West Virginia Ethics Commission

2020 Ethics and Open Meetings Acts Training

Presented By:
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General Counsel
Jurisdiction

- Ethics Act
- W. Va. Code § 61-10-15 (*County officials and employees*)
- Open Meetings Act
- School Board eligibility
- Administrative Law Judge Code of Conduct
- Lobbyists registration
- Financial Disclosure Statements
Topics of Ethics Act

- Use of Office for Private Gain
- Solicitation and Gifts
- Name/Likeness (“Trinkets”)
- Prohibited Public Contracts
- Voting
- Conflicts of Interest
- Employment Restrictions
Use of Public Office for Private Gain

W. Va. Code § 6B-2-5(b)

- May not use public resources, including time and subordinate staff, for someone’s personal benefit.
- Ethics Act prohibits more than a *de minimis* use for personal purposes.
**Question:** May you, while on state business, use a personal rewards card when purchasing fuel with a state-issued credit card and keep the rewards points for yourself? Falls under “frequent traveler exception.”

A.O. 2019-13
Use of Public Office for Private Gain
Nepotism

• “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.

• "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.

• Must follow the Legislative Rule at 158 C.S.R. § 6.
Use of Public Office for Private Gain

Nepotism

- Must administer employment and working conditions in an impartial manner.

- To the extent possible, a public official or employee may not directly supervise or participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides.

- A.O. 2019-03: Teachers putting relatives on preferred sub list is prohibited.
Use of Public Office for Private Gain
Unauthorized Spending

• The Ethics Commission only has authority to determine whether a proposed expenditure violates the private gain provision of the Act.
• The Commission considers, among other factors, whether the proposed expenditure is authorized elsewhere.
  • W. Va. Code
  • Legislative Rules
  • Attorney General Opinions
  • Auditor Opinion Letters
Use of Public Office for Private Gain
Unauthorized Spending

- May you use BOE funds to reward the superintendent with a trip to Myrtle Beach?

- May you use BOE funds to support a candidate for governor?
Use of Public Office for Private Gain

Paying for Meals

- Review applicable laws to determine whether there is express or implied authority for the expenditure.
- Unauthorized expenditures for meals violate the private gain provision of the Act if the overriding benefit is to the employee, or another person, and not the government agency.

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

A.O. 2016-09
Use of Public Office for Private Gain

2020 Employee Recognition/Retirement Events

- Food and beverages, entertainment, and gift or memento.

- Total public funds = $25 per employee per year. May be allocated between events and employees. (Maximum $100 per employee.)
Use of Public Office for Private Gain

Retirement Gifts/Events

- May spend up to $100 of public funds to purchase plaque or other commemorative item.
Use of Public Office for Private Gain

Endorsements

• Do not endorse commercial products. Do not give testimonials such as town was a “satisfied customer.”

• A.O. 2017-24: Can sell ads but should use disclaimers and make ads available to other businesses.
Endorsements

QUESTION: May public educators appear in a software vendor’s promotional video and articles demonstrating how West Virginia teachers and students use the vendor’s products?

ANSWER: See A.O. 2015-17
Confidential Info

W. Va. Code § 6B-2-5(e)

No present or former public official or employee may disclose confidential information or use that information to further his/her personal interests or the interests of another person. [Address, SS#, credit card, driver’s license and marital status]

Improper disclosure of confidential information is a criminal misdemeanor.
Gift Rules

No Gifts over $25 from Interested Persons

An interested person is:

• A Lobbyist

Or one who:

• Seeks or does business with the public servant’s agency (vendor);

• Is engaged in activities regulated or controlled by the agency; or,

• Has financial interests which may be substantially & materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of official duties.
Gift Rules

Some Exceptions

- Meals and beverages of any value if the person purchasing them is present

- Ceremonial gifts with insignificant value – for example, a plaque

- Reasonable travel, meals and lodging expenses for being a speaker at conference

- Gifts that are purely private in nature

Ethics Commission Gift Guideline – outlines other exceptions
Gift Rules

Solicitation of gifts is generally prohibited.

W. Va. Code § 6B-2-5(c)
Gift Rules
Charitable Solicitations

W. Va. Code § 6B-2-5(c)

Gifts may only be solicited for a charitable purpose, such as the United Way. Public agency may impose stricter standards.

