

ADVISORY OPINION 2015-15

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Superintendent of a County Board of Education** asks whether the Board of Education's employment of the Superintendent's spouse as a literacy coach constitutes a violation of W.Va. Code § 61-10-15.

FACTS RELIED UPON BY THE COMMISSION

Requester states that the Board of Education has posted positions for five literacy coaches. Requester provided the Commission with a job posting which describes the qualifications, key duties and responsibilities of a literacy coach. According to Requester, the literacy coach is essentially a teacher of other teachers. The literacy coach works with other teachers for the sole purpose of improving literacy instruction and educational outcomes for students. The literacy coach assists teachers in understanding the assessment of students' reading abilities, the collection and interpretation of data from the assessments and the disaggregation of the data for the purpose of providing individualized reading instruction with a goal of targeting each student's specific deficits as a reader.

The job posting describes the key duties and responsibilities of a literacy coach as follows:

1. Promote effective instructional practices in helping students to collaborate, communicate, problem solve and critically think about the content;
2. Articulate appropriate instructional technology practices as described in the standards for students and teachers;
3. Ability to collaborate in the evaluation, selection and the implementation of materials and software as aligned with the core standards for literacy;
4. Work with the curriculum staff to develop and implement content and the integration of projects into the core scope and sequence;

5. Provide support and oversight to school in terms of assisting the School Leadership Team with monitoring the Strategic Plan goals and action steps related to developing effective instructional, curricular and assessment practices;
6. Must participate in ongoing professional development related to literacy collaborative design work;
7. Must be willing to travel countywide and work a flexible schedule before school and after-school trainings, and
8. Must travel frequently.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(d)(1) reads 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) reads, in relevant part:

It is unlawful for any . . . superintendent, principal or teacher of public schools . . . 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 . . . superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided*, That nothing in this section prevents or makes unlawful the employment of the spouse of a . . . superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county

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Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale over which their public position gives them control.

However, the relevant provision in the Ethics Act further states that the prohibition does not apply to “the employment of any person with any governmental body.” W.Va. Code § 6B-2-5(d)(1). Accordingly, the Ethics Act does not prohibit Requester’s spouse from being employed by the Board of Education as a literacy coach. See A.O. 2011-10 (“there is nothing in the Ethics Act which prohibits a BOE superintendent’s spouse from being employed by the same BOE”). However, as Requester presupposes, the Commission must next address whether the more stringent and comprehensive provisions contained in W.Va. Code § 61-10-15 authorize the proposed employment of Requester’s spouse.

Unlike the Ethics Act, W.Va. Code § 61-10-15 does not specifically make an exception for the employment of any person by any governmental body. Instead, it applies a more limited exception allowing a spouse of a Superintendent to be employed by a Board of Education as “a principal or teacher or auxiliary or service employee.” W.Va. Code § 61-10-15(a). As Requester recognized in the written request, the only permissible category that could apply to a literacy coach under the statute is that of a teacher. Thus, the Commission must determine whether a literacy coach qualifies as a teacher for purposes of the exception to the prohibition in W.Va. Code § 61-10-15(a).

W.Va. Code § 61-10-15 does not define the term “teacher.” However, the West Virginia Supreme Court of Appeals has provided guidance on this precise issue. In *West Virginia Educ. Ass’n v. Preston County Bd. of Educ.*, the Court found that the term “teacher” as it is used in W. Va. Code § 61-10-15 is comparable to Chapter 18A-1-1(c)'s “classroom teacher,” which is defined as “[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity.” *West Virginia Educ. Ass’n*, 171 W.Va. 38, 41, 297 S.E.2d 444, 447 (1982); W.Va. Code 18A-1-1(c)(1). The Ethics Commission has previously relied on this definition when determining what qualifies as a teacher for purposes of the exception found in W.Va. Code § 61-10-15.

For example, in A.O. 2006-16 the Commission was asked whether a County Board of Education may contract with the Superintendent’s spouse to conduct training sessions for teachers. The spouse was to be hired “to provide such services as preparing facilities for training and testing, working with students conducting testing for instructional purposes, and face-to-face training with teachers who will be using DIBELS¹ to assess reading skills.” A.O. 2006-16. Relying on the definition of “classroom teacher” as discussed above, as well as two previous Advisory Opinions which determined that a part-time football coach and a work-based learning coordinator did not come within the exception to W.Va. Code § 61-10-15, the Commission concluded that employment of the

¹ DIBELS is a reading assessment tool called Dynamic Indicators Basic Early Literacy Skills.

Superintendent's spouse to provide DIBELS training was prohibited under W.Va. Code § 61-10-15. *Id.*; See also A.O. 2000-14; A.O. 99-15.

