



May 13, 2014

Pre-conference ASBO

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E-newsletter

A quarterly email from the Education Law Group with summaries of the latest West Virginia Supreme Court school law decisions, Grievance Board opinions, and Ethics Act advisory opinions.

If you would like to receive the E-newsletter, please call Sarah Plantz at 304-347-1183 or email her at splantz@bowlesrice.com and provide your name, position with the school board and let her know you would like to be added to the emailing list.



Overview of today's presentation

1. Appointment /bonding of treasurer/approval of bank accounts
2. Policy 1224.1 Basics
3. Unauthorized Expenditures
4. The Ethics Act & The Pecuniary Interest Statute
5. Sale of surplus school property



Staying on top of the Board's Money

Appointing a treasurer

- on or before the first Monday in May every year
- superintendent's recommendation required
- One-year term only for "treasurer of the board of education"

Bonding of treasurer

- requires board approval
- amount of bond cannot exceed the amount of school funds which it is estimated the treasurer will handle within any period of two months.
- board must pay the premium

Approval of bank accounts & authority to invest/security for funds invested





He (or she) Who Holds the Key . . .

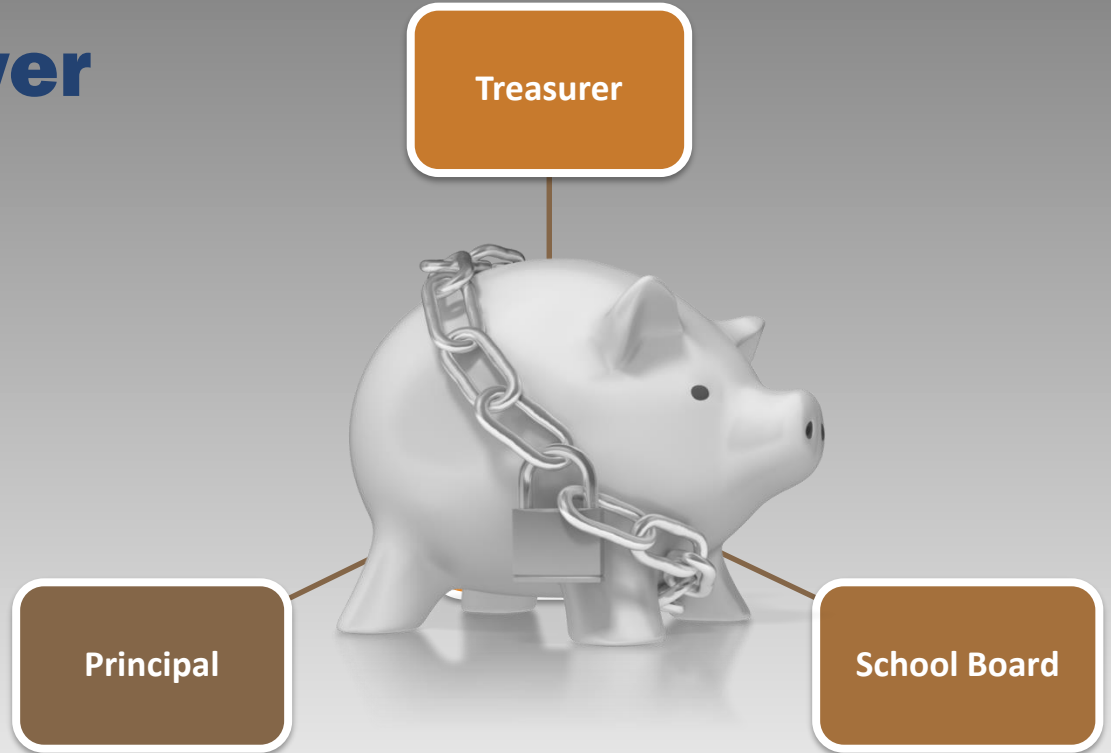


Whose is responsible for the use of school funds ?

The Short Answer

The buck stops with these three.

Other school employees also have significant duties and responsibilities under the law.



Policy 1224.1: Accounting Procedures Manual

&

Policy 8200: Purchasing Policies and Procedures Manual Policy

Effective date August 13, 2012

1224.1 has the force of law
“It is a policy, not a suggestion”

Applies to every public
school and multi-county
vocational center

(1)

Establishes *minimum* school
accounting requirements
(1)

Mandates, recommends,
urges, prohibits . . .

