

Advisory Opinion 2021-10

Issued on June 3, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commissioner** asks whether she may be employed as the executive director of the Convention and Visitor's Bureau located in her County.

Facts Relied Upon by the Commission

The Convention and Visitor's Bureau ("CVB"), a non-profit corporation located in the Requester's County, is funded, in part, by the County Commission from its hotel occupation tax ("hotel tax") revenues. W. Va. Code §§ 7-18-1 and 7-18-14. One other county commission and multiple cities are also members of the CVB. West Virginia counties and municipalities are not required to collect hotel taxes. According to the Requester, at present only her County and one municipality are making appropriations to the CVB.

The county hotel tax rate was initially set by statute at three percent of the cost paid by a consumer for a hotel room. W. Va. Code § 7-18-2(a). Since July 1, 2007, counties have been authorized to increase the hotel tax rate up to six percent. W. Va. Code § 7-18-2(c). The County's hotel tax rate is currently set at six percent. County commissions are required by statute, W. Va. Code § 7-18-14, to appropriate at least 50 percent of the county's hotel tax revenue to the eligible CVBs located in the County.

A CVB must comply with the requirements of W. Va. Code § 7-18-13a(b) (2021) to be eligible to receive hotel tax revenues. For example, a CVB must receive accreditation from an accrediting body and submit an annual report to all its funding entities, including county commissions. W. Va. Code § 7-18-13a(b)(7), (8) (2021).¹

Presently, the CVB with which the Requester may seek employment is the only one in the County. The Legislature placed a moratorium on the creation of new CVBs until July 2024. W. Va. Code § 7-18-13a(d) (2021). After the moratorium expires, however, a county commission "may allocate the [hotel] tax ... to one or more of such bureaus in such portion as the county commission in its sole discretion determines." *Id.*

The CVB has a board of directors comprised of 16 members representing counties, municipalities, and various business and tourism interests.² Each of the two participating county commissions appoint a board member. The CVB board is responsible for hiring its employees, including its executive director. Currently, the

¹ Effective July 7, 2021.

² According to the Requester, seven of these positions are currently vacant.

executive director is the only CVB employee.

The Requester believes that the total budget for the CVB in fiscal year 2019-2020 was approximately \$300,000. The County Commission, as required by law, appropriated 50% of the County's hotel tax revenue to the CVB. The County also appropriated money received from a lawsuit to the CVB. The County's total appropriation to the CVB was approximately 43 percent of the CVB's fiscal year 2019-2020 budget.³

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)(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 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 § 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... [an] officer... he or she may have any voice, influence or control....

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Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute that applies to certain county officials and employees, including county commissioners,

³ The Requester asserts that the CVB has failed to produce budgets since its fiscal year 2019-2020 budget.

prohibit the Requester from being a party to, or having a financial interest in, a public contract over which her public position gives her varying degrees of control.

The Commission must determine whether the Requester may exercise the requisite “voice, influence, or control” over the CVB’s employment contracts, under W. Va. Code § 61-10-15, to prohibit her from being employed by the CVB as its executive director. The Commission has consistently stated in past Advisory Opinions, e.g., Advisory Opinion 2018-05, that two factors to consider in 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. Both factors will now be considered.

Appointment power

The Ethics Commission has held that a county commissioner may not be employed by (or have contracts with) a county subunit, such as a solid waste authority, an ambulance authority, hospital, public service district, or development authority because the county commission appoints all the members to these boards and has the authority to make contributions to them. See Advisory Opinions 2013-41, 2009-01, 1996-23, 1994-30, and 1992-48.

The question of whether a county’s power to appoint some - but not all - of an entity’s board members would prohibit a commissioner’s employment or contract with the entity is a more unsettled question.

In Advisory Opinion 1999-26, the Commission held that a Board of Education (BOE) member *was not prohibited* from contracting with a parks commission where the BOE appointed only three of nine of the members of a parks commission board and the BOE’s financial contribution was limited.

In contrast, the Commission, in Advisory Opinion 1999-29, held that the same Requester as in 1999-26, *was prohibited* from contracting with a multicounty training center where the BOE appointed roughly the same number of board members as it did to the parks board. The Commission differentiated the situations because the training center board included the school superintendents who were subject to discipline by the BOE. In Advisory Opinions 2004-10A and 2004-10B, the Commission reaffirmed its holding in Advisory Opinion 1996-26, finding that a BOE member was prohibited from contracting with a multicounty board.