The Ethics Commission finds that the position of literacy coach, as described both by the job description and by the Requester, is not one which provides for the majority of time to be spent in a direct instructional or counseling relationship with pupils. A literacy coach instead spends the majority of the time, as Requester aptly describes, as “a teacher of teachers.” The literacy coach assists *teachers* in understanding assessments, the collection and interpretation of those assessments, and utilizing those assessments to provide individualized reading instruction. Therefore, the Commission concludes that a literacy coach is not a “teacher” for purposes of the exception in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15 accordingly prohibits the County Board of Education from employing the Requester’s spouse as a literacy coach.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.



Jack Buckalew, Acting Chairperson
WV Ethics Commission

ADVISORY OPINION 2015-16

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks if there is any conflict of interest for a developer, who also serves as a Member of the County Building Commission, to purchase and develop property owned and managed by a County Urban Renewal Authority.

FACTS RELIED UPON BY THE COMMISSION

Requester states that the County Building Commission has the responsibility of building structures for the county. According to the Order Establishing the County Building Commission, the Building Commission is comprised of three members. One of the Commission members (hereinafter "Member") is also a residential and commercial developer. Requester states that the Member, in his/her private capacity as a developer, recently completed the purchase of property located in a business and residential park which is owned and managed by the County Urban Renewal Authority. The Member plans to build several houses on the property.

Requester states that neither the County Urban Renewal Authority nor the County Building Commission may oversee one another's operations. Accordingly, the County Urban Renewal Authority need not seek approval from the County Building Commission to sell or lease real property in the business and residential park it owns and manages. Furthermore, Requester states that the County Building Commission and the County Urban Renewal Authority do not have a working relationship unless the county were to build a county-owned facility in the business park. In that instance, Requester states that the relationship between the two would be that of a buyer and seller of real property.

The County Building Commission already owns one building located in the park that serves as the County 911 Center. Requester states that no member of the County Building Commission filled any role in the building of that facility other than that associated with their membership on the County Building Commission. Requester asks whether, given the above, there is any conflict of interest in the Member continuing to serve on the County Building Commission.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

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 ... 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.

W. Va. Code § 6B-2-5(d)(1) reads 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[.]

Finally, W.Va. Code § 61-10-15(a) reads, in pertinent part:

It is unlawful for any member of a . . . 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

ADVISORY OPINION

Both the Ethics Act, W. Va. Code § 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code § 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. Pursuant to W. Va. Code § 6B-2-5(b), a public official may not knowingly and intentionally use his office for his own private gain or that of another person. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. See A.O. 2013-13.

Public Contracts

The Ethics Act prohibits public servants 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)(1). Based on the facts provided, a County Building Commission Member does not have direct authority or control over the letting of a public contract by the County Urban Renewal Authority. Furthermore, the County Urban Renewal Authority needs no approval from the County Building Commission in order to sell real property. See W. Va. Code § 16-18-5(d) (granting urban renewal authorities the power “to sell, lease . . . or otherwise encumber or dispose of any real or personal property or any interest therein”). **Consequently, since the Member in this situation has no direct authority or control over the approval of public contracts by the County Urban Renewal Authority, it would not be a violation of W. Va. Code § 6B-2-5(d)(1) for the Member to purchase real property from the County Urban Renewal Authority.**

W. Va. Code § 61-10-15 applies a similar, but more stringent, standard to the degree of official involvement a public servant may have in a public contract. W. Va. Code § 61-10-15 provides in relevant part:

It is unlawful for any member of a . . . county or district board . . . 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, . . . he or she may have any voice, influence or control.

The Member in this case is a member of a county board and thus subject to the limitations set forth in W. Va. Code § 61-10-15. It is also without question that the Member is pecuniarily interested in a contract to purchase real property from the County Urban Renewal Authority so that the Member, as a private developer, may build several houses on said property. With these two elements satisfied, the Commission must next determine whether the Member “may have any voice, influence or control” over the letting of the contract.

The Commission finds that the Member does not exercise any voice, influence or control over the letting of public contracts by the County Urban Renewal Authority. While the County Building Commission owns a County 911 Center within the County Urban Renewal Authority’s residential and business park, there are no facts demonstrating that, as a result, the County Building Commission has any voice or influence over the County Urban Renewal Authority’s future sale of real property. Accordingly, the Commission finds that the Member’s purchase of real property from the County Urban Renewal Authority does not violate W. Va. Code § 61-10-15.

Private Gain

The Ethics Act, at W. Va. Code § 6B-2-5(b), prohibits public officials from using their office or the prestige of their office for their own private gain or that of another person. W. Va. Code § 6B-2-5(b)(1). **Given this prohibition, the Member may not use his or her official position on the County Building Commission to obtain, influence or promote business for his or her own benefit, or that of a private business with which he or she is associated. It does not appear, based on the facts provided, that the Member used his or her public position in this manner. Accordingly, the Commission finds no violation of W. Va. Code § 6B-2-5(b).**

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.



