

ADVISORY OPINION NO. 93-42

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 2, 1993

GOVERNMENTAL BODY SEEKING OPINION

A County Commissioner

OPINION SOUGHT

Is it a violation of the Ethics Act for a County Commissioner who also serves as a member of the County Solid Waste Authority to have a pecuniary interest in the profits or benefits of public contracts?

FACTS RELIED UPON BY THE COMMISSION

The requestor is a County Commissioner and a member of the County Solid Waste Authority appointed by the WV Dept. of Natural Resources. He is also the president and majority stockholder of a privately held West Virginia corporation. This corporation would like to retail various commercial/industrial equipment that is used for material handling. Much of the equipment would be marketed for use in the recycling process centers and collection programs. The corporation would sell such equipment to both private and public entities such as state, regional, county and municipal governments throughout the state. Regional and county solid waste authorities would be the focus of the marketing effort.

The requestor has stated that the corporation will not conduct business with his own County Commission or the County Solid Waste Authority over which he has some direct authority and control.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official or public employee may not knowingly and 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(d)(1) states in pertinent part that...no elected or 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 or she 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.

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...a...public official...or...a business with which he...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; and
- (ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission... or 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 he may have any voice, influence or control.

ADVISORY OPINION

Pursuant to WV Code §6B-2-5(d)(1), a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. As the majority stockholder of the private corporation, the County Solid Waste Authority member would have more than a limited interest in the profits or benefits of any contract between the corporation and such Authority.

However, this section specifically states that a part-time appointed public official is exempt from this prohibition provided he seeks to be recused from deciding or evaluating the contract, is excused from voting on the contract, and has fully disclosed the extent of such interest in the contract. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

Since the requestor is an appointed member of the County Solid Waste Authority and such membership is considered part-time, it would not be a violation of WV Code §2-5-(d)(1) for the requestor to have a pecuniary interest in the profits or benefits of public contracts over which he may have direct authority and control provided he recuses himself, as outlined above, from the decisions to award such contracts.

The Commission would remind the Authority member that WV Code §6B-2-5(b)(1) prohibits a public official from using his public office or the resulting prestige for his own private gain or the personal gain of another. Specifically, the requestor may not use his official positions to obtain, increase, influence or promote business for his private corporation.

West Virginia Code §61-10-15

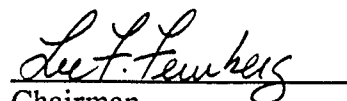
West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office.

Although the Commission previously determined that if the part-time appointed Authority member recuses himself from deliberations and voting on the public contract, he would be exempt from the prohibitions established in WV Code §6B-2-5(d)(1) (and therefore would not violate the Ethics Act) WV Code §61-10-15 requires only that a county official exercise voice or influence over the contract. The West Virginia Supreme Court, interpreting WV Code §61-10-15, has held that a public official has voice, influence or control over a public contract simply by virtue of his public position.

Further, the Court, in Fisher v. Jackson, 107 W.Va. 138. 147 S.E. 541 (1929) held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15.

Therefore, it would be a violation of WV Code §61-10-15 for the requestor to have a pecuniary interest in the profits or benefits of the public contracts over which he has direct authority or control as a County Commissioner or member of the County Solid Waste Authority.

The Commission notes, however, that it would not be a violation of the Ethics Act or WV Code §61-10-15 for the requestor to have a pecuniary interest in any public contract if he does not have authority or control over such contract. Therefore, he would be permitted to sell equipment to other County Commissions and other Solid Waste Authorities.


Chairman