3 Primary Points of Responsibility

The Principal

- “The school principal is responsible for the financial management of the school. The principal *must ensure* that
 - *all* provisions of this manual and local board policies and procedures are complied with,
 - *all* accounting records are maintained accurately, and
 - *all* financial reports are prepared and submitted in a timely manner.” (4)

The Chief School Business Official

- Signature authority on all accounts (6)
- Recipient of financial statements (26)
- Recipient of reports (8, 11)
- Role in annual examinations? (27)
- Other?

The County Board of Education

- Mandated policies
 - 4, 8, 13, 14
- Optional policies
 - Should: 8, 23
 - May: 14, 16, 18, 27, 30, 33, 37
- “Procedures”: 11, 20, 21, 33

Some major provisions:

- Separate entity (1-3)
- The principal's responsibility (1-4)
- Bank deposits (1-16)
- Unauthorized expenditures (1-18, App C)
- Purchase orders (1-19)
- Payments for personal services (1-22, App D)
- Petty cash, starting cash (1-26, 1-30)
- Reconciliation of bank statements (1-28)

Some major provisions:

- SSAC tournaments (1-31)
- Uniforms (1-32)
- Fund raisers (1-34)
- Faculty senate funds (1-37)
- Consumer sales tax (1-38, 1-39, App B)
- Support organizations (2)

HANDOUT

(Courtesy of the WV Department of Education)

Significant Revisions Between the “Old” and “New” 1224.1

Policy 1224.1

Top Ten

Things to advise your
principals and others
responsible for handling public
or quasi-public funds

Policy 1224.1

1. Scrupulously follow all the requirements of the State Board policy and related county policies. *Review them once a year.* Share them with each PTO, booster club, and support group.

2. Never pay in cash. Always pay by check.

- surprising how many schools are allowing cash payments to continue

3. Except for athletic officials, pay for all personal services through the central office payroll process unless you are CERTAIN that the provider is an independent contractor, then always pay by check.

4. NEVER make a purchase before the purchase order is approved

5. Be sure that invoices contain the necessary information

6. Don't hold money.
Deposit it in a timely fashion.

7. Require PTOs, booster clubs, and support organizations to follow all the rules and make all the reports

8. Be sure that the principal approves all fundraisers by these groups and requires and receives a P&L for each

9. Require groups collecting funds in the school's name to receive prior approval of the Board before fund raising.

10. Pay attention to the reports you receive and don't receive. Where there is smoke, there could be fire. Report suspected irregularities, breaches of policy, and suspicious circumstances.

Unauthorized Expenditures: violations have real consequences

- WV Code §11-8-25 (funds expended only for purposes for which raised)
- WV Code §11-8-26 (unlawful expenditures by local fiscal body)
- WV Code §11-8-29 (personal liability of official participating in unlawful expenditure)
- WV Code §11-8-30 (recovery of unlawful expenditure from participating official by action)
- WV Code §11-8-30 (criminal liability of official violating provisions of article; proceeding for removal)



West Virginia Governmental Ethics Act

And conflicts of interest



A Refresher

Developing an appreciate the interrelationship
between the standards of
the **Ethics Act**

(West Virginia Code § 6B-2-5)

and

the **Pecuniary Interest Statute**

(West Virginia Code § 61-10-15)

Pecuniary Interest Statute

Dates back to 1879

Applies only to:

- county school boards,
- superintendents, principals, supervisors, and teachers;
- members or officers of county commissions and other county or district boards

When the Pecuniary Interest Statute prohibits something, it doesn't matter if the Ethics Act appears to allow it. It is illegal to do it.

Ethics Act

First enacted in 1989

Applies across-the-board to

- public officials and employees throughout state, county and municipal government

When the Ethics Act prohibits something, it doesn't matter if the Pecuniary Interest Statute appears to allow it. It is illegal to do it.

Pecuniary Interest Statute

Often it is harsher than the Ethics Act by absolutely prohibiting a county board or school official from doing something

Example: When a county board is forbidden to enter into a contract or transaction, it usually does not make a difference if the board member or school official who has the conflict of interest “recuses” himself or herself

Ethics Act

Sometimes it does not absolutely prohibit a county board or school official from doing something. Instead, the Act contains exceptions

Example: Sometimes a forbidden transaction is permitted when the board member or school official who has the conflict of interest “recuses” himself or herself

Persons Subject to the Ethics Act

West Virginia Code 6B-2-5(a)

All elected and appointed public officials and public employees, whether full time or part time

Their respective boards, including county school boards

Minimum Ethical Standards

meant to “maintain confidence in the integrity and impartiality of the governmental process in the state of West Virginia and its political subdivisions”

-- W. Va. Code § 6B-1-2

Selected Standards from the Act

1. Use of public office for private gain
2. Interests in public contracts
3. Employment by regulated persons & vendors
4. Limitations on voting

