

## ADVISORY OPINION NO. 2002-11

Issued On May 2, 2002 By The

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

A **County Solid Waste Authority Board Candidate** asks whether she may be appointed to the Board while it has an outstanding debt owing to her husband's business.

#### FACTS RELIED UPON BY THE COMMISSION

In 1999 a business owned by the Requester's husband built an office building for the Board. During construction, the Board made changes to the construction contract which caused the Board to exceed its construction budget by \$16,000. The Board executed a promissory note to cover the outstanding balance, which it is paying off at the rate of \$500 per month.

The Requester asks if she may be appointed to serve on the Board, if she refrains from any official action in regard to the note and its terms and conditions remain unchanged.

#### 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 ...supervisor or superintendent, principal or teacher of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... supervisor or superintendent, principal or teacher, he may have any voice, influence or control ...

#### ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15 prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale which their public position gives them authority to award or control. WV Code 61-10-15 is a criminal misdemeanor statute which applies only to certain county personnel, including the members of county solid waste authority boards.

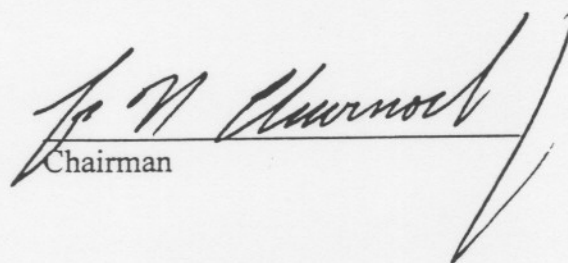
These provisions are designed to prevent both actual misconduct in awarding public contracts and the appearance of impropriety inherent in public servants awarding public contracts to themselves. The provisions steer public servants away from situations where they might need to consider their own financial interests in awarding or implementing agency contracts. Both would prevent the Board from entering into a new contract with the Requester's husband's company, if she were serving on the Board.

However, the Ethics Commission has recognized instances in which agencies may continue to do business under the terms of a contract in which an agency member has an otherwise prohibited personal financial interest, **if** the contract was OK when entered into - where, for example, the public servant had no control over the contract at the time of its execution.

In A.O. 91-66 the Commission ruled that it would not be a violation for a County Commission to pay for gasoline purchased under a contract between the County and a business in which a County Commissioner had an ownership interest, since the contract was entered into before the County Commissioner's election to office. The Commission ruled that he "did not have any voice, influence, authority or control over the awarding or letting of that particular contract."

In this case, the Board's construction contract was entered into, its debt to the Requester's husband's business was created, and the terms of the promissory note were established months before she was considered for appointment to the Board. During that time she held no public position giving her control over any of those matters.

The Commission therefore rules that it would not be a violation of WV Code 61-10-15 or the Ethics Act for the Requester to serve on the Board, while the Board continues to pay off its indebtedness to her husband's business, so long as there is no modification of the terms and conditions of the existing promissory note.

  
Chairman