

# West Virginia Ethics Commission

## 2018 Ethics Act Training



Presented By:

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Staff Attorney



## Jurisdiction

- **Ethics Act** (*State and local officials and employees, even if part-time or temporary*)
- **W. Va. Code < 61-10-15** (*County officials and employees*)
- **Open Meetings Act**
- **School Board eligibility**
- **Administrative Law Judge Code of Conduct**
- **Lobbyists**
- **Financial Disclosure Statements**



## Use of Office for Private Gain

- Public employees and officials may not use more than a de minimis amount of public resources, or subordinate staff, for personal benefit.

**NEW 2018: Public servant volunteer** means any person who, without compensation, performs services on behalf of a public official and who is granted or vested with powers, privileges, or authorities ordinarily reserved to public officials.

**Public hearings:** Deputy Assessor used county computer and phone to buy and sell things from china for his private business; City council members used city funds for criminal defense of employee; county Ambulance Authority members loaned public money to its Director to enable him to timely transfer from the PEIA to the Emergency Medical Retirement System.

Public hearings: Deputy Assessor using county computer and phone to buy and sell things from china for his private business; City council using city funds for criminal defense atty for an employee; state worker using his position to get an employee to repay a personal loan he should not have made to her in the first place.

**2018: Public servant volunteer** means any person who, without compensation, performs services on behalf of a public official and who is granted or vested with powers, privileges, or authorities ordinarily reserved to public officials



## Use of Office for Private Gain

- Question: May a Public Service District give unused or out-of-service property to its employees? If so, may those employees sell said property and keep the money from such sales?
- Advisory Opinion 2013-23

AO 2013-23 – Ethics Act prohibits a local Public Service District from giving unused or out-of-service property to its employees for any purpose. Employees prohibited from selling such property. Commission lacks authority to opine about appropriate disposition of surplus or property by PSD, so long as it does not result in private gain.



## Nepotism

158 C.S.R. § 6.3

- Must follow the Legislative Rule at 158 C.S.R. § 6.
- 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.
- Must comply with agency rules.
- **W. Va. Code § 61-10-15** – BOE members and superintendents – certain restrictions on positions spouse may hold.



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... 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.



# Nepotism

- "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.
- Public servant may not influence the employment of relatives or person with whom she resides.
- Public servant (and subordinates) may not directly supervise a relative or a person with whom she resides. This prohibition includes reviewing work, making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters.





## Use of Office for Private Gain

### Endorsements



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- Do not endorse commercial products. Do not list your agency as a "satisfied customer."
- A.O. 2017-24: Recommend using disclaimer in advertising and make available to other businesses.



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A.O. 2000-19: May not send letter of support to other county clerks for a specific product (training program) for scanning and storing court orders even if it is meant to help fellow clerks.

A.O. 2015-04: A new legislator may continue being in commercials for his own business. Do not use public title in commercials.

A.O. 2015-17: Teachers may not appear in a software vendor's promotional video.

A.O. 2017-24: Disclaimer in advertising and make available to other businesses.



## Use of Office for Private Gain Paying for Meals

A.O. 2018-02 -The Ethics Commission was unable to determine whether there is implied (or express) authority for a county commission to use public funds to buy lunches for county elected officials and their staffs for an annual working lunch meeting. If the Office of the Attorney General or Auditor's Office opines there is express or implied authority for the expenditure, then the expenditure of public funds for this purpose would not violate the Ethics Act.



2018-04 -Before purchasing meals for its officials or employees, public agencies should review applicable laws to determine whether there is express or implied authority for the expenditure. When a meal is authorized, reimbursement at a rate established by the West Virginia Travel Rules does not violate the Ethics Act. Nothing in the Opinion grants express or implied authority to spend public funds for meals under the Ethics Act. If a public official or public employee makes an unauthorized expenditure, it may constitute the unlawful use of office for private gain if the overriding benefit is to the public official or employee, or another person, and not to the government agency.

