

ADVISORY OPINION NO. 2001-11

Issued On April 5, 2001 By The

WEST VIRGINIA ETHICS COMMISSION

COPY

OPINION SOUGHT

A County School Superintendent asks whether the Board may buy dairy products from the company by which her spouse is employed?

FACTS RELIED UPON BY THE COMMISSION

The Requester is Interim Superintendent of Schools and a candidate for the Superintendent's position. She asks whether it would be a violation for her spouse's employer to continue to supply dairy products to the Board under an existing contract or under a future contract, if her spouse's employer were the only supplier to submit a bid. Neither she nor her spouse have an ownership interest in the company by which he is employed.

The Board solicits competitive bids for dairy products every three years. The contract is awarded as three one year contracts with automatic renewal for the second and third years, unless either party elects to terminate at certain points. The Board's current contract with the company which employs the Requester's spouse took effect in August 1999 and will expire in August 2002.

CODE PROVISIONS RELIED UPON BY COMMISSION

WV Code 6B-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or 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 ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control...

WV Code 61-10-15 states in part that ... It shall be unlawful for a ... superintendent ... of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... superintendent ... he may have any voice, influence or control...

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WV Code 61-10-15 is a criminal misdemeanor statute which applies to county personnel. Both it and the Ethics Act prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale over which their public position gives them control.

These provisions are designed to prevent both actual misconduct in awarding public contracts and the appearance of impropriety inherent in public servants awarding public contracts to themselves or those with whom they have a financial association. The provisions steer public servants away from situations where they might need to consider their own financial interests in awarding agency contracts.

Ethics Act

The Ethics Act's prohibition against private interests in public contracts, WV Code 6B-2-5(d), applies to public servants, their spouses and businesses in which they or their spouses have an ownership interest of more than 10%. This prohibition does not apply to a business which employs a public servant or his or her spouse, unless one of them also has an ownership interest of more than 10% in the business. The prohibition does not apply here, since neither the Requester nor her spouse have an ownership interest in the firm by which he is employed.

61-10-15

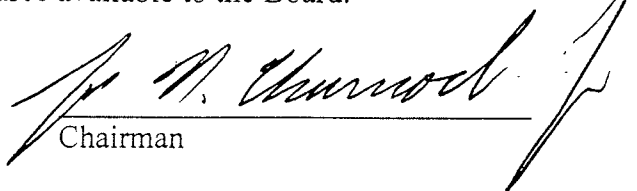
Unlike the Ethics Act, WV Code 61-10-15 does apply to businesses by which public servants and their spouses are employed and, generally speaking, the Board may not purchase goods or services from a company which employs the School Superintendent's spouse.

However, the Commission has recognized instances in which agencies may continue to do business under the terms of an existing contract in which an agency member has an otherwise prohibited personal financial interest, **if** the contract was OK when entered into - where, for example: (1) the public servant had no control over the contract at the time it was entered into and (2) the public servant's interest in the contract arose after the contract was entered into.

In A.O. 91-66 the Commission ruled that it would not be a violation for a County Commission to buy gasoline under a contract between the County and a business in which a County Commissioner had an ownership interest, since the contract was entered into before the County Commissioner's election to office. The Commission ruled that he "did not have any voice, influence, authority or control over the awarding or letting of that particular contract."

In this case, the Board's contract for the purchase of dairy products was entered into before the Requester assumed her role as Interim Superintendent. Therefore, the Commission rules that it would not be a violation of WV Code 61-10-15 or the Ethics Act for the Board to continue buying dairy products under the existing contract, so long as there is no modification of its terms.

If in 2002 the Requester is Superintendent and her spouse's employer is the only supplier to submit a bid to supply the Board's dairy products, she should come back to the Commission seeking relief based on the fact that there is no other source available to the Board.


Chairman