

ADVISORY OPINION NO. 94-27

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 6, 1994

GOVERNMENTAL BODY SEEKING OPINION

Executive Director of a County Development Authority

OPINION SOUGHT

Whether the Ethics Commission will reconsider Advisory Opinion #94-16?

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 that 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.

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.

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 addition to the facts outlined above, which were previously set forth in Advisory Opinion #94-16, the requester has submitted the enabling legislation of County Development Authorities for the Commission's consideration. Local Development Authorities are established under Chapter 7, Article 12 of the West Virginia Code. West Virginia Code §7-12-5(b) provides for the exclusion of members from voting where a conflict of interest is involved.

Specifically, WV Code §7-12-5(b) provides that "each member of a County Development Authority present during any meeting of the Authority when any question is put, shall vote unless he or she is immediately and particularly interested therein. Before such a question is put, any member having direct personal or pecuniary interest therein shall announce this fact and request to be excused from voting. The presiding officer of the meeting or a majority of the members present may then excuse the member from voting upon the question. The disqualifying interest must be such as affects the members directly, and not as a member of a class."

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

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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 requester'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 Supreme Court of Appeals of West Virginia, 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." (emphasis added). 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.

The Supreme 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. West Virginia Code §61-10-15 prohibits 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.

The Commission held in Advisory Opinion #94-16 that 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 because of this long- standing precedent.

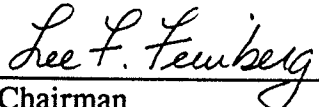
At the request of several county development authorities, the Commission agreed to reconsider the decision reached in Advisory Opinion #94-16 in light of WV Code §7-12-5(b).

West Virginia Code §7-12-5(b) provides that "each member of a County Development Authority present during any meeting of the Authority when any question is put, shall vote unless he or she is immediately and particularly interested therein. Before such a question is put, any member having direct personal or pecuniary interest therein shall announce this fact and request to be excused from voting. The presiding officer of the meeting or a majority of the members present may then excuse the member from voting upon the question. The disqualifying interest must be such as affects the members directly, and not as a member of a class."

The Commission understands that the Supreme Court, in Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209 (WV 1988), carved out a narrow exemption to WV Code §61-10-15 which allows school board members to have an interest in a bank selected to be the depository of county board of education funds. Further, it has been suggested to the Commission by various county development authorities that the legislature anticipated that there would be instances in which members of such authorities would have a personal or pecuniary interest in matters coming before the development authority and that by including the language in WV Code §7-12-5(b), the legislature intended to carve out an exception to WV Code §61-10-15 for members of county development authorities.

However, language similar to that contained in WV Code §7-12-5(b) exists in other statutes. See e.g. WV Code §7-1-5(a) which applies to county commissioners and WV Code §22C-4-4(b) which applies to county solid waste authorities. Consequently, holding that the language contained in the development authority statute creates an exception for those authority members would ultimately require an identical holding for county commissioners and members of county solid waste authorities as well. Such action would be tantamount to invalidating WV Code §61-10-15 as it has been traditionally interpreted by the Court. The Commission considers this to be an invasion of the prerogatives of the legislature and the judiciary. Further, the Ethics Commission does not have the authority to interpret or ascertain the legislative intent of other statutes contained in the West Virginia Code.

Therefore, the Commission upholds the decision reached in Advisory Opinion #94-16. The Commission does point out, however, that WV Code §61-10-15 would not prevent a Development Authority Board Member/Bank employee from assisting the Authority in putting together loan or development packages provided the expanding business has the sole authority to select which bank will participate in the loans. West Virginia Code §61-10-15 would not apply to any bank contracts with private entities.


Chairman