ADVISORY OPINION NO. 2010-10

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Board of Directors** for a **County Solid Waste Authority** (CSWA) asks whether it is permissible for board members and/or their family members to bid on the purchase of a building owned by the CSWA which is being sold at a public auction.

FACTS RELIED UPON BY THE COMMISSION

In 1995, a County Solid Waste Authority (CSWA) purchased a one story building to house its offices and a recycling/reuse/repair center. In 2002, the CSWA leased a larger building and moved its office and operations into that new larger building.

The CSWA retained ownership of the one story building, and has rented out the space to various entities and parties over the years. However, the income from the renters has not been enough to offset the cost of the insurance and maintenance of the building. As a result, in October 2005, the Board of Directors (Board) of the CSWA decided to sell the building. The Board of the CSWA listed the property with a local realty company in 2005, but it did not sell.

In February 2007, the Requester decided to list the property with a different realty company and to drastically reduce the selling price. Despite these changes, the building still did not sell. In August 2007 and in November 2008, the Requester again lowered the selling price, but neither price reduction resulted in a sale of the property.

Due to the lack of success by local realty companies, in December 2009, the Board of the CSWA decided to look at other avenues through which to sell the property. One method the Board is considering is to sell the property through an auction company.

To date, the Executive Director of the CSWA has only made initial contact with an auction company to obtain information. No agreement or contract has been discussed by the Board, nor has the Board formally voted on the matter. According to the Requester, the Board of the CSWA is only in the information gathering stage.

As part of this information gathering, two current members of the Board inquired whether they would be permitted to bid on the building at the public auction. According to the Requester, the Board has not taken any official action in furtherance of a decision to sell the building at auction, and therefore, the two members themselves have not taken any official action in regard to placing the building for sale at auction.

Additionally, one of the two members inquired whether her son could bid at auction if she was prohibited from bidding. The Requester indicates that the member and son are not in business together nor do they reside in the same house. However, the son's name is listed on a few utility bills at the house she now lives in, and on a checking account that he opened for her some years ago when she was in the process of moving. According to the Requester, although the Board member's son's name is on the bills and checking account, all of their monies are separate. The Requester further states that neither the son nor the Board member is a legal dependent of the other.

The Requester inquires whether either a Board member or a Board member's family member may bid on the CSWA building if the Board decides to sell it at a public auction.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W. Va. Code § 6B-2-5(d)(1) states:

> [N]o elected or appointed public official or public employee … or business with which he or she is associated may be 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: . . . Provided, however, That nothing herein shall be construed to . . . prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

Further, W.Va. Code § 6B-2-5(d)(2) provides in part:

> In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract.

W.Va. Code § 6B-1-3(f) defines "Immediate Family" as "a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents."

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

> It is unlawful for any member of a county commission, district school officer, . . . or any member of any other county or district board or 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, . . . , he or she may have any voice, influence or control[.]

ADVISORY OPINION

The question as to whether a public official may bid on property at a public auction is not a matter of first impression for the Commission. In Advisory Opinion 93- 49, the Commission held that it would be a violation of the Ethics Act and W.Va. Code § 61-10-15 for members of a county school board, and their spouses, to bid on surplus county school board property at an auction.

However, since the issuance of Advisory Opinion 93-49, the Legislature amended the Ethics Act to include a proviso allowing for ***part-time*** appointed public officials to enter into certain public contracts. Thus, the Commission must revisit its outright prohibition in light of the statutory amendment.

Further, since the prohibitions in the Ethics Act and W.Va. Code § 61-10-15 differ, the Commission shall address each separately.

The Ethics Act

The Ethics Act prohibits public officials, including appointed members of a CSWA Board, from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). However, the Ethics Act does have a limited exception for certain part-time appointed public officials. Specifically, the Ethics Act states:

> Provided, however, That nothing herein shall be construed to . . . prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

Board Members

Accordingly, under the West Virginia Ethics Act, a part-time appointed public official may enter into a contract with an entity over which he or she has direct authority or control, so long as the public official has properly recused him or herself from the vote and discussion. To the extent that any part of Advisory Opinion 93-49 is inconsistent with this Opinion, that part is hereby expressly overruled.