Ten years later, in Advisory Opinion 2014-09, the Commission, without addressing Advisory Opinions 1999-29, 2004-10A, and 2004-10B, held that a BOE member *was not prohibited* from working for a similar multicounty agency, finding that the BOE did not have voice, influence, or control over a multicounty vocational center that was overseen by six board members consisting of one BOE member and the superintendent

of each of the three participating counties.⁴

In this case, the County Commission is limited to appointing only one of 16 board members of the CVB. (Presently, there are nine board members.) The Ethics Commission has never found that appointing only one of 16 members (or nine) to an entity is sufficient to give a county official voice, influence, or control over an entity's contracts. Further, no member of the CVB board is employed by the County Commission and subject to discipline by the Commission. Therefore, the Commission finds that the County's appointment power *alone* is insufficient to prohibit the Requester's employment with the CVB.

Appropriations

Next, the Ethics Commission will factor in whether the County Commission's appropriation of money, amounting to approximately 43 percent of the CVB's budget in fiscal year 2019-2020 gives the County Commission voice, influence, or control over the CVB's employment contracts.

In Advisory Opinion 2001-28, a BOE member asked whether his private company was permitted to bid on projects proposed by a behavioral health center to which the BOE annually contributed \$15,000 to its \$10,000,000 budget. Acknowledging that the BOE had no supervision or oversight of the behavioral health center, the Commission concluded that it would not violate either the Ethics Act or W. Va. Code § 61-10-15 for the BOE member to contract with the center. Presumably, the relatively small contribution, at less than one percent of the center's budget, was insufficient to bar the contract. See *also* Advisory Opinion 2018-05 (holding that a contribution of less than one percent was insufficient to prohibit a BOE member from working with WVU Extension.)

The Ethics Commission held, in Advisory Opinion 2017-04, that a county commissioner could not work as the director of a city library that received county appropriations constituting approximately seven percent of the public library's \$55,645 budget. The Ethics Commission found that the appropriation of money, without any appointment power, constituted the exercise of voice, influence, and control over the public library's contracts.⁵

In this case, the proportionate amount of the County's appropriation to the CVB's budget was much greater - at 43 percent. The Commission finds that a contribution of this size could be sufficient to prohibit the employment of the Commissioner by the CVB.

⁴ The holding in this case does not require the Commission to address whether Advisory Opinion 2014-09, overruled the earlier Opinions.

⁵ The Requester specifically asked the Ethics Commission to overrule Advisory Opinion 2017-04. The Commission notes that its holding today does not rely on Advisory Opinion 2017-04. Therefore, it is not necessary to overrule Advisory Opinion 2017-04 today.

Mandatory contribution

The Commission has also factored in that the County Commission is “mandated” by statute to contribute 50 percent of its hotel tax proceeds to the CVBs in its County and currently there is only one CVB. This fact suggests that the Commission has no or limited voice, influence, or control over the CVB’s contracts because the Commission lacks discretion in determining whether to make an appropriation or the amount. The Commission does not agree with this conclusion.⁶

In this case, the County does have some control over the amount of funding received by the CVB. First, the Commission decides whether to institute a hotel tax. Further, the Commission may adjust the tax rate between three and six percent. W. Va. Code § 7-18-2(c). And, although currently there are no other CVBs competing for the hotel tax proceeds, the County is authorized to allocate the hotel tax funds in different proportions to newly established CVBs after July 2024. Last, the County could find that the CVB is not eligible for funding under W. Va. Code § 7-18-13a(b)(2021), and deny funding.⁷

Therefore, the Ethics Commission holds that the County Commissioner may not be employed by the CVB because the County does have some voice, influence, or control over the amount of its hotel tax funding that the CVB receives, and the County Commission appropriated approximately 43 percent of the CVB’s budget.⁸

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should 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 at W.Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. § 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 other public agencies unless

⁶ Situations involving mandatory funding have been taken up by the Commission in the past, but the effect of the mandatory funding has not been clearly articulated. In 2014-09, *infra*, the Commission held a BOE member may work as a teacher for a multi-county Area Vocational Center that services his county. Each participating County BOE contributed a mandatory local share to the vocational center. The contributions were based on the percentage of students enrolled in each county. Thus, although not stated in the Opinion, the amount of the contributions was not under the control of the BOE. In Advisory Opinion 2001-30, the Ethics Commission found that a BOE member could work for a private school even though the BOE provided support to the private school that was mandated by Federal programs. The BOE did not have appointment power over the private school.

⁷ W. Va. Code § 7-18-14(e) states, “Any member of a governing body who willingly and knowingly votes to or causes to be expended moneys generated by the provisions of this section for purposes other than specifically set forth in this section is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$100.”

⁸ It is also troubling that the executive director is the sole employee of the CVB.

and until it is amended or revoked or the law is changed.

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