AO 2012-27 – Act does not prohibit a State Board to provide a working meal to member and staff required to be present at a meeting because the meal was being provided so that the Board may accomplish its public mission. Length of meeting, members travel times, may not recess to go off-site, reasonable amount of funds, denied to extend ruling to local governmental officials.

AO 2001-18 – local bodies may provide expenditures on meals and refreshments for such training sessions for employees who attend on their own time, without pay, would be justified by the counterbalancing public benefit from the training. The expenditures would not be a prohibited use of office for the private gain of Authority employees.



AO 2018-04 – What is reasonable amount? If authorized, and there is no other statute or rule governing, reasonable rates which do not exceed the reimbursement rates for meals set forth in West Virginia Travel Rules comply with the Act. The Travel Rules use the rates prescribed by the United States General Services Administration (“GSA”) on a yearly basis.



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## Use of Office for Private Gain Paying for lodging



A.O. 2018-03 -the Requester asked when it is reasonable for a public employee to book and seek reimbursement from the employee's agency for overnight lodging while on official business including what distance or amount of travel time would qualify for the overnight lodging to be appropriate. The Ethics Commission finds that following the restrictions imposed by an agency's applicable State Travel Rules satisfies the requirements of the Ethics Act.



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## Use of Office for Private Gain

### Expending Public Funds

**QUESTION:** May a public agency use public funds to purchase coffee makers or refrigerators for office employees?

**A.O. 2016-09**



2016-09 – Permissible because of the public benefit to the agencies including increased employee productivity, health, and morale. With kitchen facilities available, employees, facing deadlines and emergencies, often find that they can more easily accommodate these deadlines. It is the employee's use of the equipment itself, rather than use of alternatives, that accrues to the agency's benefit.



## Use of Office for Private Gain

### Employee Recognition

- May use public funds to recognize public employees because it serves a public purpose of promoting employee morale through recognition of achievement.
- \$25 per employee per year
- May be used, for example, to purchase light refreshments, meals or mementos of appreciation.





# Use of Office for Private Gain

## Retirement Gifts/Events

- **General Rule:** May spend up to **\$100** of public funds to purchase plaque or other commemorative item
- Supervisors may not solicit retirement gifts from their subordinates
- Organizer may ask for \$5 contributions per employee
- Absent specific legislative authority, may not spend public funds to pay for meals, food, or beverages at an event.





## Gift Rules

W. Va. Code § 6B-2-5(c)

- Solicitation of gifts is generally **prohibited**.
- Don't accept a gift with a fair market value over \$25 per year from an **interested** party.
- No limitation on food and beverages if the person providing it is present.
- Other exceptions: Personal; Travel (presumption not improper)



**A.O. 2017-07:** Microsoft's Home Use Program "HUP" is not a prohibited gift or private gain to employees due to the following circumstances: HUP is offered to all eligible employees; HUP is not offered to impair the impartiality of employees with the authority to determine whether to do business with Microsoft; HUP is made available to a large group of customers, and HUP adds no additional cost to the public agency.

Received and consumed in the presence of the donor.

2017-07: Microsoft's Home Use Program "HUP" is not a prohibited gift or private gain to employees due to the following circumstances: HUP is offered to all eligible employees; HUP is not offered to impair the impartiality of employees with the authority to determine whether to do business with Microsoft; HUP is made available to a large group of customers, and HUP adds no additional cost to the public agency.



## Limitations on Public Official's Name or Likeness

- May **not** use public funds, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the purpose of promoting public official or political party. W. Va. Code § 6B-2B-2(b).
- May not be used on trinkets, publicly owned vehicles or table skirts/banners.



## Limitations on Public Official's Name or Likeness

- **May**
  - ✓ Purchase and distribute with private funds and on own time
  - ✓ Use minimal funds to purchase pens or pencils for ceremonial signings



## Limitations on Public Official's Name or Likeness

- May use name or likeness on educational material and press releases so long as the primary purpose is to provide information. W. Va. Code § 6B-2B-2(d)-(e).
- Educational material defined as publications, guides, calendars, handouts, pamphlets, reports or booklets....It includes information...about the office, services the office provides to the public, updates on law.... W. Va. Code § 6B-2B-1(c).

