

ADVISORY OPINION NO. 2002-02

Issued On February 7, 2002 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education Member** asks whether the Board may contract with the hospital by which he is employed part-time.

FACTS RELIED UPON BY THE COMMISSION

The Member is a physician who maintains a private medical practice and is employed part-time by the local hospital, the only one in the county. He asks whether certain associations between the hospital and the Board may pose a problem with his continued service on the Board.

The Board's relationships with the hospital fall into four distinct categories:

1. High school students in the nursing assistant program receive part of their training at the hospital. The hospital receives no compensation for this activity.
2. Certain Board employees participate in a wellness program with services provided by the hospital. Individual employees pay for the services they receive - the Board pays nothing to the hospital.
3. The Board contracts with the hospital to perform preemployment physical examinations on certain prospective employees. These examinations may be performed at the hospital by a hospital employed physician, or referral may be made to one of the participating private physician offices or clinics apart from the hospital. The Board pays the hospital for this service.
4. The Board contracts with the hospital to provide mandated drug and alcohol testing for certain Board employees. The hospital coordinates the random selection of employees for testing, collects samples for analysis by an outside lab and maintains the necessary records. In addition, the hospital conducts blood alcohol tests as needed.

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 any member ... of any ... county or district board ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such member he may have any voice, influence or control ...

ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15, a criminal misdemeanor statute, 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.

The Ethics Act's prohibition against private interests in public contracts applies to public servants, their spouses, and businesses in which they or their spouses have an ownership interest of more than 10%. It does not apply to businesses by which the public servant, or the spouse, is employed, unless there is also an ownership interest of more than 10%.

Unlike the Ethics Act, WV Code 61-10-15 does apply to businesses by which public servants or members of their immediate families are employed, even if they have no ownership interest in the business which employs them. In most situations, it would be a violation for a school board to contract with the employer of one of its members.

The WV Supreme Court of Appeals has ruled that employees have an indirect financial interest in the contracts of their employers and that it would be a violation for a school board to do business with a company which employed a school board member. Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209 (1988).

The Commission will now discuss how these rules apply to each of the 4 categories of contacts between the Board and the hospital.

1. **Student training.** This agreement between the Board and the hospital poses no problem because there is no compensation being paid the hospital. The Board Member has no personal financial interest, directly or indirectly, in the agreement. It is not a violation.
2. **Wellness program for Board employees.** The Board does not pay for the services supplied those Board employees who participate in the program. The Board Member has no personal financial interest, directly or indirectly, in the program. It is not a violation.
3. **Preemployment physicals.** The hospital is paid for the physicals performed for the Board and the Board Member is considered to have an indirect financial interest in such exams. Even though the Member's financial interest is small, the rule applies and the Commission finds that the Board must have the exams performed by others, if the Member is to remain on the Board. This doesn't appear to be a problem, as there are other physicians in the community.

The Commission dealt with a similar situation in Advisory Opinion 2000-25 and said: "Even where their financial interest in Board business with their employer is negligible, their interest in the financial health of their employer is substantial and confronts Board members with the type of divided loyalty that WV Code 61-10-15 was created to avoid. Those who are responsible for spending public funds should not have to take into account their own financial interests, or those of their employers, when deciding where and how to spend public funds."

4. Drug and alcohol testing. The hospital is paid for conducting these tests and the Board Member is deemed to have an indirect financial interest in them. However, it is possible that his position on the Board gives him no control over the Board's selection of who is to do the tests. If he, or the other Board Members, have no real alternative to the only hospital in the county, then they don't have the level of control needed to trigger WV Code 61-10-15.

In Advisory Opinion 2000-30 the Commission ruled that it would not be a violation for a school board to contract for the use of a swimming pool owned by the private college by which a board member was employed. The board was considering a high school swim team and the only indoor pool within 25 miles, the only pool which could reasonably be utilized by the team, was owned by the board member's employer.

There the Commission said that the board couldn't really exercise control over the selection of a venue for the swim team, since there was no acceptable alternative to the college pool. The Commission cited the Supreme Court's decision in Dials v. Blair, 111 S.E.2d 17 (1959) that it would not be a violation for a school board to buy water from a company in which a board member had an ownership interest, since water service could not be obtained from any source other than water companies in which the member had an ownership interest.

In this case it is not clear whether the Board can locate a suitable alternative source of drug testing. The Commission notes that the tests themselves are not done by the hospital, but by an outside lab. Nor is it clear whether blood alcohol tests could be performed by others in the community, or in reasonable proximity.

The Board Member's letter raises the possibility that the lack of available alternatives might legitimize the hospital's involvement in, and compensation for, drug and alcohol tests. However, there are not sufficient facts for the Commission to rule that it would not be a violation. The Board Member may submit further facts, if he feels they satisfy the criteria discussed here.


Chairman