likely be a witness.

Facts Relied Upon by the Commission

The Requester is a member of a county board of education (“BOE”). The Requester has a brother who is a former employee of the BOE. The Requester and her brother do not reside together. Neither derives financial support from the other.

After his retirement, the Requester’s brother filed a lawsuit against the BOE. The lawsuit was based upon incidents that occurred shortly after his retirement. The brother asserts that various of his civil rights were violated during the investigation and criminal charges stemming from an alleged break-in and theft at the BOE bus garage. He is not seeking reemployment nor retroactive wages or benefits relating to his prior employment with the BOE. The disposition of the lawsuit will have no conceivable impact on his former employment or working conditions with the BOE nor will it impact his retirement benefits.

A current employee of the BOE has also filed a lawsuit against the BOE based upon the same incidents as alleged in the lawsuit filed by Requester’s brother. It is quite probable that the Requester’s brother will testify in the employee’s lawsuit. The Requester has no financial or familial relationship with the current BOE employee, and, as the brother of the Requester is no longer employed by the BOE, the disposition of the employee’s lawsuit will have no conceivable impact on the brother’s former employment or working conditions.

The lawsuits are covered by the BOE’s liability insurance policy. The insurance carrier and the BOE’s legal counsel, who is paid for by the insurance carrier, control the decisions about the lawsuits and provide periodic updates to the BOE. Although the BOE makes no decisions about the lawsuits, under the insurance policy, the BOE’s superintendent must agree to any settlement of the lawsuits. As matters involving the employment and working conditions of the superintendent come before the BOE, the members do exercise influence and control over the superintendent.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3 provides, in relevant part:

(f) “Immediate family”, with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren, and dependent parent or parents.

...

(m) “Relative” means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

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

Use of public office for private gain. -

(1) 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.

...

(4) A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: Provided, That as used in this subdivision, “employment or working conditions” shall only apply to government employment: Provided, however, That government employment includes only those governmental entities specified in subsection (a) of this section.

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

(e) *Confidential information.* - 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) states, in relevant part:

Limitations on voting. - (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.

...

(C) The employment or working conditions of the public official's relative or person with whom the public official resides

...

(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 R. § 158-6-3 (2017) states:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

3.3. "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law.

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

Advisory Opinion

The Commission must determine whether the Ethics Act and relevant Legislative Rule, specifically W. Va. Code § 6B-2-5(b), (j), and W. Va. Code R. § 158-6-3, require the Requester to recuse herself from participating in the periodic updates to the BOE presented by the insurance carrier about the lawsuits filed against the BOE by her brother and an employee of the BOE in which the Requester's brother will likely testify.

First, the Commission notes that it does not appear that the BOE will vote or take any official action regarding the lawsuits because the decisions related to the lawsuits are made by the insurance carrier and the superintendent. However, the Commission will consider each of the relevant voting restrictions that require recusal in the event a voting matter does arise before the BOE.

Prohibited financial interest

W. Va. Code § 6B-2-5(j)(1)(A) prohibits the Requester from voting on matters in which she or an immediate family member has a financial interest. It is clear that the Requester has no personal financial interest in the outcome of the two lawsuits. Requester's brother does not reside with her, nor are they financially dependent on each other. Therefore, the Requester's brother does not meet the definition of "immediate family" pursuant to W. Va. Code § 6B-1-3(f). **As such, W. Va. Code § 6B-2-5(j)(1)(A) does not require the Requester's recusal from the discussion and vote on matters related to the lawsuits.**

Today's decision is consistent with Advisory Opinion 92-31 in which the Requester became a BOE member after he and a citizen's group filed a lawsuit against the BOE. Although the lawsuit was voluntarily dismissed, there remained a pending issue of whether the BOE would be awarded its defense costs. The Commission ruled that the Requester's financial interest in the matter prevented him from taking any part in the BOE's action regarding the pending motion. The Commission clarified, "... but the Requestor's involvement in an organized effort opposing the Board's consolidation procedures and policies does not disqualify him from voting, deciding or otherwise taking an official role as a Board member in determining those procedures and policies during his term as a Board member...."

Nepotism

The relevant anti-nepotism provisions, at W. Va. Code § 6B-2-5(b)(4),(j)(1)(B) and W. Va. Code R. § 158-6-3.5.a, prohibit the Requester from participating in and voting on the employment and working conditions of her relatives. The Requester's brother does meet the definition of "relative" pursuant to W. Va. Code §6B-1-3(m), and her brother does have a financial interest in the lawsuits.