-1-

Use of public office for private gain

West Virginia Code § 6B-2-5(b)

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

Exemption #1

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

Exemption #2

Using bonus points acquired through participation in frequent traveler programs while traveling on official government business: *Provided*, That the official's or employee's participation in such program, or acquisition of such points, does not result in additional costs to the government

Exemption #3

***The case of the high
school show choir
director***

Advisory Opinion No. 2006-17

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Interests in public contracts

West Virginia Code § 6B-2-5(d)

No school board official or 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

***a spouse with whom the individual is living as husband and wife, or any dependent child, grandchild or parent**

West Virginia Code § 6B-1-3(f)

***“Business with which they are associated”* means that the public official or an immediate family member is one of these**

- director
- officer
- owner
- employee
- compensated agent
- holder of 5% or more of any class of the outstanding stock

The employment exception

“Nothing *herein* shall be construed to prevent or make unlawful the employment of any person with any governmental body”

The “*limited interest*” exception

Absent bribery or a purpose to defraud, the official or employee, member of his or her immediate family, or a business with which he or she is associated shall **not** be considered to have a prohibited financial interest if the interest:

- does not exceed \$1000 in the profits or benefits of the public contract(s) in a calendar year, or
- is as a creditor of the public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than \$5000

If the official or employee, member of his or her immediate family, or a business with which he or she is associated has a limited interest in the profits or benefits of a contract

- 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 interest
- he or she may not vote on the matter and must recuse him/herself

For a public official's recusal to be effective, it is necessary for the public official:

- 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

Recusal

West Virginia Code § 6B-2-5(j)(3)

***The case of the
superintendent and the
local country club***

Advisory Opinion No. 2010-21

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Employment by regulated persons & vendors

West Virginia Code § 6B-2-5(h)

No full-time school board official or employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who is, among other things, a vendor of the board, if the official or employee, or his or her subordinate, exercises “authority or control” over a board contract with the vendor

“Exercises authority or control over a public contract”
with a vendor includes, but is not limited to:

- drafting bid specifications or requests for proposals,
- recommending selection of the vendor,
- conducting inspections or investigations,
- approving the method or manner of payment to the vendor,
- providing legal or technical guidance on the formation, implementation or execution of the contract, or
- taking other action which may affect the financial interests of the vendor and requiring the exercise of the individual’s judgment as to the propriety of the act

“Seeking” employment with a vendor includes:

- responding to unsolicited offers of employment
- any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment

Seeking “employment with” a vendor includes:

- professional services
- other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor

Exemption?

Exemptions issued by the Ethics Commission or its Executive Director

- Series 3 of the Ethics Commission's legislative rules

Permission granted by an exemption:

To engage in a transaction that would otherwise be prohibited by the ban on purchasing, selling or leasing personal property to or from a regulated person or vendor under W. Va. Code § 6B-2-5(h)

Exemption?

***The case of the principal
employed by one of his
school's coaches***

Advisory Opinion No. 2013-02

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Limitations on voting

West Virginia Code § 6B-2-5(j)

Public officials may not vote on a matter in which they, an immediate family member* or a business with which they or an immediate family member* is associated has a financial interest

***a spouse with whom the individual is living as husband and wife, or any dependent child, grandchild**

West Virginia Code § 6B-1-3(f)

“Business with which they are associated”
means that the public official or an immediate family member is one of these

- director
- officer
- owner
- employee
- compensated agent
- holder of 5% or more of any class of the outstanding stock

A public official who is employed by a financial institution, whose primary duties include consumer and commercial lending, **may not vote on a matter directly affecting a customer of the institution if the official is, or in the past 12 months has been, directly involved in approving loans for that customer exceeding a total of \$15,000**

“may” vs. “shall” – a note

Nor may a public official vote on a personnel matter involving the public official's spouse or relative*

“Relative” means 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

West Virginia Code § 6B-1-3(I)

“Immediate family member”

with respect to an individual means a spouse with whom the individual is living as husband and wife and any **dependent child or children, **dependent** grandchild or grandchildren and **dependent** parent or parents.**

West Virginia Code § 6B-1-3(f)

If the official, spouse, immediate family members or relatives, or business with which they are associated, are affected as a member of, and to no greater extent than, any other member of a profession, occupation or **class** of persons or businesses

A “class” consists of not fewer than five similarly situated persons or businesses

Exception # 1 to Rule 4
West Virginia Code § 6B-2-5(j)(2)(A)

If the matter affects a publicly traded company, and

- the official, or dependent family members individually or jointly own less than 5% of the issued stock
- the value of the stocks so owned is less than \$10,000, and
- prior to voting, the official discloses his or her interest in the publicly traded company

