

ADVISORY OPINION NO. 96-46

Issued October 3, 1996 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

County School Superintendent

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for the County School Board to use the services of a local public service district (PSD) that has an Assistant School Superintendent as its President?

FACTS RELIED UPON BY THE COMMISSION

The County School Board is building a new school which will require water and sewer service from one of two PSDs that service the area in which the school is located. Either PSD could be selected by the School Board. An Assistant School Superintendent serves part-time as the President of one of the PSDs.

The School Board is anxious to consider the PSD with which the Assistant Superintendent is associated since it is able to provide the required services for approximately \$20,000 per year less than the other PSD. Public Service Districts are non-profit governmental agencies which are strictly regulated by the Public Service Commission. Salaries of Board members of PSDs are set by statute. For example, the Assistant Superintendent's compensation as a PSD board member is \$600 per year. These PSD salaries will be unaffected by the addition of the new school as a customer.

The Assistant Superintendent is responsible for coordinating the County School Board's building program and serves as the Board's liaison with the State School Building Authority, architects, maintenance department and Fire Marshall's office. His position gives him some input on the selection of the PSD, but the final decision will be made by the Board of Education.

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 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...

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools, 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

Both the Ethics Act and WV Code 61-10-15 contain a prohibition against public servants having a personal financial interest in a public contract over which they have control. The School Board is concerned to establish whether these provisions prevent the Board becoming a customer of the PSD with which the Assistant Superintendent is associated.

Ethics Act

West Virginia Code 6B-2-5(d) prohibits public servants from being a party to, or having a financial interest in, a public contract which they may have the authority to award or over which they may have control. The Ethics Commission has determined that this provision does not apply to a contract between two public agencies.

The Commission discussed WV Code 6B-2-5(d) in its Advisory Opinion No. 89-100 and ruled "A Governmental Agency is not considered a business which the employee is associated with or has an interest in under the terms of the Act." As a result, an employee of one government agency was allowed to serve as a member of another governmental entity which ruled on funding requests for the first agency.

West Virginia Code 6B-2-5(d) does not apply to a contract between the School Board and a county PSD since both are governmental agencies. Therefore it would not be a violation for the School Board to select the PSD with which its Assistant Superintendent is associated.

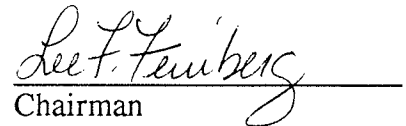
Finally, nothing in the Assistant Superintendent's actions on behalf of either the School Board or the PSD suggests a violation of the Ethics Act's prohibition against public servants using their public positions for their own private gain or the private gain of another.

West Virginia Code 61-10-15

West Virginia Code 61-10-15 provides that it is a criminal violation for any county officer to have a direct or indirect interest in the proceeds of a contract, if he has voice influence or control over the letting of such contract.

A review of judicial precedent in regard to this statute reveals that it has been applied only to public contracts between a public agency and a private individual or private business. In light of the lack of judicial precedent, the Commission is unwilling to extend the harsh provisions of WV Code 61-10-15 to a situation where there is substantial benefit to the public school system and no discernable **private** financial gain to those involved in letting the contract.

Therefore, the Commission finds that it would not be a violation of WV Code 61-10-15 for the School Board to become a customer of the PSD with which the Assistant Superintendent is associated. This opinion is limited to the unique facts of this case and should not be relied upon by any other individual.


Chairman