Supervisors may not solicit contributions from a subordinate. May solicit other public agencies 2019-11
Gift Rules

May you accept a discount on a personal cell phone service plan offered by a vendor to public employees?

**Answer:** Yes. If the discount is not solicited and is part of the company’s standard practice. AOs 2010-02 and 2017-07.
Gift Rules

May you ask a vendor for free dog food for your dog?

What about dog food for the humane society?

If the solicitation is okay, are there rules on oral solicitations? Yes. Legislative Rule, Title 158, Series 7.
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).
Public Official’s Name or Likeness

- May **not** use name or likeness on trinkets:
  
  examples- magnets, mugs, cups, keychains, bags

- May **not** be used on publicly owned vehicles or table skirts/banners.
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).
• May use public funds to communicate with constituents in the normal course of duties but do not include any reference to voting in favor of the public official in an election.
• May use name on letterhead, envelopes, reports, certificates, office signs, press releases, bios
Public Official’s Name or Likeness

Websites & Social Media

• May appear on the agency’s website or social media so long as it is reasonable and has a primary purpose to promote the agency’s mission and services rather than to promote the public official.
QUESTION: May a public official authorize private organizations to use her name and public job title when recognizing her for personal donations she makes to charitable events?

See Advisory Opinion 2016-10
Prohibited Contracts

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, gas, hardware and sales) except employment contracts with governmental bodies.

W. Va. Code § 6B-2-5(d)
Prohibited Contracts

W. Va. Code § 6B-2-5(d)

- Part-time appointed officials, legislators are not subject to prohibition, but must recuse themselves if a conflict arises.
- Contracts do not include employment.
Prohibited County Contracts


- W. Va. Code § 61-10-15 prohibits some county officials, including school officers and employees, from having personal financial interests, directly or indirectly, in a contract, purchase or sale over which their public position gives them voice, influence or control.
Prohibited County Contracts


School officers and employees include:

“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.”
Prohibited County Contracts

Exceptions

• Nothing prevents or makes unlawful the employment of a spouse as a principal or teacher or auxiliary or service employee in the public schools of any county.

• Does not apply to any person who is a salaried employee of a vendor or supplier if the employee meets the five criteria found in W. Va. Code § 61-10-15(e).
Prohibited County Contracts


• You may serve as a volunteer coach if you are paid $1.00?

• You may not be paid to serve as a referee at baseball games for the school system?

• Answer: See A.O.s 2005-03, 2005-18 and 2010-15
Prohibited County Contracts


2018-05 (BOE member may work for WVU extension because BOE made only limited appropriations.)

2018-10 (BOE member may work business that markets for textbook company that sells to BOE.)
Public Contract

Exemptions

Ethics Commission has discretion to grant an exemption to public entity based upon undue hardship or excessive cost.
State Contracts
$1,000,000

• NEW (2018) for state agency contracts of $1 million, the state agency must file the disclosure of interested parties form with the Ethics Commission.
Voting

W. Va. Code § 6B-2-5(j)

• May not vote if public official or employee, 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.

2019-08 hotel development in mayor’s neighborhood
Voting

W. Va. Code § 6B-2-5(j)

• 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.
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
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, or

• Currently has a matter before their agency on which they or a subordinate is working, or

• Is a vendor over which they exercise control
Outside Employment

• May not conflict with your current employment.

• Must work on your own time.

• Consult with your supervisor to ensure compliance with agency rules.

• May not get paid for something that is part of your public job duties or by two public agencies for the same work.
QUESTION: Is it permissible for a public laborer’s private trucking business to subcontract with a contractor of the agency which employs him?

What if the public employee is an inspector at the job site where the contractor works?

ANSWER: See A.O. 2013-22
QUESTION: You work for the State overseeing a private contractor on a bridge repair project. The owner of the company 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?
Post-employment restrictions

Prohibited Representation

• Public official or employee may not represent a client in a matter in which he or she is or was substantially involved on behalf of the agency.

