

ADVISORY OPINION NO. 91-48

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 11, 1991

GOVERNMENTAL BODY SEEKING OPINION

A Part-time Appointed Public Official

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a part-time appointed public official to have more than a limited interest in the profits or benefits of a private contract?

FACTS RELIED UPON BY THE COMMISSION

The requestor is a part-time appointed public official. He is also the Executive Director of a private, non-stock, non-profit, IRS approved 501(c)(3) organization. This Organization was established under Federal, State and Local guidelines as a Community Action Agency. The Organization is not a governmental agency nor is it an extension of any such agency. The Organization operates through contract grants and donations from the private and public sector.

A State Department has requested that the Organization assume the management and control of the present Homeless Program in the County. This would require that the Organization provide transient and temporary shelter, placement in long term shelters, counseling, need assessment and outreach.

In developing this package plan, the State Department, working in conjunction with the Director of the Organization's Homeless Program, specified a small hotel as the desired facility for the Program. This hotel is the only facility available which meets the proposed program needs in the County.

The requestor has a 1/3 ownership interest in the hotel which is the proposed facility for the Homeless Program. Immediately upon being informed that his property was the selected site for the Homeless Program, the Executive Director recused himself from any deliberations, decisions, negotiations and arrangements relating to the Program. The Organization's Board President and the Director of the Homeless Program have been working with the State Department on the entire package.

The proposed contract for the use of the hotel would exist between the private Organization and the owner of the hotel and would be considered private in nature. The proposed contract would extend for a period of one year, with the rental fee for the 15 room hotel being \$9,000 per year. The requestor's 1/3 interest would amount to approximately \$3,000.

The present cost of temporary housing for the participants in the program is over \$10 per night with each client being housed for up to 30 days. Currently the number of program participants is 15 and the total cost of the Program is \$4500 per month. Under the proposed contract the hotel facility would offer a total rental cost of \$750 per month and would save the Program \$3750 per month.

The Executive Director of the Organization does not have any authority or control over the letting of the proposed contract, nor did he solicit, seek or initiate the proposal. Further, as noted above, the requestor has recused himself from participating in any discussions regarding this matter.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no appointed public official...or a business with which he...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 he...may have control...Provided, however, that nothing herein shall be construed to prohibit a...part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he...may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

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The West Virginia Ethics Act was established to create a code of minimal ethical standards of conduct for public officials and public employees. Subsection 6B-2-5(d)(1) prohibits a public official or a public employee from having more than a limited interest in the profits or benefits of a **public** contract over which he has direct authority or control.

The Commission would note that in this instance the requestor would not have direct authority or control over the contracts of the State Agency or the letting of the specific contract, which provides for the use of the hotel facilities, either in his capacity as the Executive Director of the private Organization or as a part-time appointed public official.

The contract described by the requestor would exist between the owner of the hotel and a private entity. The fact that the owner of the hotel is a public official is inconsequential in this analysis since the contract would be considered **private** in nature.

Therefore, it would not be a violation of the Ethics Act for the part-time appointed public official to have more than a limited interest in the profits or benefits of a contract for the use of facility in which he has a 1/3 ownership interest since, the contract would be considered private in nature.

Although the contract outlined in this request would be considered private in nature and the requestor does not have authority or control over the letting of such contract, the Commission would like to emphasize that subsection 6B-2-5(d)(1) of the Ethics Act specifically provides that a **part-time appointed public official** may have more than a limited interest in the profits or benefits of a public contract over which he may have authority or control provided the official recuses himself from voting or deciding a matter and fully discloses the extent of his interest in the public contract.


Chairman