

ADVISORY OPINION NO. 2000-23

Issued On September 7, 2000 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education Member** asks whether she may vote to pay bills to the utility company by which her spouse is employed.

FACTS RELIED UPON BY THE COMMISSION

The Board purchases electricity from an electrical utility which employs the spouse of the Board Member. This utility is the sole provider of electrical power in the county.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1), *Interests in public contracts*, provides in 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 may have direct authority to enter into, or over which he or she may have control”

W. Va. Code § 61-10-15 states in part that “[i]t 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 . . . [s]he may have voice, influence or control”

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Both the Ethics Act and W. Va. 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, W. Va. Code § 6B-2-5(d), applies to public servants, their spouses, and businesses with which they or their spouse have an ownership interest of more than 10%. The Ethics Act’s prohibition does not apply to a business by which the spouse of a public servant is employed, unless the employee or the employee’s spouse also has an ownership interest in excess of 10%.

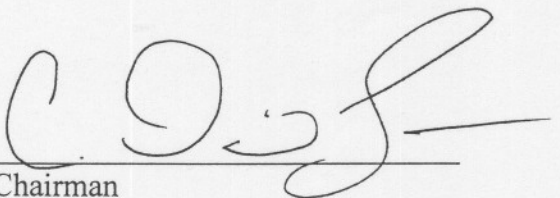
While the employment relationship of the Board Member's spouse is not sufficient to trigger the Ethics Act prohibition against a contract between the Board and a business by which the Member's spouse is employed, it is sufficient to require that the Member be recused from official action on the Board's discussion and vote on matters affecting her spouse's employer.

Unlike the Ethics Act, W. Va. Code § 61-10-15 does apply to businesses by which public servants or members of their immediate family 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.

W. Va. Code § 61-10-15 prohibits public servants from having personal interests directly, or indirectly through their employer, or the employer of their spouse, in public contracts over which they have "voice, influence or control." In this situation, the Board has no meaningful discretion in the selection of a utility to provide electricity to its schools. The employer of the Member's spouse is the only public utility providing electricity in the county.

The West Virginia Supreme Court of Appeals dealt with a comparable situation in Dials v. Blair, 144 W. Va. 764, 111 S.E.2d 17 (1959), where a county school system purchased water from a company in which a board member had an ownership interest. The Court ruled that it was not a violation of W. Va. Code § 61-10-15 for a county board of education to purchase water from the company where water service could not be obtained from any source other than water companies in which a member of the board had an ownership interest.

The Commission recently dealt with a similar issue in A.O. 2000-13, finding it would not be a violation of W. Va. Code § 61-10-15 for a county board of education to purchase gas transported through lines owned by a board member's employer where that employer was the sole available source for the service. Therefore, the Commission rules that, although the Board Member must be recused from any official action involving her spouse's employer, it would not be a violation for the Board to continue purchasing electricity from the utility which employs the Member's spouse.



Chairman