• Prohibition applies forever.
Post-employment Restrictions

W. Va. Code § 6B-2-5(g)

Roving Door

- No elected or appointed public official or full-time staff attorney or accountant, shall:
- for 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
Financial Disclosures

W. Va. Code § 6B-2-6

- Elected and certain appointed officials and employees in state government and elected county officials must file by February 1 annually.
- File within 30 days of taking office or employment; and candidates or elected office must also file within 10 days after filing their candidacy papers with Secretary of State.
- Must report business interests, sources of income and contracts with public agencies in the state.
- 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 work.
Financial Disclosures: Executive Branch filers

• 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. This category is for only the executive branch, but not to those in state colleges and universities.
Sanctions

W. Va. Code § 6B-2-4(s)(1)

- Public reprimand
- Restitution
- Fines of $5,000 per violation
- Reimbursement to the Commission
- Recommendation that a Respondent be terminated from employment or removed from office.
BOE Eligibility

W.Va. Code § 18-5-1a

May not Become a candidate for or hold any other public office, unless:

The member does not receive compensation; and the primary scope of the board is not related to public schools.

SBAO 2017-01 (most recent)(Resign from BOE before candidacy for county commission.)
Open Meetings Act

- Enacted in 1975
- State, county, and municipal administrative and legislative bodies, and any bodies that meet the definition of ‘public agency,’ are subject to the Act.
https://ethics.wv.gov/Pages/default.aspx

Staff opines that allowing citizens to attend a meeting in person is not required if the governing body determines, based upon guidance issued by the federal government, the state of West Virginia, the Centers for Disease Control and Prevention or other government agencies authorized to make these types of decisions, that it constitutes a public health risk to allow citizens to attend in person. The governing body may instead provide citizens with a call-in number for a telephonic meeting or provide access via web link to a livestream of the meeting.
Topics of Open Meetings Act

- Definition of meeting
- Exceptions to having an open meeting
- Notice of meeting
- Agenda for meeting
- Executive session
- Meeting minutes
- Violations
A meeting is defined by the Act as:

- The convening of a governing body of a public agency
- For which a quorum is required in order to make, or deliberate toward, a decision
- On a matter which results or will result in official action.
Exceptions

• Adjudicatory

• On-site inspection
  • Construction site

• Political party caucus

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Exceptions

- General Discussion
  - Planned or unplanned
  - Social, educational, training, informal, ceremonial or similar setting
  - Without intent to conduct public business
  - No intention for the discussion to lead to an official action
Exceptions

The ‘general discussion’ exception is most difficult to follow. Some guidelines:

• If discussion is about something that will lead to official action, either right then or at a later time, the meeting must be noticed.

• Does not prevent a quorum of members of the governing body from going to the mayor’s house for barbecue.

• Does prevent a quorum of members of the governing body from going to the mayor’s house for barbecue and a discussion about the new budget.
Exceptions

- May a quorum of school board members visit a school and observe building conditions, educational programs, teaching strategies and other school activities?
- OMAO 2001-03
The Open Meetings Act requires advance notice of the date, time, and place of the meeting, including any committee meeting, and an agenda of all matters to be considered and/or discussed.
Notice and Agenda

• Regular meeting notice must be posted and agendas made available THREE business days in advance (unless you meet every week, then two days).

• Special meeting – TWO business days
Notice and Agenda

- Are out-of-calendar days and days outside the school environment counted as business days when computing time periods for providing notice of meetings?

- OMAO 2019-01
Meeting Agenda

• Agendas must give reasonable notice to the public of every issue to be discussed.

• Items must be specific enough to put the public on notice of intended action.

• Vague headings are insufficient, e.g.,
  • Old Business
  • New Business

• Open Meetings Advisory Opinion 2008-17
Meeting Agenda

‘Personnel’ is also too vague a description

Instead, use “filling position of office manager,” or “open sealed bids for XYZ project.”

West Virginia Ethics Commission
Open Governmental Meetings Committee Agenda
210 Brooks Street, Third Floor Conference Room
Charleston, West Virginia 25301

August 3, 2017
9:30 a.m.

