

ADVISORY OPINION NO. 91-20

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 4, 1991

GOVERNMENTAL BODY SEEKING OPINION

A Superintendent of a County School System

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a County Board of Education to contract with a Company for services when the County Board of Education member's spouse has more than a limited interest in the Company?

FACTS RELIED UPON BY THE COMMISSION

A County Board of Education member's spouse has an ownership interest in a mechanical contracting Company. The spouse holds 48% of the outstanding shares of stock and is an officer and director of the Company. However, the County Board of Education member is not a shareholder, officer, director or employee of this Company.

The County Board of Education has entered into contracts with the Company both directly and indirectly through general contractors for which the Company was a subcontractor. It is not known what interest of profits or benefits the spouse will receive in the contracts where her Company acts as the subcontractor. The Company has been involved in the construction of schools in the County and has also installed and/or repaired the mechanical systems of many of the County schools.

The requestor states that it is the practice of the County Board of Education to secure competitive bids (at least three whenever possible) both for construction projects, maintenance and repair work. When accepting a competitive bid from a general contractor and awarding the contract thereon, the Board of Education does not have the authority to dictate which subcontractors will be used to fill the requirements of the awarded contract. That decision is left to the general contractor.

According to the requestor, the inability of the County Board of Education to enter into such competitively bid contracts would result in reduced competition and increased costs thereby creating undue hardship and substantial interference with the operation of the County Board of Education.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use ...her office or the prestige of...her office for...her own private gain or that of another person.

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected public official...or member of her immediate family or business with which she is associated may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which...she may have control...

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of her immediate family or a business with which 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 subsection is:

(A) An interest:

- (i) not exceeding ten percent of the partnership or the outstanding shares of a corporation;
- or
- (ii) Not exceeding thirty thousand dollars interest in the profits or benefits of the contract;...

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...where the provisions of this subsection 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...county school board...the affected governmental body or agency may make a written application to the Ethics Commission for an exemption...

West Virginia Code Section 6B-1-2(c) states in pertinent part that...local governments have many part-time public officials serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official...such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code Section 6B-2-5(e) states in pertinent part that...no...public official...may knowingly and improperly disclose any confidential information acquired by...her in the course of... her official duties nor use such information to further...her personal interests or the interests of another person.

ADVISORY OPINION

Public Contract

Pursuant to subsection 6B-2-5(d)(1) of the Ethics Act, a public official, a member of her immediate family or a business with which she is associated may not have more than a limited interest in the profits or benefits of a public contract over which she has direct authority or control.

The Commission finds that as an elected member of the County Board of Education, the public official has direct authority and control over the letting of the County Board of Education's public contracts.

In this instance, the spouse of a County Board of Education member owns 48% of the outstanding shares of stock of a company which is contracting either directly with the County Board of Education or as a subcontractor to the general contractor with the Board. It is not known what amount of profits or benefits the spouse would receive as a result of the contracts where the Company acts as a subcontractor and does not directly contract with the County Board of Education.

Therefore, it would be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for the County Board of Education to contract with a Company for services when the County Board of Education member's spouse has more than a limited interest in the Company.

However, the affected governmental body has submitted a written application to the Ethics Commission for an exemption stating that the enforcement of the prohibition contained in subsection 6B-2-5(d)(1) of the Ethics Act would result in excessive cost, undue hardship, or other substantial interference with the operation of the County Board of Education.

The County Board of Education has stated that contracts are awarded based on a competitive bid process and the Ethics Commission could grant an exemption on this basis. However, the Commission can not prospectively grant a blanket exemption to the County Board of Education. Instead, the Commission must consider each contract and subsequent requests for exemptions on a case by case basis. However, evidence that the Company has been awarded several competitive bids and that the spouse's Company submitted the lowest bid could demonstrate a basis for an exemption.

Further, West Virginia Code Section 61-10-15 provides that it is a criminal violation for any member of a County Board of Education to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract when he may have voice or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor.

However, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission shall be immune from the sanctions of West Virginia Code Section 61-10-15.

Private Gain

Pursuant to subsection 6B-2-5(b)(1) of the Ethics Act a public official may not knowingly and intentionally use her office or prestige for her own personal gain or the private gain of another.

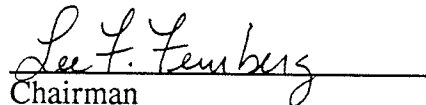
Voting

Subsection 6B-1-2(c) provides that certain conflicts of interest are inherent in part-time public service, however, the part-time elected official should seek to be excused from voting, recused from deciding or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter that has become "personal to her". The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly **or indirectly** in the matter, is affected in a manner which may influence her vote or would give the appearance of impropriety.

The Commission has previously determined that in order for a public official's recusal to be effective, it is necessary for the official to excuse herself from participating in the discussion and decision-making process by physically removing herself from the room during that period.

Confidential Information

The County Board of Education member should also be mindful of subsection 6B-2-5(e) of the Ethics Act which prohibits a public official from using confidential information acquired by her during the course of her official duties to further her personal interest or the interests of another. Therefore, the public official may not use any confidential information acquired by her as a County Board of Education member to assist the private Company to secure a public contract through a competitive bid process or otherwise.


Chairman