Statute amended, effective June 5, 2018.

Statute amended, effective June 5, 2018. Old statute prohibited name or likeness to be placed on any educational material paid for with public funds.



## Limitations on Public Official's Name or Likeness

### Websites & Social Media

- Name and Likeness may appear on the agency's website or social media accounts or pages so long as it is reasonable, incidental, appropriate, and has a primary purpose to promote the agency's mission and services rather than to promote the public official.



Old Statute - Websites: **Picture** – OK on home page and section devoted to biographical information, **Name** OK throughout if reasonable and promote mission.  
Social Media: - Name and Picture OK if reasonable and promote mission.



## Prohibited Interest in Agency Contracts

W. Va. Code § 6B-2-5(d)

- Elected public officials and employees may not have a financial interest in a public contract under their authority or control (\$1,000 threshold).
- This means almost all financial transactions (e.g., purchases, leases, labor and sales) except employment contracts with governmental bodies.
- Ethics Commission has discretion to grant exemption to public entity based upon undue hardship or excessive cost
- NEW (2018) for state agency contracts of \$1 million, the state agency must file the disclosure of interested parties form with the Ethics Commission.

AO 2018-07: A County Commission may allow a sheriff to live rent free in a house located in the county park because the sheriff's presence enhanced security and he would maintain and repair house.

Blind trust: (b) The provisions of subsection (d), section five of this article shall not apply to holdings which are assets within the trusts referred to in subsection (a) of this section. And no Financial Dis

Authority or Control: not overall budget.

CE 2017-05: Commission finds there are no other viable options to repair street available to the Requester other than contracting with the Mayor's company. The Requester has properly advertised for bids for the West Street project. The Requester has twice advertised for bids, placed ads in its local newspaper and on its Facebook page and Town officials have directly sought bids from two companies other than Brown's.

CE 2014-04: Denied mayor contract spouse to do building repairs for \$2,500 less than only bid.



## Prohibited Interest in Public Contracts

W.Va. Code § 61-10-15

- Applies to some county officials, including county commissioners and appointed members of county boards
- May not have financial interest in public contract
- Voice, influence or control
- Criminal misdemeanor/removal

Exceptions: principal, teacher, auxiliary or service personnel.

Employee of vendor if no comp and not involved in selecting the bank depository of funds, healthcare providers at government hospitals or agencies. Spouse cannot work in county if married or engaged before you took office.

### 2017-15 Board of Education Member

W. Va. Code § 61-10-15 prohibits a board of education from contracting with a business that leases commercial property from a company owned by a board of education member's spouse.



## Voting



### W. Va. Code § 6B-2-5(j)

- Public officials may not vote if they, or an immediate family member, or a business with which they or a family member is associated, has a financial interest. (Class exception - five similarly situated).
- Public officials may not vote on a personnel matter involving a relative (spouse, parent, sibling, child, - including in-laws - and grandparent, grandchild)
- 2017 Amendment: If member also serves on a non-profit, the agency may still make appropriations to the non-profit.
- Member or spouse may not vote if either is employed by non-profit.
- If Board member is unpaid, he/she may vote only if disclosed on agenda and at the meeting

Class example: a physician or health care provider to vote on health care legislation or for a teacher to vote on matters affecting education, or for a coal miner to vote on laws regulating the coal industry. Mother in law is a relative but not "immediate family member. So, mother in law can work for the county under nepotism, but you may not vote on her personnel matters

(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: Provided, That if the public official or immediate family member is an uncompensated officer or board member of the nonprofit, then the public official shall publicly disclose such relationship prior to a vote on the appropriations of public moneys or award of contract to the nonprofit;





## Voting

### Proper Recusal

A public servant who is required to recuse himself or herself must:

- Fully disclose his or her interest
- Leave the room during both the discussion of, and the vote on, the issue
- Minutes must reflect recusal



#### 158—8—5. Recusal .

5.1. For the purposes of W. Va. Code S6B—2—5 (d) , the Ethics Commission will consider a person "recused" if he or she (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.