Further, while the Requester's brother previously worked for the BOE, that is no longer the case. The subject matter of the litigation post-dates the retirement of the Requester's brother. The brother does not seek reemployment with the BOE through the lawsuit or monetary damages, i.e., back wages or benefits, related to his prior employment with the BOE. The same is true of the lawsuit filed by a current employee in which the Requester's brother will probably testify. The disposition of this lawsuit cannot conceivably affect, negatively or positively, the financial interests of the Requester or the employment or working conditions of the Requester's brother.

The Ethics Commission holds that neither the Ethics Act nor W. Va. Code R. § 158-6-3 requires the Requester to recuse herself from participating in updates about the lawsuits filed against the Board of Education by her brother and a related lawsuit in which her brother will likely be a witness.

Last, the Commission notes that this Advisory Opinion effectively overrules prior Advisory Opinions 1999-19, 2011-15, and 2011-16, or portions thereof. In Advisory Opinions 2011-15 and 2011-16, the Requesters were a president and a member of a non-profit organization that had a pending lawsuit against the board of health on which the Requesters were members.

In Advisory Opinion 2011-15, the Commission stated:

[t]he Requester may not be involved in matters relating to a lawsuit which was filed by a fraternal organization while the Requester was president. For purposes of determining litigation strategy, it is entitled to engage in full and frank discussions with its attorney.

It is essential that these attorney-client communications remain confidential. While there is no allegation that the Requester would reveal this confidential information to the organization, the limitations in the Ethics Act are intended to safeguard against the potential for abuse... it would be inconsistent with the spirit and intent of the Ethics Act... for the Requester to be involved in decisions or privy to information thereto relating to the Board's defense of the lawsuit.

Hence, the Commission finds that the voting provisions in the Ethics Act, when read in conjunction with the private gain provisions, require the Requester to recuse himself from being involved in deliberations or votes relating to the lawsuit.

In Advisory Opinion 2011-16, the Commission reached the same conclusions concerning another member of the board of health, stating: "The Requester has no direct interest in the lawsuit. Still, it is an adversarial proceeding, and the Board Members have a fiduciary responsibility to defend the lawsuit in a manner determined to be in the best interest of the Board."

In Advisory Opinion 99-19, a member of a county BOE asked to what extent she could participate in BOE decisions concerning pending litigation against the BOE in which she was involved prior to her election to the BOE. As a volunteer member of a nonprofit citizen's group prior to her election to the BOE, the Requester had initiated a lawsuit on behalf of the group against the BOE. Shortly after election to the BOE, the Requester resigned her position with the group and caused her name to be removed from the litigation. Despite finding that the Requester had no financial interest in the outcome of the litigation, the Commission held, "The Commission considers the course and outcome of the litigation against the school board to be 'personal' to the Requester, as that term is used in [W. Va. Code §] 6B-1-2(c) and finds that she should be recused from all Board action concerning the disposition of the pending suit."

The reasoning asserted in Advisory Opinions 99-19¹, 2011-15, and 2011-16 is flawed. In *Young v. State*, 241 W.Va. 489, 826 S.E.2d 346 (W. Va. 2019), the West Virginia Supreme Court of Appeals held, "The primary rule of statutory construction is to ascertain and give effect to the intention of the Legislature." Syl. pt. 8, *Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953). We have long recognized that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. pt. 5, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).

¹ Advisory Opinion 99-19 was also issued under a previous version of the Ethics Act. The amendments to Ethics Act in 2005, adding specific restrictions, and exceptions, for voting in W. Va. Code § 6B-2-5(j) invalidate the "personal" test. It is no longer good law.

The Ethics Act and the Legislative Rule contain the express and limited instances when recusal is required. It is the duty of the Commission to apply the provisions of the Act and Rule. Neither the Act nor the Rule prohibits voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision (W. Va. Code § 6B-2-5(f), or a potential violation of the private gain provision (W. Va. Code § 6B-2-5(b)(1)). 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.

Therefore, Advisory Opinions 1999-19, 2011-15, and 2011-16 are overruled to the extent they held that recusal is required on grounds other than those expressly contained in the Ethics Act or a Legislative Rule.

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 the 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 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