

ADVISORY OPINION NO. 89-72

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 4, 1990

GOVERNMENTAL BODY SEEKING OPINION

An attorney on behalf of the Fund

OPINION SOUGHT

A request that the Ethics Commission provide exemptions and issue opinions on the following matters:

1. The private directors of the Fund request exemptions from the financial disclosure statement filing requirements of subsection 6B-2-6 of the Ethics Act, or, in lieu of such an exemption, that they be permitted to file the statements with the Executive Director of the Fund?
2. Whether the private directors of the Fund bring with them "their own unique personal prestige" and are permitted exemptions to use their office for private gain for this reason pursuant to section 5(b)(2) of the Ethics Act?
3. Does subsection 5(d) of the Ethics Act apply only to direct contracts with the Fund?
4. To the extent there is any inconsistency between the provisions of subsection 5(d) of the Ethics Act and the conflict of interest statute contained in the Act governing the Fund, which statute would control the actions of the Fund?
5. Are certain gifts received by the public officials or public employees of the Fund prohibited under subsection 5(c) of the Ethics Act?
6. Must a person who is required to file a financial disclosure statement pursuant to 6B-2-7 of the Ethics Act include income, profits or benefits from public contracts, interest groups or categories, debts, debtors, and gifts of or pertaining to the person's spouse as well as to himself?

OTHER FACTS RELIED UPON BY THE COMMISSION

Six individuals with a variety of occupations make up the Private Directors of the Fund. None of the directors nor any member of the directors' immediate families or businesses they are associated with are parties to contracts with the Fund but, the directors may benefit indirectly.

Public officials and public employees of the Fund who participate in the sale of bonds or other securities attend dinners and other social activities where they receive gifts of nominal value and free taxi service.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

Financial Disclosure

West Virginia Code 6B-2-6(a) states in pertinent part that the requirements for filing a financial disclosure statement shall become initially effective on the first day of February, one thousand nine hundred ninety, for all persons holding public office or employment on that date and who are otherwise required to file such a statement under the provisions of this section.

West Virginia Code 6B-2-6(a)(2) states that all members of state boards, commissions and agencies appointed by the governor are required to file a financial disclosure statement.

West Virginia Code 6B-2-7(3) states that the identification, by category, of every source of income over five thousand dollars received during the preceding calendar year, in his or her own name or by any other person for his or her use or benefit, by the person filing the statement, and a brief description of the nature of the services for which the income was received. This subdivision does not require a person filing the statement who derives income from a business, profession or occupation to disclose the individual sources and items of income that constitute the gross income of that business, profession or occupation.

West Virginia Code 6B-2-7(8) states that the source of each gift having a value of over five hundred dollars received from a person having an interest in a governmental activity by the person filing the statement when such gift is given to the person filing the statement in his or her name or by any other person for his or her use or benefit during the preceding calendar year, except gifts received by will or by virtue of the laws of descent and distribution, or received from one's spouse, child, grandchild, parents or grandparents, or received by way of distribution from an inter vivos or testamentary trust established by the spouse or child, grandchild, or by an ancestor of the person filing the statement. As used in this subdivision any series or plurality of gifts which exceeds in the aggregate the sum of five hundred dollars from the same source or donor, either directly or

indirectly, and in the same calendar year, shall be regarded as a single gift in excess of that aggregate amount.

Private Gain

West Virginia Code 6B-2-5(b)(1) states in pertinent part that a public official...may not 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...

West Virginia Code 6B-2-5(b)(2) states in pertinent part that...there may be certain public officials or public employees who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skill and abilities, or other personal gifts or traits...

Public Contracts

West Virginia Code 6B-2-5(d)(1) states in pertinent part that no appointed public official...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 with governmental body over which he or she has direct authority...

West Virginia Code 6B-2-5(d)(2) states in pertinent part that...in the absence of bribery or a purpose to defraud, an...appointed public official...or business with which he or she is associated 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 partnership or the outstanding shares of a corporation or thirty thousand dollars, whichever is the lesser...

Gifts

West Virginia Code 6B-2-5(c)(1) states in part that an official or employee of the state may not solicit any gift. No official or employee may knowingly accept any gift, directly or indirectly, from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency.

(B) Is engaged in activities which are regulated or controlled by his or her agency.

