

ADVISORY OPINION NO. 98-19

Issued On September 3, 1998 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education Member** asks if it is a violation of the Ethics Act or WV Code 61-10-15 for the County Board of Education to use a towing company which is owned by the Board member and her spouse.

FACTS RELIED UPON BY THE COMMISSION

The requester, a member of a County Board of Education, and her spouse own and operate a towing service centrally located in the county and within two miles of the school bus garage. There are several other towing services available, but all are outside the county and none are within such close proximity to the bus garage.

The County Board of Education does not enter into a specific yearly contract with any wrecker service but does, on occasion, use their services. When towing services are needed the bus driver contacts his supervisor who in turn immediately contacts a towing company. Because of the urgency of the situation, the supervisor is not required to get formal approval from the Board and the selection of a wrecker company is made without the Board's knowledge. However, the Board members do vote to approve all invoices for payment.

The requester is concerned that if the Board is required to use only towing services from outside the county, instances may arise when delays could jeopardize the safety of bus students or, if a bus were not promptly moved, create a risk of an accident.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) provides 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 Section 61-10-15 states in pertinent part that ... It shall be unlawful for any member of any county board ... 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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The Ethics Act

The Ethics Act prohibits public servants from being a party to or having a private financial interest in a public contract, purchase or sale which their public position gives them authority to award or control. This prohibition extends to their spouses and businesses in which they or their spouses have an ownership interest of more than ten percent.

As a member of the County Board of Education, the requester does have authority and control over contracts entered into by the Board. Therefore, it would be a violation of the Ethics Act for the County to hire the requester's company to tow county school vehicles.

However, the Ethics Act does permit the Ethics Commission to grant an agency's application for an exemption from this prohibition, where it would result in undue hardship or substantial interference with the agency's operations. A request from the School Board for an exemption to permit the use of the requester's company when the welfare or safety of students or the preservation of property dictate would be granted by the Commission.

61-10-15

West Virginia Code 61-10-15 applies a similar, but stricter, rule against public servants having a personal financial interest in a public contract, purchase or sale over which their public position gives them control. It prohibits certain county personnel, including Board of Education members, from having a personal financial interest in a public contract over which their position gives them "**voice, influence or control.**" Any person who violates this provision is guilty of a misdemeanor and subject to removal from office. The Commission is without authority to grant exemptions from this provision.

The West Virginia Supreme Court, interpreting WV Code 61-10-15, has held that "whether or not they choose to exercise it, board of education members have voice, influence or control over board contracts by virtue of their public positions." In State v. Neary, 365 S.E.2d 395 (1987), the West Virginia Supreme Court held that the law does not require the showing of an actual exercise of influence, and that a violation of the conflict of interest statute can be proven by a showing that the public official became or remained interested in the proceeds of a contract, in which, by virtue of his office, he may have voice, influence or control.

It is clear that the central location of the requester's company will in some instances permit it to provide the Board's towing services more conveniently or economically than towing companies located outside the county. However, the WV Supreme Court of Appeals has ruled that such considerations do not excuse the prohibition of WV Code 61-10-15, see Jordan v. McCourt, 62 S.E.2d 555 (1950). Therefore, the Commission finds that it would be a violation of WV Code 61-10-15 for the Board Member's company to provide towing services to the County Board of Education.

However, the Commission believes that, under the facts of this request, 61-10-15 does not bar the use of the Board Member's business when its geographic proximity makes it the only reasonable choice in extreme emergency situations where prompt response time is crucial to the welfare or safety of students or the traveling public.

The Commission believes that all candidates should be made aware of potential conflicts and take such conflicts into consideration prior to seeking election to public office.


Chairman