

ADVISORY OPINION NO. 2004-12

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON AUGUST 5, 2004

OPINION SOUGHT

A **County Board of Education Member** asks whether it would be a violation of the Ethics Act or WV Code 61-10-15 for the County School System to buy crushed stone from a company owned by the member's spouse and a brother-in-law.

FACTS RELIED UPON BY THE COMMISSION

The spouse of a County Board of Education Member owns a stone company. The company sells crushed limestone. The brother-in-law of the Board Member is also an owner in the company.

Prior to the election of the Board Member, the company sold stone to the Board of Education. The stone was ordered by the maintenance director.

There is no other stone business located in the county. There are other companies, located in adjacent counties and states that deliver stone to the county.

The spouse and brother-in-law have owned the company for two years. During that time period, and prior to the election of the Board Member, the company sold approximately \$ 1,350.00 worth of stone to the Board of Education. That amount represents a limited percentage of the total annual revenue of the company.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected public official...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...

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application for an exemption...

West Virginia Code Section 61-10-15 states in pertinent part that...It shall be unlawful for any member of any county board...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.

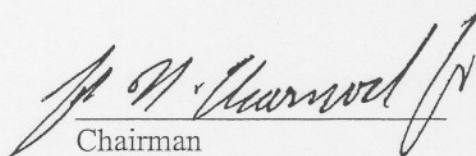
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Both the Ethics Act and WV Code 61-10-15 prohibit public servants from having a personal financial interest in a public contract, purchase or sale over which their public position gives them control. Both prohibit county school board members, who clearly have control over their school systems' financial transactions, from having a personal financial interest in such transactions.

Pursuant to subsection 6B-2-5(d)(1), the Commission finds that the Board Member is an elected public official with direct authority and control over the letting of the Board's public contracts. As a partner in the stone company, the Board Member's spouse has more than a limited interest in the stone company. The Commission finds that it would be a violation of subsection 6B-2-5(d)(1) of the Act for the stone company to contract with the Board of Education for the purchase of stone when the company is partly owned by the husband of a Board Member. WV Code 6B-2-5(d)(3) allows for the affected governmental body to apply for an exemption. However, even if an exemption was granted, the purchase would nonetheless violate WV Code 61-10-15.

WV Code 61-10-15 prohibits members of a county board of education from having a personal interest in a public contract. The West Virginia Supreme Court recognized an exception to that rule when it held in Jordan v. McCourt, 62 S.E. 2d 555 (W.Va. 1950), that there are certain instances where the pecuniary interest in a public contract is so small as to be deemed *de minimis*. The Court held a *de minimis* interest may be a technical violation but is not the type of pecuniary interest which triggers the sanctions of WV Code 61-10-15.

In this case the Commission considers the interest of the Board Member's spouse in the potential profits from the contract to be more than *de minimis*. While the revenues from potential sales to the school board only represent a limited percentage of the total revenues of the company, the actual amount of monies which may be paid are, under the facts presented, more than *de minimis*. Therefore it would be a violation of the Ethics Act and WV Code 61-10-15 for the school system to purchase crushed stone from the business.


Chairman
8-5-04