

ADVISORY OPINION NO. 94-16

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 2, 1994

GOVERNMENTAL BODY SEEKING OPINION

Executive Director of a Development Authority

OPINION SOUGHT

Is it a violation of the Ethics Act or West Virginia Code §61-10-15 for a County Commission to appoint to the Board of Directors of a Development Authority an individual who is employed by a banking institution that currently conducts business with that Authority?

FACTS RELIED UPON BY THE COMMISSION

A County Development Authority has recommended to the County Commission that a certain individual be appointed to the Authority's Board of Directors. The nominee, once appointed, will help the Development Authority put together commercial loan packages for the expansion of new businesses in the county. Authority Board members are not compensated for their service.

The nominee is an employee of a bank with job responsibilities which include handling commercial loans. In addition to receiving a salary, the nominee owns less than one percent of the bank's stock. The bank currently conducts business with the Development Authority and has worked with the Authority to finance economic development projects in the County.

The County Development Authority has a NOW checking account at the bank and will be opening three additional accounts with the appointee's employing institution. The opening of these additional accounts is being done because of federal deposit insurance restrictions and federal grant requirements and is not related to the nominee's potential service on the Authority's board. The Authority has additional accounts at another local bank. The nominee's bank is also one of several banks that have extended a line of credit to the Development Authority. The line of credit from the nominee's bank has not been drawn on.

In the past, the nominee's employing institution has participated in commercial loans to the Development Authority as well as to new businesses the Authority has assisted in expanding or locating. , Depending on the type of project, the Authority may control which lending institution gets to participate in the project financing. However, in other cases the expanding company decides what lending institution(s) will participate and negotiates the terms of the agreement.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no ...appointed public official...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 which such official...may have direct authority to enter into, or over which he or she may have control...

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

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county 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

The Ethics Act

Pursuant to West Virginia Code §6B-2-5(b)(1) a public official may not use his office or the resulting prestige for his own private gain or for the private gain of another. Therefore, the nominee, if appointed, should not use his position as a member of the County Development Authority to influence, obtain, increase, or promote his personal interests or the interests of his private employer.

West Virginia Code §6B-2-5(d)(1) provides that a public official may not be a party to, or have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. For the purpose of this section, limited interest is defined as an interest not exceeding ten percent of the outstanding shares of stock in a company or an interest of less than thirty thousand dollars in the public contract.

Although as a member of the Development Authority's Board of Directors the nominee may have control over the Authority's banking decisions and certain project financing decisions, he would have only a limited interest in such matters since he owns less than one percent of the outstanding shares of stock of the bank. Further, the Commission previously determined that **employees** of companies which are involved in public contracts have only a limited interest in such contracts.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for the nominee to serve as a member of a County Development Authority which may conduct business with his private employer.

The Commission notes that WV Code §6B-2-5(e) provides that a public official may not knowingly and improperly disclose any confidential information acquired by him in the course of his official duties nor use such information to further his personal interests or the interests of another person. Therefore, the nominee may not use any confidential information acquired as a public official to assist his employer in securing a public contract.

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 or she may have voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and is subject to removal from office. Members of the Board of Directors of a County Development Authority fall within the scope of this statute.

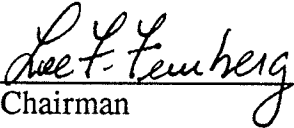
The requestor's nominee to the Authority Board is an employee and limited shareholder of a banking institution which conducts business with the County Development Authority. The WV Supreme Court of Appeals, in Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209 (WV 1988) held that a county officer is "pecuniarily interested, directly or indirectly, in the proceeds of any contract or service where the county officer is an **employee** of a private entity which is the other party to the contract with the county, whether or not the county officer is also a shareholder, director, or officer of such private entity." Therefore, the nominee, if selected would not be insulated from the sanctions of WV Code §61-10-15 merely because of the limited number of shares of stock he owns or his employee status with the bank.

Further, in Fisher v. Jackson, 107 W.Va. 138. 147 S.E. 541 (1929) the Court 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. West Virginia Code §61-10-15 sanctions the mere existence of a pecuniary interest, thus the nominee cannot obtain protection from the sanctions of the statute by abstaining from voting on any issues which affect the requestor's private employer.

Although the mere existence of an unused line of credit with the banking institution does not trigger the prohibition established by WV Code §61-10-15, any use of this line of credit or other services offered to the Authority by the bank, such as NOW checking accounts or commercial loans would fall within the purview of this section.

Therefore, it would be a violation of WV Code §61-10-15 for the nominee to serve as a member of a County Development Authority which conducts business with or receives services from his private employer.

The Commission notes that it is without authority to grant exemptions to WV Code §61-10-15.


Chairman