

ADVISORY OPINION NO. 2002-10

Issued On May 2, 2002 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County School Superintendent asks whether the Board may buy dairy products from the company by which her spouse is employed?

FACTS RELIED UPON BY THE COMMISSION

The Requester is a County Superintendent of Schools whose spouse is employed by a company which currently provides dairy products to the Board under a contract executed prior to her employment as Superintendent. The Board solicits competitive bids for dairy products every three years and the Board's current contract expires in August 2002.

The Superintendent asks whether the recent amendment to WV Code 61-10-15 will permit the Board to accept bids from, and award contracts to, her husband's employer. Neither she nor her husband are an owner, shareholder, director or officer of the company; neither will receive any commission, bonus or other direct remuneration for its contracts with the Board.

The Superintendent is not involved in the process by which Board contracts are awarded, but is required to recommend agenda items to be voted on at Board meetings and to sign Board checks.

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 (a) states in part that ... It shall be unlawful for a ... superintendent ... of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... superintendent ... 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.

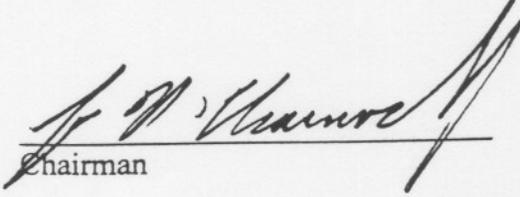
WV Code 61-10-15 is a criminal statute governing the activities of certain county personnel, including school board members and superintendents. Like the Ethics Act, it applies to public servants, their spouses and the businesses in which they have an ownership interest. Unlike the Ethics Act, it has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

During its Regular 2002 Session, the Legislature amended WV Code 61-10-15 to allow agencies to deal with businesses which employ agency personnel or their spouses, if the conditions of subsection (e) are met. Stated simply, those conditions exclude public servants from involvement in awarding or paying for agency contracts and require that neither they nor their spouses benefit directly from them.

The Commission must decide whether the Requester's situation satisfies those conditions. Only one of the conditions, subsection (e)(5), is subject to question. The Commission must decide whether the Superintendent can be said to "... approve ... or otherwise authorize the payment for ...supplies furnished under the contract " when she carries out her duty to recommend bills submitted for Board approval and to countersign Board checks.

The Commission believes that subsection (e)(5) is not intended to encompass mandated ministerial actions in regard to contracts. The Commission finds that actions which the Superintendent is required to take, but which allows for no personal judgment or discretion, are not at odds with (e)(5). The Superintendent's actions in countersigning orders or checks and carrying out routine logistical or administrative duties do not deprive the Board of its ability to deal with the company which employs her husband.

Therefore, the Commission rules that, if the conditions of subsection (e) are otherwise complied with, it would not be a violation of WV Code 61-10-15 for the board to contract with a company which employs its superintendent's spouse, simply because the superintendent may be required to discharge ministerial duties in regard to the contract.


Chairman