

ADVISORY OPINION NO. 99-26

Issued On September 2, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County School Board Member** asks whether a business owned by the Member and her spouse may contract with the County Parks and Recreation Commission.

FACTS RELIED UPON BY THE COMMISSION

The School Board Member and her spouse own a general contracting company which would like to bid on a construction project proposed by the County's Parks and Recreation Commission. Three of the nine members of the Board of the Parks Commission are appointed by the County School Board, three are appointed by the County Commission and three are appointed by the Council of the municipality which is the County seat.

Beyond the appointment of Parks Commission Board members, the School Board exercises no control over the operation of the Parks Commission. A share of the County's special education levy provides about 6% of the Parks Commission's operating budget.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) provides in pertinent part that... In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, 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 or district 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...

ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15 prohibit public servants from having a personal financial interest in public contracts over which their public position gives them control. The language used by the Ethics Act prohibits private interests in public contracts which the public servant can award or control. WV Code 61-10-15 prohibits interests in contracts over which the public servant has voice, influence or control.

Ethics Act. The Ethics Act's prohibition does not prevent the School Board Member's construction company from contracting with the County's Parks Commission, because her position on the School Board gives her no authority to award or to control Parks Commission contracts. It would not be a violation of the Ethics Act for the construction company to contract with the Parks Commission.

WV Code 61-10-15. This prohibition is more comprehensive and extends to contracts over which a public servant may exercise voice, influence or control. The School Board's authority to appoint three of the Parks Commission's nine Board members and its contribution, through the special levy, to its operating budget must be weighed to see if it allows School Board members to influence, if not control, the actions of the Parks Commission.

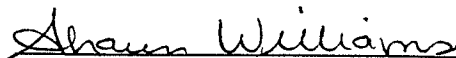
Earlier opinions of the Ethics Commission have held that a public official's authority to appoint some or all of the member of another agency's board, when coupled with other factors, may give the official voice, influence or control over the other agency's contracts. Other factors which have been taken into account are (1) the degree of supervision or oversight the public official's own agency is authorized to exercise over the other agency's activities and (2) the extent to which the public official's agency provides financial support to the other agency.

The decision of the WV Supreme Court of Appeals in *State v. Neary*, 365 S.E. 2d 395 (1987) illustrates this concept. There the Court ruled that the broad powers which a county commission exercises over a public service district, including the authority to appoint **and remove** all of its members, gave commission members voice, influence or control over the contracts of its public service districts.

In this case the School Board Member's vote, one of five, on the appointment of three of the Parks Commission's nine members is insufficient to give her voice, influence or control over the Commission's contract, unless there are additional factors which would add weight to the influence she could exercise. It does not appear that the School Board has any authority to supervise or oversee the Parks Commission's actions and its 6% contribution to its operating budget is relatively insignificant.

It is the Commission's opinion that the Requester's position on the School Board does not give her voice, influence or control over the contracts of the Parks Commission. It would not be a violation of WV Code 61-10-15 for the construction company she and her spouse own to contract with the Parks Commission.

The Commission notes that this decision is limited to the facts and circumstances of this particular case and the decision may not be relied upon by others without having first consulted with and received written confirmation from the Ethics Commission.


Chairman