Exception # 2 to Rule 4
West Virginia Code § 6B-2-5(j)(2)(B)

The case of the board member voting on a budget that includes a raise for his wife

Advisory Opinion No. 2010-13

Advisory opinions issued by the Ethics Commission

Series 2 of the Ethics Commission's legislative rules

The WV Ethics Commission's contact information:

Phone: (304) 558-0664

Toll free: 1-866-558-0664

Web site: <http://www.ethics.wv.gov>

“Phone a Friend”

Sanctions

Ethics Commission Sanctions

West Virginia Code § 6B-2-4

Public reprimand (r)(1)(A)

Cease and desist order (r)(1) (B)

Order of restitution (r)(1)(C)

Fine not to exceed \$5000 (r)(1)(D)

Reimbursement to the Commission (r)(1)(E)

Termination or removal recommendation (r)(2)

Civil proceedings to enforce sanctions (r)(3)

Reference to Prosecuting Attorney (v)(i)



West Virginia's Pecuniary Interest Statute

Where is this found in the Code? Why there?

Organization of WV Code

- Chapter (Broadest description of topic)
- Article (subcategory of Chapter)
- Section (subsection of Article)
- e.g., 18A-4-7a
- Chapter: School Personnel
- Article: Salaries, Wages and Other Benefits
- Section: Employment, promotion and transfer of professional personnel; seniority.

The Pecuniary Interest Statute

Chapter 61

- Crimes and their Punishment

Article 10

- Crimes Against Public Policy

Section 15

- Pecuniary interest of county and district officers, teachers and school officials in contracts; exceptions; offering or giving compensation; penalties.

The Pecuniary Interest Statute

Financial conflicts of interest

- Stricter than Ethics Act.

The Pecuniary Interest Statute

“It is unlawful for any . . . district school officer, secretary of a board of education, supervisor or 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 member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control”

The Heart of the Statute:

It is unlawful for the school system to enter into a contract for goods or services if:

- any board member, administrator, or employee
- who has voice, influence, or control over the decision to contract or purchase
- has a direct or indirect financial interest in the proceeds.

The Pecuniary Interest Statute is broad enough to cover expenditures at the school level

The Pecuniary Interest Statute

Possible Penalties for Violating the Pecuniary Interest Statute

- Removal from office
- Revocation of any professional certificates
- Conviction of a misdemeanor punishable by a fine of \$50-\$500 and up to one year in jail
- Required to repay any expenditure by the county board that violated the Statute, even if the official did not receive the payment/profit
- Payment of the attorney fees and court costs incurred by any private citizen in enforcing the Statute

You have “voice, influence, or control” over a transaction between the school board and another party if you:

- vote for the transaction in whole or in part, or
- recommend approval of the transaction, or
- *are in a position, organizationally, to do either, even if you don't vote or don't recommend (Yikes!)*

“Voice, Influence, or Control”

As a school board member or official, you are **financially interested, directly or indirectly**, if the business or party with whom the board does business is:

- you
- your spouse
- your dependent child
- (business) owned in whole or part by you, your spouse, or your dependent child, or
- with certain exceptions, your employer, your spouse's employer, or your dependent child's employer.

“Financially Interested, Directly or Indirectly”

If member or school official is pecuniarily interested in the proceeds of a contract or purchase, it doesn't matter that he or she made no profit or lost money, or that the contract is a great deal for the school system.

Because the law is intended to protect the public purse, it is strictly construed against school officials, even where they violate it with the very best of intentions.

**It Doesn't Matter if the Transaction is Profitable to the
Member or Official**

As the W. Va. Attorney General has observed:

“No showing of bad faith, corruption or evil intent is required under this section, for the conduct proscribed by this statute is unlawful precisely because it is forbidden by statute, not because it is inherently evil, corrupt or immoral.”

As the W. Va. Supreme Court has opined:

“Significantly, the statute does not require that there be actual corruption on the part of the government agent or that there be any actual financial loss sustained by the government. The statute consequently establishes an objective standard of conduct. It is directed not only at dishonor, but also at conduct that tempts dishonor.”

