

Advisory Opinion 2021-16

Issued on August 5, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County School Superintendent** asks whether a Board of Education member or employee may use or allow friends and relatives to use a Board of Education gymnasium under terms and conditions not afforded to the public.

Facts Relied Upon by the Commission

The Requester is a County Board of Education Superintendent. The Board of Education (“BOE”) owns several facilities that have gymnasiums, and the BOE allows citizens to use these facilities for recreational activities as authorized by statute and in accordance with the BOE’s facility use policy (“policy”).

The BOE policy prohibits the use of BOE facilities by commercial or profit-making organizations. The BOE policy requires any individual or group who wishes to use a particular facility or gymnasium¹ to submit a reservation request, to pay an hourly rental and clean-up fee², and to pay an additional clean-up fee if a BOE employee must clean the facility after the private event. In addition, the BOE Facilities/Activities Director must unlock and lock the facility before and after each event.

One BOE employee or member, who is not the Facilities/Activities Director, has a key to one of the facilities that contains a gymnasium and either uses or intends to use the gymnasium for friends, relatives, or themselves without reserving it or paying the required fees. The Requester states that in contrast, the general public and other BOE members and employees may only use the gymnasium in accordance with BOE policy. The Requester also asks if it is permissible for a board member or employee to have a key to a BOE gymnasium.

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

¹ The request for an Advisory Opinion does not state whether this policy is applicable to other facilities that contain gymnasiums.

² Groups comprised of school-aged children that do not charge admission for their event, do not have to pay a rental fee but may have to pay the clean-up fee. They must also reserve the facility.

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 R. § 158-6-5 states in pertinent part:

5.2. Improper Use - Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

Advisory Opinion

The Ethics Act, at W. Va. Code § 6B-2-5(b), prohibits use of public office or employment for private gain. In the instant situation, the BOE authorizes individuals and organizations to use BOE facilities for private purposes in accordance with the terms of its facility use policy. The policy prohibits the use of the BOE facilities by commercial and profit-making organizations. The policy further requires an individual or group seeking to use the gymnasium to reserve the facility and to pay the applicable rental and clean-up fees.

The Requester states that one BOE employee or board member has a key to the gymnasium. The BOE board member and/or employee has used or intends to use the gymnasium for him or herself or others without reserving the gymnasium or paying the fees as required by the BOE policy.

In Advisory Opinion 2006-13, the Ethics Commission held that a county commissioner may not use county resources to provide free shuttle services for a private picnic. In Advisory Opinion 2021-11, the Ethics Commission held that businesses owned by city council members or city employees are eligible to receive small business grants from the city but may not receive favorable treatment. The Opinion states: "City Council members are cautioned, however, that it would be a violation of the Ethics Act's prohibition against the use of office for private gain, if a City Council member were to use his or her position on City Council to influence Program awards or to obtain preferential treatment, terms, conditions, or other consideration not available to the general public."

The Ethics Commission finds that W. Va. Code § 6B-2-5(b)(1) and W. Va. Code R. § 158-6-5 prohibit a BOE member or employee from allowing friends, relatives, or others to use a BOE gymnasium or facility under terms and conditions unavailable to the public. A BOE member or employee is also prohibited from

accessing the BOE's gymnasium in an unauthorized manner or using the gymnasium for an unauthorized purpose.³

The Requester generally inquires whether a BOE member or employee may have a key to a BOE facility. This type of question is not governed by the Ethics Act but by BOE policies governing building access. It does not violate the Ethics Act for a BOE member or employee to have a key to a facility if they are authorized by BOE policy to have one. The Ethics Act is only implicated if a public official or employee uses his or her position to access and use a BOE building for unauthorized and unlawful purposes.

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

³ The present situation is distinguishable from that in Advisory Opinion 2008-05 and Advisory Opinion 2008-07. In the former, the Ethics Commission held that public golf course employees may be permitted by their government agency employer to use the course for free under certain conditions. In the latter, the Ethics Commission held that employees of a public swimming pool were allowed to use the facilities without charge. However, in both cases the privilege/fringe benefit was extended to all similarly situated employees of the facility. Accordingly, the public purpose of boosting morale was held to outweigh the use of public employment for private gain.