

## ADVISORY OPINION NO. 2009-05

Issued On June 4, 2009 By The

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

A **Prosecuting Attorney** asks whether his business may contract with a local extension service agency.

#### FACTS RELIED UPON BY THE COMMISSION

A Part-Time Prosecuting Attorney is the owner of various small businesses. One of these businesses is a storage facility which is solely owned and operated by the prosecuting attorney and his wife. The business is organized as a Limited Liability Company.

A local extension service agency desires to rent a storage unit from the company. The County Commission provides funding for the local extension agency through excess levy funds which are transferred into a general fund which has the express purpose of funding the extension agency. The extension agency is overseen by a service extension committee, comprised of various leaders in the community including a County Commissioner who is statutorily required to serve on the committee. See W.Va. Code § 19-8-1. The purpose of these local extension agencies is to provide outreach services in accordance with the mission of West Virginia University, a land grant institution.

In the Requester's County, the extension agency is housed in the County Annex. The County Commission pays for two of the extension agency's employees. The director of the extension agency is paid through other funding sources. The County Commission also processes the extension agency's bills. If the agency rents the storage building, the County Commission would pay the bill directly to the part-time prosecuting attorney's business.

#### CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1) reads in relevant part:

[N]o 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 the 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...

W. Va. Code § 7-4-1 provides in relevant part:

It shall be the duty of the prosecuting attorney to attend to the criminal business of the state in the county in which he is elected and qualified... Every public officer shall give him information of the violation of any penal law committed within his county. It shall also be the duty of the prosecuting attorney to attend to civil suits in such county in which the state, or any department, commission or board thereof, is interested, and to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested.

W. Va. Code § 61-10-15(a) reads in relevant part:

It is unlawful 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 the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided*, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse...

(h) Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of the code, for an exemption from subsection (a) of this section.

## **ADVISORY OPINION**

### **The Ethics Act**

Pursuant to W.Va. Code § 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. A limited interest is an amount not to exceed one thousand dollars in the gross revenues in a public contract or contracts per calendar year.

In the present case, the Prosecutor does not normally render legal advice to the extension agency. Further, it is the extension agency, not the county commission,

which would be contracting with his company for services. Based upon these facts, the Commission finds that for purposes of the Ethics Act, he does not have direct authority over the public contract in question. Hence, pursuant to the Ethics Act, the contract would be permissible. However, this analysis is purely academic in light of the stricter limitations imposed by W.Va. Code § 61-10-15.

### **West Virginia Code § 61-10-15**

WV Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

In this case the Commission must examine whether pursuant to W.Va. Code § 61-10-15, the Prosecutor exercises voice, influence, or control over the extension agency contracts. As the County Prosecutor, the Requester must provide legal advice to the County Commission. W.Va. Code § 7-4-1.<sup>1</sup> While the Requester does not provide legal advice to the extension agency, or exercise direct control over its contracts, the extension agency is intertwined with the County Commission through its shared office space and funding. Moreover, two extension agency employees are paid by the County. If the County Commission were to have a question about the operation of the extension agency and whether it was legally expending public funds, the County Commission would look to the County Prosecutor for advice. Due to the interrelationship between the Prosecutor, County Commission and local extension agency, the Commission finds that the Prosecutor exercises voice, influence or control over extension agency contracts. Hence, his business may not contract with the extension agency.

The extension agency may seek a contract exemption from the Ethics Commission if it believes that other suitable storage space is not available in the county. Pursuant to W. Va. Code §61-10-15, the Ethics Commission may grant an exemption from the prohibitions in this code section if the extension agency demonstrates that the prohibition will result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.*, and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon

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1 The Prosecutor states that historically he has not provided legal advice to the extension agency. It does not appear to be clear in the code whether prosecutors have a legal duty to provide legal advice to extension agencies. However, the answer to this question is not outcome determinative to the Commission's analysis in the present case.

in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

  
Drema Radford, Vice-Chairman

9-14-2009 MK  
Date

**Procedural Note:** This opinion was decided by the Commission on June 4, 2009 and signed by the Chair on that date. A technical revision was made subsequent to that meeting. This opinion, containing the technical revision, is the final opinion.