5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a public employee or public official or immediate family thereof in a public contract.



## Contract Exemptions



C.E. 2017-05: Commission finds there are no other viable options to repair street available to the Requester other than contracting with the Mayor's company. The Requester has properly advertised for bids for the West Street project. The Requester has twice advertised for bids, placed ads in its local newspaper and on its Facebook page and Town officials have directly sought bids from two companies other than Brown's.

C.E. 2014-04: Commission denied contract with Mayor's spouse to do building repairs. Only \$2,500 less than other bid.

Class example: a physician or health care provider to vote on health care legislation or for a teacher to vote on matters affecting education, or for a coal miner to vote on laws regulating the coal industry. Mother in law is a relative but not "immediate family member. So, mother in law can work for the county under nepotism, but you may not vote on her personnel matters

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# Employment Restrictions

W. Va. Code § 6B-2-5(h)

Full-time public employees may not seek employment with, or buy, sell or lease property to or from, any person who:

- Had a matter on which they or their subordinate took regulatory action within the past 12 months (county assessors) or
- Currently has a matter before their agency on which they or a subordinate is working. (city code enforcement – property maintenance) or
- Is a vendor over which they exercise control
- AO 2018-07: A deputy fire marshal may lease and operate a private club that is subject to the City's fire codes as long as neither he nor a subordinate inspects or investigates the club.



“Person” Does not include state agencies or other public bodies. May work for a subordinate employee under some circumstances. May rent a house to or from a subordinate.

AO 2018-07: A deputy fire marshal may lease and operate a private club that is subject to the City's fire codes as long as neither he nor a subordinate inspects or investigates the club.

Employment Exemptions available



## Employment Exemption

**QUESTION:** You oversee the work of a C.P.A. firm on an audit. An owner of the firm mentions that someone is retiring. He comments you would be a perfect fit to replace the person. May you meet with this person for lunch to discuss this job opportunity?



**ANSWER:** See How to Obtain Employment Exemption Guideline and W.Va. Code § 6B-2-5(f), (g) and (h).



## Post-employment restrictions

W. Va. Code § 6B-2-5(f)

### Prohibited Representation

- The Ethics Act requires a public official or employee to obtain his or her agency's consent before representing a client in a matter in which he or she is or was substantially involved on behalf of the agency.
- Only applies to those matters in which the official or employee was personally involved in a decision-making, advisory or staff support capacity.
- Prohibition applies both during and after the person's governmental service.

**(f)** In a particular matter in a contested case, can never rep. unless consent from agency.



## Post-employment restrictions

W. Va. Code § 6B-2-5(g)

- No elected or appointed public official or full-time staff attorney or accountant, shall:
- for a period of ONE YEAR after the termination of that service, appear in a representative capacity before the entity he or she served in:
  - A contested administrative matter,
  - To support or oppose a proposed rule,
  - To support or oppose issuance of a license or permit,
  - Rate-making proceedings, or
  - To influence the expenditure of public funds, *i.e.*, represent client for zoning variance

Above is (g)

Zoning

97-17: County BOHealth: member's employees could not talk to staff about permits.

2005-22: General Counsel to Cabinet Secretary is not employed by the separate agencies within the department. IE. General counsel to Administration may appear before the Ethics Commission, unless he provided legal services to EC.

Advisory Opinion 2017-09

A Cabinet Secretary asks whether his private business interests implicate the West Virginia Governmental Ethics Act. There are no facts indicating that the health care consulting firm is seeking or has any public contracts with the governmental entity in which Requester serves. Nonetheless, in the instant situation, there are no facts indicating that either the Requester or the health care consulting firm represents or will represent clients before the governmental entity in which Requester serves.

2007-04- **(f)** and **(g)**, Asst AG was representing a claimant before his agency whose case is set to proceed to public hearing within several months. The Requester has expressed an interest in taking on this claimant as a private client once he joins the law firm. He would then continue his representation of the claimant at the public hearing before the State Agency.

