

Advisory Opinion 2021-13

Issued on June 3, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Board of Education Member** asks whether she may be employed as a teacher by a private, nonprofit school which contracts with the BOE to provide educational and behavioral health services to students in the County School System.

Facts Relied Upon By the Commission

The Requester is a member of a County Board of Education (BOE). The BOE contracts with a private, out-of-state, nonprofit school (nonprofit school) to provide services to students who require additional assistance due to behavioral health issues or intellectual disabilities. Some of the BOE's students attend day school at the nonprofit school. The contract with the nonprofit school contains agreed-to rates for the services it provides. For example, the nonprofit school charges a per day attendance fee for day school students and charges additional fees for other required services such as speech therapy.

The Requester is employed as a math teacher at the nonprofit school. The nonprofit school pays her an annual salary and issues her a W-2. The Requester's employment contract expressly states that she is not entitled to overtime and her salary is not tied to the number of students that she teaches.

A student from the County School System is currently a student in the class the Requester teaches at the nonprofit school. The Requester did not request that the student be assigned to her. The Requester also teaches children from other counties and states.

The Requester, in her capacity as a teacher at the nonprofit school, has attended Individualized Educational Program (IEP) team meetings, at which a BOE staff member is present, to discuss the student's progress and needs. It is customary for a student's teacher to participate in IEP meetings. The IEP team, which mainly consists of members from the nonprofit school, uses the IEP meetings to assess the student's progress and to determine what other services the student may need. The Requester or other teachers from the nonprofit school must communicate during IEP meetings what services they recommend for the student, but it is the BOE staff and the BOE which has the legal authority to determine whether to authorize additional services for students at the nonprofit school.

The BOE approves payments to the nonprofit school at the BOE's monthly meeting. The BOE's Director of Special Education has a breakdown of charges for the services provided by the nonprofit school to each student but the BOE does not individually consider each invoice. The BOE normally votes to approve all monthly invoices to all vendors, which are listed on a spreadsheet, 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: ...

...

(2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder, or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed \$1,000 in the profits or benefits of the public contract or contracts in a calendar year;

...

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code R. § 158-8-2 provides:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents,

assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 provides:

The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.

Public officials or public employees or members of their immediate family are considered to be “associated” with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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

....

(e) The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

W. Va. Code § 6B-2-5(j) provides, 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 . . .

(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:

. . .

(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.

Advisory Opinion

Analysis under the Ethics Act

The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d). Under W. Va. Code § 6B-2-5(d), public officials are "associated" with a business if they or an immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class. W. Va. Code R. § 158-8-4.

The Ethics Commission held in Advisory Opinion 2002-02 that under the Ethics Act, a board of education member's employment by a hospital which contracted with the BOE did not give him a prohibited financial interest in the contract between the hospital and the BOE.¹ A public official's employment by a business or nonprofit entity does not, therefore, make her associated with the business or nonprofit for purposes of imputing to her a financial interest in the contract under the Ethics Act.

The Ethics Commission holds that the Requester is not associated with the nonprofit school for purposes of W. Va. Code § 6B-2-5(d) because the Requester is not a director, officer, or holder of stock in the nonprofit school. The Ethics Act does not therefore prohibit her employment with a nonprofit school which

¹ The Ethics Commission held that the BOE member's employment by the hospital was a prohibited financial interest for purposes of W. Va. Code § 61-10-15, but the Legislature then amended W. Va. Code § 61-10-15 during the 2002 Legislative Session to make an exception for employees of vendors who meet the five-part test.

contracts with the BOE. The Requester must abide by the voting restrictions which are discussed below.

Analysis under W. Va. Code § 61-10-15

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials, including board of education members, who are pecuniarily interested, either directly or indirectly, in the proceeds of a public 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.

