

ADVISORY OPINION NO.90-190

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 3, 1991

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of Appointed Part-time Public Officials

OPINION SOUGHT

Whether the term "any person" as it is used in subsection 6B-2-3 of the Ethics Act which provides immunity from prosecution under West Virginia Code 61-10-15 only applies to persons covered by the Act?

OTHER FACTS RELIED UPON BY THE COMMISSION

The requestor states that subsection 6B-2-3 of the Ethics Act seems somewhat ambiguous. This section provides that "a person subject to the provisions of this chapter", but thereafter states that "and any person" acting in good faith reliance on any such opinion shall be immune from the sanctions of the Ethics Act and those set forth in West Virginia Code §61-10-15.

Thus, subsection 6B-2-3 could be construed as providing immunity only to a "person subject to the provisions of the Act". However, the later phrase "any person" could be broadly interpreted to offer immunity to everyone involved in the actions for which an advisory opinion is sought.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 61-10-15 states in pertinent part that...it shall be unlawful for any member of a county commission ...school officer, secretary of a board of education...superintendent, principal or teacher of public schools, or any member of any other county or district board, or for any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member, officer, secretary, supervisor, superintendent, principal, or teacher, he may have any voice, influence or control...Any person, firm or corporation that offers or gives any compensation or thing of value or forbears to perform any act whatever to any officers or persons hereinbefore named or to or for any other person with the intent to secure the influence, support or vote of such officer or person for any contract, service, award or other matter...shall guilty of a misdemeanor...

West Virginia Code Section 6B-2-3 states in pertinent part that... **A person subject to the provisions of this chapter** may rely upon ...an advisory opinion of the Commission, and **any person** acting in good faith reliance on any such guideline or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of the code 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 this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.

West Virginia Code Section 6B-2-5(a) states that the provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.

ADVISORY OPINION

The Ethics Act was created to establish a code of minimal ethical conduct for **public officials** and **public employees**. Subsection 6B-2-5(a) specifically states that the provisions of the Ethics Act only apply to public officials and public employees in full or part-time service.

The language in Subsection 6B-2-3 specifically provides immunity from the sanctions established in subsection 61-10-15 **only** to "persons covered by the Ethics Act". The Commission would note that the Ethics Act does not have jurisdiction to proscribe standards of conduct for private individuals, nor can they offer immunity from prosecution to persons who are not otherwise required to follow the rules of minimal ethical conduct established by the Ethics Act.

The legislative intent of West Virginia Code §61-10-15 is to implement public policy of this State. It is designed to protect public funds and give official recognition to the fact that a person cannot properly represent the public when transacting business with himself.


Further, West Virginia Code §61-10-15 is applicable to private individuals only in that it stipulates that any person, firm, or corporation that offers or gives any compensation or thing of value or forebears to perform any act whatever to any person of influence with the intent to secure support or vote for any contract, service or other matter shall be guilty of a misdemeanor.

This subsection addresses a different factual scenario than that contemplated in 6B-2-5(d)(1), which is the most parallel provision to West Virginia Code §61-10-15. Subsection 6B-2-5(d)(1) prohibits a public employee or official from having more than a limited interest in the profits or benefits of a public contract over which he has direct control.

Further, subsection 6B-2-5(d)(3) offers a public official or employee the opportunity to apply for an exemption from this prohibition under certain circumstances. In instances where the provisions of the subdivisions (d)(1) would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency the affected governmental body make a written application to the Ethics Commission for an exemption.

The second part of West Virginia Code §61-10-15 which relates to private individuals (not covered by the Ethics Act) pertains in essence to bribery and extortion and is the State counterpart to a federal Hobbs Act violation. This provision makes it a crime for private individuals to offer or give public employees or officials anything of value with the intent to secure their vote, a contract or other support. It is inconceivable that the Ethics Commission would grant immunity from prosecution to any individual guilty of such an offense.

Therefore, the only individuals receiving immunity from the Ethics Commission would be persons covered by the Act who apply for and receive an exemption allowing them to contract with their governmental agency pursuant to subsection 6B-2-5(d)(3) or persons relying on or seeking advisory opinions stating that they do not fall within the purview of subsections 6B-2-5(d)(1) and (2). For example, persons who have a limited interest in the public contract, who do not possess the requisite direct authority or control over a contract, or when the contract is not with an "immediate" family member.


Chairman