1. Approve Minutes of June 1, 2017, Meeting

2. Respond to Open Meetings Advisory Opinion Request

   OMAO 2017-02  (Mr. Knopp)
   The Director of the West Virginia Division of Homeland Security and
   Emergency Management asks whether the Open Governmental
   Proceedings Act applies to meetings of the Statewide Interoperability
   Executive Committee in the exercise of its supervision and implementation
   of the Statewide Interoperable Radio Network.

3. Motion to Adjourn
Executive Session

W.Va. Code § 6-9A-4

• May only go into executive session for reasons permitted by the Open Meetings Act.
• There must be a corresponding agenda item.
• The motion to go into executive session must identify the reason for entering the session.
• Majority vote of those present is required.
• No decision may be made in the executive session (except for student matters).
Executive Session reasons include -

- To consider personnel matters of a particular public official or employee. But, must vote in public and announce employee’s name. OMAO 99-10

- To decide upon disciplining, suspension or expulsion of any student in any public school or public college or university, unless the student requests an open meeting. OMAO 99-05 (Can vote in Executive session, too)

- To discuss matters which, by express provision of federal law or state statute or rule of court is rendered confidential. OMAO 2017-02.

- W. Va. Code § 6-9A-4 (contains complete list)
Meeting Minutes

Minutes required for all meetings, including committee and sub-committee meetings, but not executive sessions

- OMAO 99-09
The Open Meetings Act specifies the information required to be in the minutes:

• The date, time and place of the meeting;

• The name of each member of the governing body present and absent;

• All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition, and

• The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member by name.
Minutes of the June 1, 2017
Meeting of the West Virginia Ethics Commission’s
Open Governmental Meetings Committee

The June 1, 2017, meeting of the West Virginia Ethics Commission’s Open Governmental Meetings Committee was called to order in the Commission’s Office at 210 Brooks Street, Charleston, West Virginia, at 9:30 a.m., by Chairperson Lawrence Tweel. Present in person were Chairperson Tweel and Committee Member Betty S. Ireland. Present via teleconference were Committee Member Suzan Singleton and Ex-Officio Committee Member Robert J. Wolfe. Executive Director Rebecca L. Stepto, General Counsel Kimberly B. Weber, Staff Attorney Andrew Herrick, Staff Attorney Derek A. Knopp, and Special Assistant to the Executive Director M. Ellen Briggs, all from the Commission staff, were present.

WHEREUPON, Chairperson Tweel asked for approval of the November 3, 2016, meeting minutes.

WHEREUPON, Committee Member Ireland made a motion to approve the minutes. Committee Member Singleton gave a second. The motion passed.

WHEREUPON, Chairperson Tweel called upon Mr. Knopp to present Open Governmental Meetings Advisory Opinion 2017-01 for consideration.

WHEREUPON, Mr. Knopp presented proposed Open Governmental Meetings Advisory Opinion 2017-01 to the Committee for consideration. After discussion, a motion was made by Committee Member Ireland to accept the proposed Open Governmental Meetings Advisory Opinion 2017-01 as amended. Committee Member Singleton gave a second, and the motion passed unanimously.

WHEREUPON, Chairperson Tweel stated there were no more items for discussion. Committee Member Ireland moved that the meeting be adjourned, and Committee Member Singleton seconded. The motion carried, and the meeting was adjourned.

The foregoing minutes of the West Virginia Ethics Commission’s Open Governmental Meetings Committee were approved at a regular meeting of the Committee on August 3, 2017.

Lawrence Tweel, Chairperson
Open Governmental Meetings Committee
West Virginia Ethics Commission

ATTEST:

M. Ellen Briggs, Special Assistant
to the Executive Director
Open Governmental Meetings Committee
West Virginia Ethics Commission
Meeting minutes must be made available within a ‘reasonable time.’

‘Reasonable time’ defined by OMAO 2010-04 as ‘close of business on the next business day following [the next meeting].’

If material changes to the minutes are necessary, then the minutes should be available no later than three business days following the next meeting.

Draft minutes are encouraged, but not required, to be made available for public inspection.
Violations

W.Va. Code §§ 6-9A-6 and 7

• An intentional violation is a criminal misdemeanor subject to prosecution by the county prosecutor and up to a $500 fine. ($1,000 for additional violations)

• May also be liable to wronged parties in civil court. (within 120 days of action)

• Court may annul vote taken in violation of Act.