

ADVISORY OPINION NO. 89-10 SUPP.

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

A City Attorney

OPINION SOUGHT

Whether an exemption should be granted to allow a City to continue to contract with a Bank in which a City Council member owns stock having a fair market value of over thirty thousand dollars?

OTHER FACTS RELIED UPON BY THE COMMISSION

Each fiscal year the City Council approves the depository that will handle the city funds. All financial institutions in the City are considered and the Council passes on all of them in total. The decision to determine which bank or banks to be used is left to the discretion of the Mayor and Recorder-Treasurer.

The City maintains two checking accounts. The first account is for the City Building Commission. The Commission began its relationship with the Bank during the summer of 1989. This Bank was chosen because it provided the lowest costs for the services required (bids were accepted from other banks). The second checking account is the City's Parks and Recreation account. The City began using this Bank several years ago when it was decided that the City's accounts were to be divided between the different banks in the area.

The City began using the services of the Trust Department of the Bank during the latter part of 1989. With the demise of the Consolidated Investment Fund, the City had no vehicle in which to deposit excess cash where it would not be tied up for long periods of time. The Bank contacted the City concerning a governmental securities mutual fund which pays a higher interest rate than certificates of deposit but keeps the funds liquidated. No other Bank in the area has approached the City regarding this type of account.

One city council member has slightly over thirty thousand dollars of stock in the Bank that contracts with the City.

However, the affected governmental body has submitted a written application to the Commission for an exemption. If the City were unable to use the services of the Bank, it would cause a loss in interest revenue and an increase in Trust Department costs. It would further be an undue hardship on the City to purchase back bonds given to the Bank and place them with another institution.

#### PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) states in pertinent part that... no elected official...may be a party to or have an interest in the profits or benefits of a contract with the governmental body over which he or she has direct authority...

West Virginia Code 6B-2-5(d)(2) states in pertinent part that... an elected...official...shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this section is an interest not exceeding ten percent...of the outstanding shares of a corporation or thirty thousand dollars, whichever is the lesser.

West Virginia Code 6B-2-5(d)(3) states in pertinent part that... where the provisions of subdivision (1) and (2) of this subsection would result...in excessive cost, undue hardship, or other substantial interference with the operation of a...municipality, ...or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption...

#### ADVISORY OPINION

An analysis of the facts presented and the pertinent statutory provisions of subsections 5(d)(1), (2) and (3) follows:

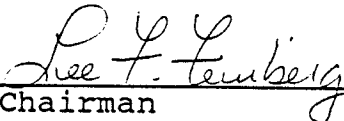
1. The City Council member is an elected public official.
2. The City Council member has more than a limited interest in the Bank which is contracting with the governmental agency over which he has direct authority.
3. For the purpose of this section "limited interest" is defined as an interest not exceeding ten percent of the outstanding shares of stock issued by a corporation or thirty thousand dollars, which ever is the lesser.
4. Therefore, it would be a violation of subsection 5(d)(1) for the City to continue to contract with a Bank in which a City Council member has more than a limited interest.

Council member has more than a limited interest.

5. However, the affected governmental body has submitted a written application to the Ethics Commission for an exemption, citing excessive cost, undue hardship and substantial interference.

6. Since three other banks in the area have had the opportunity to bid for services other than trust services, the Commission finds that excessive cost, undue hardship and substantial interference would otherwise result if the exemption is not granted. Therefore, the Commission hereby grants the requested exemption.

7. Assuming, as with the previously identified banking services, that the City has investigated and obtained the lowest costs for Trust Department services, the Commission grants the requested exemption based on excessive costs, and undue hardship.

  
Chairman