

ADVISORY OPINION NO. 2002-15

Issued On July 11, 2002 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County School Board Member asks if it is a problem for the Board, or its contractors, to buy building materials from retailers who buy their products from the Board Member's employer.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a newly elected Board Member. He is employed as a sales representative by a building products distributor and he sells to retail building supply companies in several counties, including his county of residence. He has no ownership interest in the company by which he is employed.

The product lines handled by his employer include siding, interior finishing products, doors, windows, skylights, flooring and deck components. He receives commissions on all sales to his designated customers, including orders called into his employer without his involvement.

The Board Member knows to whom he sells his products, but does not know to whom his customers sell the products he has supplied them. He asks if it will be a problem if materials he has sold local retailers are (1) resold to the Board or (2) resold to a contractor for use in a Board construction project.

Because he must be personally involved in such orders, he can say there have not been and will not be any "special orders" from his customers for sale to the Board or from contractors for use on Board projects. As a practical matter, a contractor that secured a major building project for the Board would command the buying power to buy directly from distributors comparable to his employer and would not make substantial purchases from local building supply companies.

The Board Member represents that while he serves on the Board his employer will not engage in any special order sales to the Board or for Board projects, unless he is entirely excluded from the process - that is to say he would receive no commission on the sale and would take no official action as a Board member in regard to approving the purchase or paying for the materials.

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 ...

WV Code 61-10-15 (e) added in 2002, exempts any person subject to the above-stated prohibition if the employee or his or her spouse is a salaried employee of a vendor or supplier under a contract and, if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and
- (5) Does not approve, vote for or otherwise authorize the payment for any services performed or supplies furnished under the contract.

ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15 prohibit public servants from having a personal financial interest in a **public** contract over which their public position gives them control.

The Ethics Act's prohibition, WV Code 6B-2-5(d), applies not just to public servants, but also to their spouses and businesses in which they, or their spouses, have an ownership interest of more than 10%. It does not apply to businesses which employ public servants or their spouses.

WV Code 61-10-15 is a criminal statute governing the activities of certain county personnel, including school board members. Like the Ethics Act, it applies to public servants, their spouses and the businesses in which they have an ownership interest. Unlike the Ethics Act, it also applies to businesses which employ public servants and their spouses.

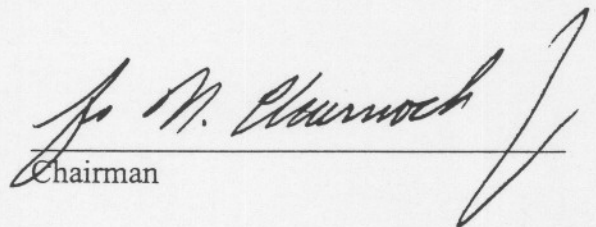
Both prohibitions will be a problem, if the Board Member can be said to have an indirect financial interest in the Board's purchases from local building suppliers or in the Board's construction contracts, if they incorporate materials from his employer.

However, the Commission finds that neither prohibition applies to the Board Member's situation because his financial interest is in the **private** contract between his customers and his employer - not the **public** contract between his customers and the Board.

The Board Member's financial interest is fixed and immutable when the sale to his customer takes place and is unaffected by the ultimate disposition of the materials - regardless of where, when or whether they are sold. Therefore, it would not be a violation of WV Code 61-10-15 if materials sold by the Board Member to his building supply company customers were resold to the Board or to a contractor for use in a Board construction project.

There remains a final, different type of sale which could pose a problem for the Board Member. It would be a violation of both WV Code 61-10-15 and the Ethics Act for him to sell building products directly to the Board or to special order materials for one of his customers for a Board job and receive a commission from the sale.

The Board Member is responsible to insure that such transactions do not take place, unless they conform to the recent amendment to WV Code 61-10-15 which legitimizes such transactions, if he receives no commission or other financial benefit from the sale and he does not take official action to approve the purchase of or payment for the products. A sale which complied with those conditions would also satisfy the requirements of the Ethics Act's prohibition.


Chairman