

ADVISORY OPINION NO. 2002-03

Issued On February 7, 2002 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission Candidate** asks if it would be a violation for her to serve, if elected, while an employee of a non-profit hospital which has received county financial support.

FACTS RELIED UPON BY THE COMMISSION

The Candidate is employed by a "private non-profit, 501(c)(3) hospital ... organized in 1948 as a private, non-profit membership organization whose membership was open to any person or corporation who paid one hundred dollars. A person or corporation who paid more than one hundred dollars was entitled to one vote for each one hundred dollars."

The Candidate explains that the articles of incorporation state that no state, county or municipality created the corporation, although its current bylaws give the County Commission the authority to appoint and remove the hospital's governing trustees. The hospital's facilities were constructed with federal funds and no county tax dollars go toward its operation, although the County Commission did, in prior years, help pay for an ambulance for the hospital.

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 ... *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body ...

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 ...

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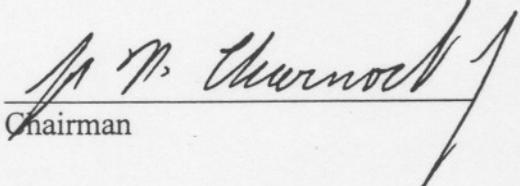
Both the Ethics Act and WV Code 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale over which their public position gives them control.

The Ethics Act's prohibition would not bar the Candidate's employment by the hospital while serving on the County Commission, because the Act specifically states that it shall not be construed to prevent or make unlawful the employment of any person with any governmental body. However, WV Code 61-10-15 contains no such proviso and it could be a problem, if the Candidate's employment contract is a "public contract".

As an example, the WV Supreme Court upheld the criminal conviction of a County Commissioner who was employed by a county public service district because his position as County Commissioner gave him control over the employment contracts of subordinate county agencies, like the public service districts whose board members the Commission appointed and could remove. State v. Neary, 365 S.E.2d 395 (1988).

However, in this situation the Ethics Commission finds that the non-profit hospital is not a public agency and its employment contracts are not public contracts of the county subject to the provisions of WV Code 61-10-15. Therefore, it would not be a violation for the Candidate to serve on the County Commission, while a hospital employee.

However, the Commission notes that the Requestor's employment by the hospital may raise additional problems with WV Code 61-10-15, if the county found it necessary to contract with the hospital while she served on the County Commission. The Requestor should consider the issues raised in the Commission's Advisory Opinion 2002-02 also decided today.


Chairman