ADVISORY OPINION NO. 2010-14

Issued On July 8, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of a Board of Education** who is the owner of a fast-food restaurant asks whether:

(1) The Board of Education may purchase meals from his restaurant for special events such as math field day;

(2) Sports teams from the schools may purchase meals from his restaurant for team travel;

(3) Schools in the county school system may hold spirit nights at his restaurant if a percentage of the proceeds from the sales go to the schools;

(4) His restaurant may sell sandwiches and related food items to booster groups for resale through concession stands; and/or,

(5) The teachers' credit union may purchase meals from his restaurant.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a recently elected County Board of Education Member. He owns a fast food restaurant. Historically, this restaurant has done business with the County Board of Education (BOE), school athletic teams, schools, booster clubs in the school system and the teachers' credit union.

In regard to the BOE office, at times, the office has purchased meals for special events, such as math field day. In regard to athletic teams, at times, when they are travelling, the schools will use public funds to purchase meals from his restaurants for the players and staff.

His restaurant also has team spirit nights. For these events, his restaurant has an agreement that if a school holds a spirit event at his restaurant, then the school receives a percentage of the sales from the event. He states that the group may be a school team or club, or the school itself. At the end of the night, his restaurant makes a donation which ranges from 10 to 15% of the proceeds. He states that if the schools or school groups are unable to have these events, then it may leave them short of funds.

Booster clubs also conduct business with his restaurant. For example, for sporting events, they may purchase food items from his restaurant at a discounted rate for resale at concession stands at school events.

The booster club funds are designated as quasi-public money. *See* July 15, 2005 Superintendent's Interpretation which cites W.Va. Code§ 18-5-13. These funds are to be spent for the benefit of the students. The booster clubs finances are subject to review by the BOE Office. On an annual basis, they submit a statement of their finances to the BOE Office.

The involvement of school officials in booster clubs may vary from school to school. At some schools, coaches may actively participate while at other schools, parents may be may be more active.

In regard to the teachers' credit union, the BOE allows it free use of space in the BOE office building. The credit union is a federal credit union which is organized as a non-profit. Public, private and school employees are eligible for membership.

The Requester states that he would take steps to address the potential for conflict. He offers to:

- Write a letter to all schools setting forth that his restaurant has done business with the schools in the past and he understands that they may want to continue to conduct business with his restaurant. In the letter he would identify the pricing so all parties related to the school system who conduct business with his restaurant would receive the same deals.
- If a specific school makes purchases from his restaurant, he would have them sign a form acknowledging that they understand his relationship with the Board and that they agree that they were not pressured to do business with [his restaurant].
- Ensure that all business is transacted through one of his representatives rather than himself.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... 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... Provided, However, that nothing herein shall ... prohibit a part-time appointed public official from entering into a contract which the part-time 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.

W. Va. Code§ 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code§ 61-10-15(a) 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, superintendent, principal or teacher ... he may have any voice, influence, or control.

W. Va. Code§ 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or agency may make a 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

Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit school officials and employees from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

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. There is a $1,000.00 exception to this provision; provided, that the affected public official does not participate in the review or evaluation of the contract and recuses him or herself from voting on the contract.

Based upon the facts presented, it appears that for purposes of the Ethics Act, the Requester exercises direct authority or control over BOE contracts. This exercise of control would bar him from contracting with the BOE for special events such as math field day. Moreover, it may bar him from contracting with the schools for spirit nights

due to the extent of control he exercises over the principals and school personnel. However, due to the stricter provisions in 61-10-15, the Ethics Commission saves for another day the application of the Ethics Act to the agreement between the schools and the Requester's restaurant for school spirit nights.

For the other three categories of expenditures, it does not appear that he exercises "direct" control for purposes of the Ethics Act. As such, it would appear that in accordance with the Ethics Act he could contract with: (1) the sports teams; (2) booster clubs; and, (3) teachers' credit union. Still, the analysis under the Ethics Act is academic in light of the stricter provisions in W.Va. Code§ 61-10-15.

West Virginia Code§ 61-10-15

W.Va. Code§ 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" 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. Further, this code provision does not contain an exception for employment by a governmental agency or a **$1,000.00 exception. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949), The application of this code section, to each of the proposed transactions, follows:**

Contract with BOE for Special Events

In Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949), the West Virginia Supreme Court considered the application of this statute in a proceeding to remove all BOE Members due to their involvement in approving payments to two businesses owned by Defendant BOE Member Ritchie. Defendant Ritchie had an ownership in a construction company which graded an athletic field at a local high school. Defendant Ritchie also owned a hardware store. Various BOE personnel, including a teacher, purchased items from the store. It appeared undisputed that the items were sold at or below the prevailing cost for similar items.

The Supreme Court held that the construction contract and the purchases of items from the hardware store violated W.Va. Code§ 61-10-15. The Court stated in its opinion:

> We are impressed with the evidence of good faith on Ritchie's part. But this action alone is not sufficient to excuse him for the violation of the statute prohibiting contracts with the board, in which he is indirectly and pecuniarily interested. Undoubtedly the sale of supplies to the board by the corporation and

payment therefor constituted a contract...[The] simple answer is that his conduct was unlawful because forbidden....

Id. at 740. The Court then found that he should be removed from office.