The Ethics Commission recognizes that at first blush, some may argue that no apparent conflict exists for the Assistant Attorney General to immediately appear before his agency because he is merely continuing to represent the interests of claimants. Still plain meaning prohibits and it's the provision is to prevent appearance not actual conflict. Statute does allow former AG to rep agency as a contract attorney ion the same matter.

To market his services to alleged victims of discrimination with whom he developed his relationship through his public employment could amount to the use of public office for private gain. Ex. While I'll no longer be working for the XXIX Division, I'll continue to represent victims of discrimination in my new capacity as a private lawyer. I'll also be working with my new firm on social security disability, black lung, police misconduct, personal injury, workers compensation, and civil liberties cases.

On the other hand, the Commission finds that as a matter of courtesy to past and present claimants whom he represented, it would be appropriate for the Requester to send a letter to them notifying them of his departure from the Agency.



## Financial Disclosures

W. Va. Code § 6B-2-6

- Elected and certain appointed officials in state government and elected county officials must file annually. Heads of agencies, directors and deputies must file.
- BOE members and superintendents
- Must report receiving gifts over \$100 from a person or entity who has direct and immediate interest in the outcome of the public official's governmental activity
- Candidates must also file within 10 days after filing their candidacy papers.
- Filed statements are public records.



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**Legislator** must Report if over \$100 in food and beverages, e.g.

Advisory Opinion 2017-03 A State Agency asks whether its directors and deputy directors are required to file Financial Disclosure Statements.

2017-06 Manager of a Legislative Office

The Manager and employees of a Legislative Office are not required to file Financial Disclosure Statements pursuant to W.Va. Code § 6B-2-6(a)(3) because that provision describe positions only in the executive branch of state government.

AO overrules AO 90-36.

(2) All members of state boards, commissions and agencies appointed by the governor; and

(3) Secretaries of departments, commissioners, deputy commissioners, assistant commissioners, directors, deputy directors, assistant directors, department heads, deputy department heads and assistant department heads

The purpose of filing Financial Disclosure Statements is to “reveal any potential conflicts of interest that ... public servants and candidates may have, as they are in, or



may assume[,] positions in which they have decision making power, with far reaching effects on matters directly affecting the public.” Advisory Opinion 2014-13 (citing Advisory Opinion 90-165). “The mere requirement of such disclosure discourages any impropriety, and also give reassurances to the public that no improper conflicts exist.”  
Id.



## Financial Disclosures: Executive Branch

- All members of state boards, commissions and agencies appointed by the governor; and
- Secretaries of departments, commissioners, deputy commissioners, assistant commissioners, directors, deputy directors, assistant directors, department heads, deputy department heads and assistant department heads



# Complaints

W. Va. Code § 6B-2-3a and 4

- Complaints may be filed by anyone, but they must be verified.
- Complaints must be filed within 5 years of the last act of misconduct that occurred after July 1, 2016; earlier misconduct within 2 years.
- Ethics Commission may initiate a complaint based on credible evidence that a material violation has occurred.
- Complaints must allege violation(s) of the Ethics Act.
- If investigation shows "probable cause," a Statement of Charges will be issued.
- Conciliation, or settlement, agreements avoid public hearings and related expenses.



## Sanctions

W. Va. Code § 6B-2-4(s)(1)

- **Potential sanctions include:**
  - Public reprimand;
  - Cease and desist orders;
  - Orders of restitution for money, things of value, or services taken;
  - Fines not to exceed \$5,000 per violation;
  - Reimbursement to the Commission for costs of investigation and prosecution, and/or
  - Recommendation that a Respondent be terminated from employment or removed from office.



## Advisory Opinions



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- Issued by the Commission
- Discussed and approved in a public meeting
- Identity of requester/agency confidential in Ethics Act Advisory Opinions.
- Immunity for conduct in good faith reliance on advisory opinion

# West Virginia Ethics Commission



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