The Commission has consistently held that board of education members have voice, influence, or control over all contracts in a county school system.² Nevertheless, W. Va. Code § 61-10-15 also contains an exception which allows board of education members and other county officials to be employed by a vendor when certain conditions are met. This exception to the restrictions in W. Va. Code § 61-10-15 states:

The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

In Advisory Opinion 2002-10, the Ethics Commission held that a BOE may contract with a dairy company that employed a BOE member’s spouse. The Commission explained in its opinion that “[d]uring its Regular 2002 Session, the Legislature amended WV Code 61-10-15 to allow agencies to deal with businesses which employ agency personnel or their spouses, if the conditions of subsection (e) are met. Stated simply, those

²This rule of law was discussed in Advisory Opinions 2010-15 and 2018-05.

conditions exclude public servants from involvement in awarding or paying for agency contracts and require that neither they nor their spouses benefit directly from them.”³

The Ethics Commission also applied the exception when it held, in Advisory Opinion 2002-09, that the BOE may award a contract to a hospital which employed a BOE member’s spouse. Similarly, in Advisory Opinion 2004-18, the Ethics Commission held that a BOE member may be employed by a company which contracted with the BOE to provide nursing services to children.

The Ethics Commission must determine whether the Requester falls within the W. Va. Code § 61-10-15(e) exception. To qualify for the exception, a public official or employee must be an employee of an agency vendor. The Requester is employed by the nonprofit school which provides services to the BOE; hence, she satisfies that element of the exception. Further, the Requester is not a party to the contract between the BOE and the nonprofit school, and she is not an owner, a shareholder, a director, or an officer of the nonprofit school.

The Ethics Commission must also consider whether the Requester receives any commission, bonus, or other direct remuneration or thing of value by virtue of the nonprofit school’s contracts with the BOE. Although the Requester, through her private employment, is presently assigned to teach a student in the County School System, she is paid the same amount by the nonprofit school regardless of how many students she has or how many hours per week she works. The Requester does not, therefore, receive any commission, bonus, or other direct remuneration by virtue of the nonprofit school’s contract with the BOE.

The Requester may not participate as a BOE member in deliberations or votes on awarding the contract to her private employer, the nonprofit school. Further, the Requester may not approve or otherwise authorize payments by the BOE to the nonprofit school for any services performed or supplies furnished under the contract between the BOE and the private school. The Ethics Commission finds that the Requester’s communications with BOE staff regarding a student’s progress or needs in an IEP meeting do not constitute participating in the BOE’s deliberations or votes to authorize payments to the nonprofit school because it is the BOE and not the nonprofit school which must decide whether to authorize the nonprofit school to provide a particular service or services to students in the school system.

Accordingly, the Ethics Commission holds that the Requester may, per W. Va. Code § 61-10-15, be employed by the nonprofit school if she complies with the restrictions herein. The Requester may not use her position to influence the

³ The Ethics Commission also considered and applied the test in allowing a BOE member to be employed by a staffing company which sold books to the County School System in which he served. Advisory Opinion 2018-10.

BOE's decisions to continue its contract with the nonprofit school nor may she approve payments of invoices to the nonprofit.

If a matter relating to the nonprofit school comes before the BOE, then the Requester must recuse herself from all discussions and votes on such matter. W. Va. Code § 61-10-15(e)(4) and W. Va. Code § 6B-2-5(j)(1)(D).⁴

If the BOE budget includes a line item for payments to the nonprofit school, then the Requester must follow the guidance in Advisory Opinion 2010-13. The Requester may vote on the overall budget, but recusal is required if the BOE discusses a line item that affects her private employer. When the BOE votes to authorize the payment of monthly invoices, the Requester must request that the invoice payments to her nonprofit school employer be considered separately so that she may recuse herself from the deliberations and votes on the invoices being approved by the BOE for payment to the nonprofit school.

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
WV Ethics Commission

⁴ For recusal to be proper under the Ethics Act, she must disclose her interest and excuse herself from participating in the discussion and decision-making process by physically removing herself from the room during the discussion and vote on the matter. Additionally, the minutes of the meeting must reflect the basis for the recusal and that she left the room during all consideration, discussion, and vote on the item(s) under consideration. W. Va. Code § 6B-2-5(j)(3).