Exceptions:

The Pecuniary Interest Statute Does Not Prohibit:

1. employing a school board member's or official's spouse as a principal, teacher, or service employee in the public schools (special rules apply)
- 2. designating as a depository for the board's funds a bank in which a school board member or official has a pecuniary interest (special rules apply)**
3. publications in newspapers required by law to be made
- 4. officials who have a pecuniary interest in a public utility which is subject to regulation by the Public Service Commission of this state.**

Exceptions:

The Pecuniary Interest Statute Does Not Prohibit:

5. transactions with the employer of a school board member or official, or the employer of a spouse of a member or official, but only if the employee:

- is salaried (i.e., receives no commission or additional benefit as a consequence of the contract)
- is not a party to the contract
- is not an owner, shareholder, director, or officer of a private party under the contract
- receives no commission, bonus, or other direct remuneration or thing of value by virtue of the contract
- does not participate in the deliberations or awarding of the contract (recusal)
- does not approve, vote for, or authorize payment for services or supplies furnished under the contract.

Exceptions:

The Pecuniary Interest Statute Does Not Prohibit:

5. transactions with the employer of a school board member or official, or the employer of a spouse of a member or official, *but only if the employee:*

...

This exception to the rule was seen as an important change to the Pecuniary Interest Statute.

Previously the rule did not allow for such transactions under any conditions; harsh seemingly unjust penalties, removal from office of well-intentioned board members

Exceptions:

The Pecuniary Interest Statute Does Not Prohibit:

6. undue hardship exception

Where application of the Pecuniary Interest Statute would result:

a) in the loss of a quorum in a public body or agency,

b) in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency,

the affected governmental body or agency may make **written application** to the West Virginia Ethics Commission for an exemption

Exception are not frequently approved

Our Supreme Court has ruled that even if the board member is not the board member (or school official) who has the prohibited financial interest in a transaction between the board and another party, *if the board members know of the financial interest of the other board member or school official and nevertheless vote in favor of the transaction, he or she is guilty of official misconduct and can be removed from office*

Important information for your Board Members

EXCEPTION: Board Member Related to Employee of Board

- Pecuniary Interest EXCEPTION: Allows employment of a spouse of a board member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county (just these three categories)
- Question: What if a board member's spouse was hired as "director of math instruction," an administrator at the central office?
 - Is this Permissible ?

EXCEPTION: Board Member Related to Employee of Board

- The Whole Board Suffers: When a person with a pecuniary sits on the board and the board enters into an agreement with a vendor with whom that board member has the pecuniary interest
 - Board member with the pecuniary interest may be removed from office, have professional licenses revoked, and worse
 - Board members who knew of the other board member's financial interest and nevertheless voted for the contract can be removed from office under a different statute for **malfeasance**.

- ❑ The Ethics Commission is authorized to publish guidelines for school officials to follow to stay out of trouble under the **Pecuniary Interest Statute**.
- ❑ School officials may request written advisory opinions from the Ethics Commission on whether a proposed course of action would violate the **Pecuniary Interest Statute**
 - ❑ The Commission must issue an advisory opinion within 30 days
 - ❑ They are published so that everyone can learn from the experiences of others, but to the fullest extent possible the published opinions are stripped of material that would reveal the identities of the persons who requested them

Get Advice in Advance!

Ethics Commission Advisory Opinion No. 2013-22 (June 6, 2013) **(modified)**

- A school employee's private company may provide contracted services to his/her employing school board under certain conditions.
- A school employee who also owns a private business may contract with and provide services to his/her employing school board so long as:
 - 1) the public employee does not exercise direct authority or control over the selection of the contracts made with the public employer,
 - 2) the public employee will not perform any work for his private company while working for his public employer, and
 - 3)* the school employee has no voice, influence or control whatsoever over the awarding or letting of that contract.

NOTE * The requestor of this advisory opinion was a **State** employee. State employees are not subject to the Pecuniary Interest Statute. School employees are. However, the opinion is still relevant to school boards. For that reason, the third condition above was added.

Any person acting in **good faith** reliance upon any such Ethics Commission guideline or advisory opinion

- is immune from the sanctions of the Pecuniary Interest Statute, and
- shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of the Pecuniary Interest Statute.
- **So ALWAYS ask if you are unsure**
- (However, there is no immunity or defense in such cases as to other West Virginia laws that may have been coincidentally violated by the same conduct)

Civil and Criminal Immunity

Real and Personal, a play in one act

- 8 actors (readers) needed
 - The Players:
 - Superintendent Saver
 - Board members:
 - Thelma Thrifty
 - Phil Follower
 - Sal Spender
 - Alice Angry
 - Bob Brainy
 - Community Member 1
 - Community Member 2



Handout & Activity

Real and Personal, a play in one act

- Handouts
 - The Play
 - The List
- Team Up in Discussion Groups
 - Goal: name as many legal issues as you can spot regarding the sale of surplus real and personal school property



Handout & Activity

Final Questions



Good luck for the 2014-2015 School Year



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