With respect to the CSWA, the two public officials interested in bidding at auction are appointed members to the Board of Directors of a County Solid Waste Authority, not full-time employees thereof. Therefore, the Commission hereby finds that the Ethics Act does not prohibit the two Board members from bidding on the CSWA building at a public auction, provided they properly recuse themselves from any and all consideration of any matter concerning the sale of the property, including the method of selling it.[1]

Family Members

The Requester also inquires whether family members of the public officials may bid on and purchase the building at auction. More particularly, the Requester indicates that the son of a Board member may seek to bid on the property. According to the Requester, neither the son nor the Board member is a legal dependent of the other. As earlier noted, although the member and son are not in business together nor reside in the same house, they are joint owners of a checking account (and the son's name appears on a few of the member's utility bills).

The Commission hereby finds that, generally, **if** the son and member had no financial relationship at all, it would not violate the Ethics Act for the son to bid on and purchase the property at public auction so long as the parent/member recused himself/herself as hereinabove set forth. However, with respect to this specific situation, the Commission lacks the information necessary to determine whether the son is the member's dependent, or vice versa. The Requester's assertion that neither the son nor the Board member is a legal dependent of the other satisfies the required inquiry by the Commission. Instead, the Commission is obligated to analyze the specific facts of the situation before issuing a binding ruling. Thus, the Commission declines to answer the second question due to the lack of crucial information.

As with other public servants, should the public official have a question about the application of the Ethics Act's prohibitions, he or she may contact the Ethics Commission for specific guidance, including requesting a formal advisory opinion.

[1] In order for recusal to be proper, the public official must excuse himself/herself from participating in the discussion and decision-making process by physically removing himself/herself from the room during the period, fully disclosing his or her interests, and recusing himself/herself from voting on the issue. *See* W.Va. Code § 6B-2-5(j).

West Virginia Code § 61-10-15

In addition to complying with the Ethics Act, a part-time appointed member of a County entity must also abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

Board Members

Unlike the Ethics Act, the prohibition under W.Va. Code § 61-10-15 does not have an exception for part-time appointed public officials. Rather, it strictly prohibits **all** members of a County Board from having any direct or indirect pecuniary interest in the proceeds of a public contract. This includes members of a Board of Directors of a County Solid Waste Authority.

Since the Board is the seller, the two board members have "voice, influence, and control" over the sale of property titled in the name of the CSWA. Although the property has not yet been presented for sale at auction, the ultimate sale of the building will constitute a public contract. Therefore, the Commission hereby finds that, under W.Va. Code § 61-10-15, the two board members are prohibited from bidding on and purchasing CSWA property at a public auction.

Family Members

Similarly, W.Va. Code § 61-10-15 imposes restrictions upon family members of public officials and employees. However, unlike the Ethics Act, W.Va. Code § 61-10-15 does not expressly identify the applicable family members. Instead, the statute provides that public officials or employees may not

> 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. . .

(Emphasis Added).

The term "indirectly" is not defined in the statute. Thus, unlike the Ethics Act, the prohibitions are not specifically limited to immediate family members. Instead, the statute applies to any individual with whom the public servant has a financial interest. Arguably, the term "indirectly" also includes those situations in which there is a co-mingling of funds, or an existing contract which obligates the individual to make payment to the public official (e.g. rent or lease agreement).

However, these are all factual determinations which must be addressed on a case by case basis. Therefore, in interpreting this term, as with the Ethics Act, the Commission expressly declines to answer the second question, without more factual information.

Should a county public servant covered by W.Va. Code § 61-10-15 have a question about the application of these prohibitions, he or she may contact the Ethics Commission for specific guidance, including requesting a formal advisory opinion.

Conclusion

Accordingly, although it is permissible under the Ethics Act, because they are **county** part-time appointed public officials, subject to the stricter provisions of W.Va. Code § 61-10-15, the two board members are precluded from bidding on and/or purchasing the CSWA building at a public auction. The Commission declines to answer the second question relating to a family member due to lack of information. Lastly, to the extent that any part of Advisory Opinion 93-49 is inconsistent with this Opinion, that part is hereby expressly overruled.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* and W.Va. Code § 61-10-15, 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 in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

____D.R signed_____ Drema