

ADVISORY OPINION NO. 97-23

Issued on August 7, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

County Commissioner/County Economic Development Authority Member

OPINION SOUGHT

1. Is it a violation of the Ethics Act or WV Code 61-10-15 if a member of a County Economic Development Authority votes to recommend to the County Commission the issuance of development bonds for a company which may purchase and expand another company that employs a member of the Authority?
2. Is it a violation of the Ethics Act or WV Code 61-10-15 if a County Commissioner discusses and votes on the issuance of development bonds which will allow, in part, the acquisition of a company that employs that County Commissioner?

FACTS RELIED UPON BY THE COMMISSION

The requester is a part-time elected member of a County Commission and a part-time appointed member of that County's Economic Development Authority. He is also employed part-time for a private company located in the same county.

An outside investor would like to establish a new business in that County. Its proposal involves acquiring and expanding an existing facility. It is anticipated that the investor would seek the issuance of bonds to assist in financing the acquisition, renovation and expansion of the current facility. A portion of the proceeds of the bonds would be paid to the existing company for its interest in the facility. The requester is a part-time employee of that existing company.

The Economic Development Authority will likely be asked to vote to formally request the assistance of the County Commission. That request would include calling upon the County Commission to issue economic development bonds. The County Commission will then be called upon to discuss and vote on issuing the bonds. Neither the Economic Development Authority nor the County Commission will attempt to influence the investor's decision on retaining any current employees of the facility that will be acquired and expanded.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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: Provided, That nothing herein shall... prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code 6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

(i) not exceeding ten percent of the partnership or the outstanding shares of a corporation; and

(ii) not exceeding thirty thousand dollars interest in the profits or benefits **of the contract**;

West Virginia Code 6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

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...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

The Ethics Act

The Ethics Act prohibits public servants from having a personal financial interest in a public contract which their public position give them direct 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 per cent. The prohibition does not apply to a business by which a public servant or his spouse is employed, unless they have the required ownership interest as well.

The requester is a part-time employee of an existing company which would be acquired by the investor if the proposed transaction occurs. Because he has no ownership interest in company, the Ethics Act's prohibition against private interests in public contracts does not apply to this situation.

Therefore it would not be a violation of the Ethics Act if the Economic Development Authority and the County Commission consider and vote on issuance of economic development bonds as described herein.

The Ethics Act provides, at WV Code 6B-1-2(c) that part-time public servants who have a personal conflict of interest in a particular matter should refrain from discussing or taking official action on such matter. Because his part-time private employment may be affected by the transaction, the requester could create the appearance of an impropriety if he takes official action on the matter. Therefore, the requester should not participate in the Economic Development Authority's decision to recommend to the County Commission that it issue bonds for the development project. Similarly, the requester should not discuss or vote on the County Commission's decision to issue such bonds.

The Commission cautions the requester that any attempt to use his influence to retain his part-time employment or to expand his part-time employment to a full-time basis would constitute a misuse of office for personal gain in violation of WV Code 6B-2-5(b)(1).

West Virginia Code 61-10-15

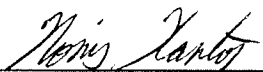
West Virginia Code 61-10-15 prohibits designated county officials, including County Commissioners and members of a County Economic Development Authority, from having a direct or indirect personal financial interest in a public contract over which their public position gives them "voice, influence, or control." The requester's positions on the County Economic Development Authority and County Commission give him voice, influence and control over the contract decisions of those bodies.

However, under the facts of this case the Ethics Commission finds that any financial interest the requester may have in the ultimate results of any actions by his governmental agencies regarding issuance of bonds for the investor is too remote to fall within the prohibitions of WV Code 61-10-15.

This conclusion is based upon two explicit understandings. First, in this case neither the Economic Development Authority nor the County Commission has any guarantee as to what, if any affect issuance of the bonds will have on the current work force of the acquired company. Second, neither agency will attempt to influence the investor's ultimate decision on whether to

retain any of the work force of the acquired company by making such retention a condition for issuance of the bonds.

In light of the above facts, the Ethics Commission finds that the requester does not have a pecuniary interest under WV Code 61-10-15 in the decision to issue bonds to the investor. Therefore it would not be a violation of WV Code 61-10-15 if the Economic Development Authority and the County Commission consider and vote on issuance of economic development bonds as described herein.



Chairman