The Commission upholds its prior holdings and that of the Supreme Court in finding that the Requester may not contract with the BOE to provide food for special events such as math field day. *See,* e.g. 2001-17, 2007-03 and A.O. 2009-01. While the Requester has recommended steps which may be taken to avoid the potential for conflict, these steps do not alleviate the express prohibition in W.Va. Code§ 61-10-15 against having a pecuniary interest in school board contracts.

Purchases by School Sports Teams

The sports teams are overseen by the respective schools. Public monies are used by the County to fund the teams. Even if a sport generates revenue, still, the money it generates is public money.

The Commission finds that§ 61-10-15 is intended to prohibit a BOE Member from contracting with the county school system where he or she serves. The BOE member's position on the Board gives him voice, influence and control over all school board contracts. *See* Alexander. *See also* A.O. 2004-10a wherein the Commission found that a BOE's power to appoint members to a regional vocational school constituted voice, influence or control so as to precluded him from being employed by the vocational school. Accordingly, the sports teams may not use **school funds** to make purchases from the Requester's restaurant.

Spirit Nights

Upon request of a school or school team, the Requester's restaurant agrees to sponsor a spirit night as a fundraiser which they jointly promote. A percentage of the sales from the event are given to the school. Although the Requester states it is a donation, it is not considered a tax deductible donation in accordance with applicable I.RS. guidelines.

The Commission finds that the agreement constitutes a contract for purposes of§ 61-10-15. The school encourages parents and students to attend the event. As consideration for the business this generates, the restaurant remits a portion of the proceeds to the school.

The BOE has responsibility for overseeing personnel in the County including principals, teachers and coaches in the school system. The Commission finds that the agreement between the Requester's restaurant and the schools for spirit night constitutes a contract which is prohibited by§ 61-10-15. It appears that the clear intent of this statute is to prevent school board members from contracting with schools in their county for any

purpose. If in fact the donation is deductible for purposes of the I.R.S., then it may not fall within this prohibition. However, the Commission would require additional information to evaluate this matter.

In regard to Spirit Nights held on behalf of booster clubs in the county school system, the Commission addresses whether these events are permissible in the next section.

Sales to Booster Groups

Booster clubs have historically existed in this State to support such extracurricular activities as band or sports. It appears that some booster clubs are organized as non-profits, while others are not. County BOEs have the right to examine the financial statements of booster funds which are considered quasi-public in nature.

The Commission has previously considered the application of the Ethics Act to purchases by booster clubs from a BOE member. In A.O. 96-14 the Commission held that a booster club could purchase a shell building to store athletic equipment from a BOE member.[1] It reasoned:

> Several factors persuade the Commission that the school board member does not have the voice, influence or control over this purchase contract contemplated by WV Code 61-10-15. First, the decision to make the purchase is solely within the discretion of the boosters organization. Second, there is no evidence of any attempt by the school board member to initiate the decision to purchase the building. Finally, the payment for the purchase will be made by the athletic boosters organization with its own funds which are not provided by, or subject to the control of, the board or any member of the central administrative office.

In the present case, while the BOE has the right to examine the finances of the booster clubs, the booster clubs are organized to support the school system. The BOE has no specific authority to direct how booster funds may be spent; provided, that, as required by law, the funds are expended for the benefit of the students.

The Commission finds that the Requester does not have sufficient voice, influence or control so as to trigger the limitations in § 61-10-15 in regard to contracting with boosters. However, limitations apply. **First,** to the extent that any teachers, coaches or other school personnel are involved with the booster clubs, they may not be involved in directing the booster clubs to make purchases from the BOE Member; instead, all such

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[1] In contrast, in A.O. 2006-17 the Commission held that a County Music Teacher could not sell his original song to the boosters club for use by the show choir. The Commission held that it would not be prohibited by the limitations against having an interested in a public contract for purposes of the Ethics Act or§ 61-10-15; however, it found that due to his involvement with the choir it would constitute use of office for private gain.

decision-making power should be delegated to parent members; **Second,** the Requester's business must disclose this requirement to all booster clubs with which he does business and provide them a copy of this opinion; **Third,** to the extent possible, all business between the Requester's restaurant and the boosters should be conducted by a representative from the Requester's business; and, **Fourth,** the Requester must recuse himself from discussing or voting upon matters, if any, which come before the BOE in regard to any booster club's financial statements. For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter.

Further, the Commission finds that the Requester's restaurant may host Spirit Nights on behalf of booster clubs. The same limitations set forth above apply. Additionally, the booster club hosting the event and the restaurant shall make it clear that the event is being held for the booster club's benefit, not a school or the BOE Office. For example, a banner at the event may read, "Sponsored by the Booster Club." Any advertising or other form of promotion for the event shall also contain this information.

Credit Union

The credit union is a non-profit which has public, private and parochial school teachers as members. The BOE allows it free use of office space.

The Commission held in A.O. 99-34 that a County Commissioner could be employed by a community service organization to which the County Commission provided financial support. The Commission found that this type of financial support was not the type of transaction governed by§ 61-10-15. The Commission held that he could work there.

Similarly, here, the Commission finds that the fact the BOE provides financial support through the donation of free office space does not constitute the requisite voice, influence or control so as to trigger the restrictions in§ 61-10-15. Hence, the requester may continue to sell food and related items to the credit union.

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

/s/ Jonathan E. Turak
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