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

West Virginia Code 6B-2-5(c)(2) states in pertinent part that...the provisions of subdivision (1) of this subsection do not apply to:

(A) Meals and beverages; or

(C) Unsolicited gifts of nominal value or trivial items of informational value...

Other Provisions

West Virginia Code 6B-1-4 states that the provisions of this chapter shall be in addition to any other applicable provisions of this code and shall not be deemed to be in derogation of or as a substitution for any other provisions of this code, including but not limited to article five-a, chapter sixty-one of this code and the remedies and penalties provided in this chapter shall be in addition to any other remedies or penalties which may be applicable to any circumstances relevant to both.

ADVISORY OPINION

1. Subsection 6B-2-6(a)(2) requires all members of State boards appointed by the Governor who hold office on February 1, 1990 to file a financial disclosure statement. Directors of the Fund are appointed by the Governor pursuant to West Virginia Code Section 31-18-4. Therefore, any Director holding office on February 1, 1990 must file a financial disclosure statement with the Ethics Commission.

2. This request does not state what financial gain is realized by the Directors as a result of their office or prestige. Therefore, the Commission needs additional information before rendering an opinion on this matter.

3. Subsection 5(d) prohibits a public official from being a party to or receiving an interest in the profits or benefits of a public contract with the governmental body over which the public official has direct authority. An example provided by the requestor is when a Director is also a broker on the sale of a house where the loan or other financial assistance was obtained from the Fund.

In the above example a Director would be receiving benefits or profits from a public contract with a governmental body over which he has direct authority. If the private Director's interest is not limited, that is, less than 10% or \$30,000 it would be in violation of subsection 5(d)(1).

4. Subsection 6B-1-4 states that the provisions of this chapter shall be in addition to any other applicable provisions of this code and shall not be deemed to be in derogation of or as a substitution for any other provisions of this code,...and the remedies and penalties provided in this chapter shall be in addition to any other remedies or penalties which may be applicable to any circumstances relevant to both.

Although the Fund statutory provision allows the Directors to receive an interest in the benefits and profits of contracts with the Fund under certain circumstances, it would be a violation under the Ethics Act since the Act specifically prohibits a public official from having more than a limited interest in the benefits or profits of a public contract with the Fund, without exemption.

5. This question refers to a public official's acceptance of gifts such as, "closing dinners", receptions, mementos of nominal value and taxi service to the airport and closing activities.

Subsection 6B-2-5(c)(1) prohibits public officials from knowingly accepting any gift from a person whom the official knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency,

(B) Is engaged in activities which are regulated or controlled by his or her agency, or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

However, certain gifts are presumed in subsection (c)(2) not to impair the impartiality and independent judgment of a public official. These gifts include:

(A) Meals and beverages; and

(C) Unsolicited gifts of nominal value.

Therefore, it would not be a violation of the Act for the director to receive mementos of nominal value and attend closing dinners and receptions. Also, it is the Commission's opinion that under the circumstances described, acceptance of free taxi service would not be a violation.

6. Financial disclosure statements are required under the Act to contain every source of income over \$5,000 received in the individual's name filing the statement or by any other person for the individual's profit or benefit. (See, 6B-2-7(3))

Also, every gift must be listed on the financial disclosure statement having a value of over \$500 that is received from a person having an interest in a governmental activity by the person filing the statement in his or her name or by any other person for his use or benefit during the preceding calendar year. Any series or plurality of gifts which exceeds the aggregate sum of \$500.00 for the same source in the same year shall be considered a single gift. (See, 6B-2-7(8))

Both provisions require disclosure of gifts or income received by an individual in his or her name or by any other person for his or her (the official's) use or benefit.

If an individual's spouse receives income over \$5,000 for the benefit or use of the individual filing the statement, then that must be disclosed on the statement or if the spouse receives a gift having a value over \$500 for the use or benefit of the individual filing the financial disclosure it must also be reported.

Additionally, the Commission does not interpret subsection 6B-2(7)(3) to require income received as a result of the individual's spouse's income from a salary of regular employment to be reported on the financial disclosure statement.

However, it is the Commission's opinion that subject to the exceptions identified in sections 6B-2-7 and 6B-2-8, a public official or employee does have to report gifts of over \$500 given to a spouse.


Chairman