Jack Buckalew, Acting Chairperson
WV Ethics Commission

ADVISORY OPINION 2015-17

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether public educators may appear in a software vendor's promotional video and articles demonstrating how West Virginia teachers and students use the vendor's products.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that it entered into a licensing agreement with the multinational software vendor in 2014. The vendor provides a bundle of web-based applications¹ which have been made available to all students and educators in West Virginia. The Requester states that the applications help the Agency meet its statutory goals, including allowing students to access its applications at home and on mobile devices and providing teachers with technological tools to help personalize student learning and corroboration among peers. The technology will also provide a safe education-based forum for teacher/student communication.

The vendor has a website where it posts customer "case studies." These case studies are customer interviews which include favorable reviews of the software which explain how the products have enhanced the customer's goals. The Requester submitted a sample case study which is posted on the vendor's website as an example of the vendor's proposed case study in this case. The proposed video would include interviews with West Virginia teachers and staff using the products in "innovative ways." The video would be placed on the vendor's and the Agency's websites and blogs. In addition to the video, the vendor would use the interviews in written materials such as articles to be placed on its website and blogs.

The Agency would allow the vendor to use the Agency's logo in connection with its website, articles, video and blogs.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

¹ Web-based applications are delivered over the internet instead of being installed on desktop computers or servers.

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.

ADVISORY OPINION

The Ethics Commission has steadfastly followed this general rule: “A public official may not endorse a particular product or business. A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit.” Advisory Opinion 2015-13, *citing* Advisory Opinions 95-05 and 2015-04. *See also* Advisory Opinions 2005-10, 2012-21 and 2014-15 [*emphasis added*].

In enacting the Ethics Act, one of the Legislature’s findings was that public officials who “seek to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of a democratic government.” W.Va. Code § 6B-1-2(a).

The Requester acknowledges that the case studies are endorsements of the vendor’s products. The Requester asserts, however, that such endorsements should not be prohibited because there are overriding public benefits which make them permissible under the Ethics Act. The Requester states that there are two overriding public benefits. First, the vendor’s case study, particularly the video, would encourage teachers and students to use the products to their full potential to meet the State’s educational goals relating to technology.

Second, the case study would garner national recognition of West Virginia’s technological advances and innovation, which in turn would provide greater opportunities for West Virginia to collaborate with other states on educational projects. The Requester also contends that the case study would give West Virginia’s education system positive publicity on a national scale.

The Commission initially will consider the Requester’s first asserted “overriding public benefit,” which is that the vendor’s case study will encourage teachers and students to use the products to their fullest potential. The Requester states that the case study is a “way to spark the interest of the [West Virginia] educators and students in an attention-getting way” to use the technology to the fullest. The Requester states that it offers tutorials on these web-based applications and could produce its own video, but it would not have the prestige that the vendor’s production carries.

Since the Requester has the ability to produce a substantially similar video, the Commission is not persuaded by the Requester's first asserted "overriding public benefit." **Therefore, the Commission holds that the vendor's case study's purported role in encouraging teachers and students to use the products to their fullest potential is not an "overriding public benefit" sufficient to overcome the Ethics Act's prohibition against a commercial endorsement of a product or business.**

The Commission will now consider the Requester's second asserted "overriding public benefit": that the case study would give West Virginia's education system positive publicity on a national scale. The Requester points to Advisory Opinion 2012-06, in which the Ethics Commission permitted the Requester to be reimbursed by a State vendor for the Requester's expenses from his attendance at and participation in an international forum to discuss fraud control and financial management and procurement. The Commission concluded therein that the Requester's appearance at the forum provided a benefit to West Virginia by allowing it to be recognized for its achievements in fraud control and by providing an opportunity for the Requester to network with other government officials who also implement and manage electronic payments. The Commission also explicitly held, however, that:

The Requester must ... formally notify the State contractor that ... [the Requester] is prohibited from endorsing the product. Moreover, at or before the forum, the Requester must notify the forum participants that the West Virginia Ethics Act prohibits him from endorsing a particular product and that his presentation relating to fraud control should not be construed as an endorsement of the ... product.

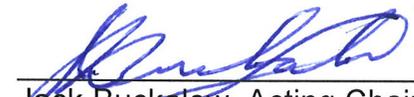
While the Requester in Advisory Opinion 2012-06 was permitted to accept reimbursement from a State vendor for his expenses associated with his attendance at the forum, the Commission prohibited the Requester from endorsing the vendor's product. In the instant situation, it would be impossible to appear in the vendor's case study without endorsing its products.

Accordingly, the Commission holds that the vendor's case study's purported role in giving West Virginia's education system positive publicity on a national scale is not an "overriding public benefit" sufficient to overcome the Ethics Act's prohibition against a commercial endorsement of a product or business.

In conclusion, the Ethics Commission holds that public teachers and staff may not voluntarily appear in the software vendor's case study video and articles without violating the prohibition against public officials' commercial endorsements of a product or business.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.



Jack Buckalew, Acting Chairperson
WV Ethics Commission