

ADVISORY OPINION NO. 95-47
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON NOVEMBER 2, 1995

PUBLIC SERVANT SEEKING OPINION

Attorney for a Public Service District

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for a Public Service district board member to sell water pumps to the district?

FACTS RELIED UPON BY THE COMMISSION

A County Public Service District, on occasion, needs to replace water pumps. One of its board members is in the business of selling such pumps and has offered to sell them to the PSD at cost plus freight. Under this arrangement, the board member would make no profit or receive any other financial benefit from the sale of the pumps to the PSD.

If purchased on the open market, the pumps would cost the PSD approximately \$4200 each. The price offered by the board member is approximately \$2200 per pump. The board member already approached his supplier to arrange for a sale directly to the PSD without the involvement of the Board member's company' but the supplier has refused to cooperate with such an arrangement.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family 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 or employee may have direct authority to enter into, or over which he or she 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 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.

ADVISORY OPINION

The Ethics Act

Pursuant to WV Code 6B-2-5(d)(1) a public servant may not be a party to a contract if he has authority or control over that contract. The PSD board member who proposes to sell the pumps at cost to the PSD has both authority and control over such a contract by virtue of his position on the board. Since the board member's supplier will not sell at cost directly to the PSD, the board member would have to be a party to the contract if the PSD is to acquire the pumps at the discount price.

However, WV Code 6B-2-5(d)(1) contains a proviso that allows part-time appointed public officials to be a party to contracts with their public employers if they recuse themselves from deciding, evaluating or voting on the contract and have fully disclosed the extent of their interest in the contract.

Therefore, it would not be a violation of WV Code 6B-2-5(d)(1) for a PSD board member to sell water pumps to the PSD, at cost plus freight, **provided** he fully discloses his involvement in any such sale and excuses himself from any evaluation, discussion or vote to approve the sale.

West Virginia Code 61-10-15

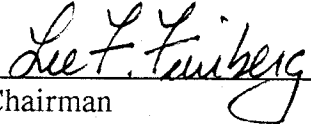
West Virginia Code 61-10-15 provides that it is a criminal violation for a member of a county board or agency to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. Any person who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

The purpose of this statute is to protect public funds and recognize the fact that a person cannot properly represent the public when transacting business with himself. However, in this instance the board member has stated that he would forego any profit or other financial benefit for his business. This arrangement would save the PSD approximately \$2,000. per pump and would remove any direct or indirect interest in the contract since the board member would receive no pecuniary benefit of any sort by selling the pumps to the PSD.

In Advisory Opinion No. 94-02 the Commission ruled that a member of a County Airport Authority would not violate WV Code 61-10-15 by serving as a realtor for an Authority land purchase provided that neither he nor any member of his realty firm received a commission or any other benefit from his participation as realtor. The facts of this case are similar to those in Advisory Opinion 94-02 since in the prior opinion the realtor agreed to forego any commission or other benefit in order to save the Authority public funds.

Therefore, it would not be a violation of WV Code 61-10-15 for a member of a PSD to sell water pumps to the PSD at cost plus freight **provided** he, his business, his immediate family, and others associated with his business do not receive any financial or other benefit arising from the sale to the PSD.

The rationale outlined in this opinion will apply to the purchase of parts and the necessary maintenance on the pumps as well as the pumps themselves. The Commission notes that this opinion is limited to the specific facts presented by the requester and should not be relied upon by anyone else.


Chairman