ADVISORY OPINION NO. 2010-16

Issued On August 5, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Board of Education Member** asks whether she may contract with the West Virginia Department of Education to facilitate on-line learning courses.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a newly elected Board of Education (BOE) Member. In the past, she has contracted with the West Virginia Department of Education to develop and facilitate on-line learning courses for secondary school teachers.

There is no enrollment fee for participating in the courses; however, there is a fee if the teachers seek certification credits from an institution of higher education. Teachers may seek these credits to upgrade or renew their teacher's certification license. The teachers must pay these fees directly to the accrediting institution of higher education.

If teachers pay for the credits, they may seek reimbursement. They submit their request for reimbursement to the County BOE's Director of Curriculum, Instructions and Federal Programs. The County BOE then forwards the request to the State Department of Education which, funding permitting, reimburses the teacher. If the State Department of Education has insufficient funds, then the County BOE may reimburse the teacher. The Director of Curriculum is responsible for making this decision. The reimbursement is paid from Title II federal funds. The Director does not seek Board approval for the reimbursements nor is she required to do so. The Director has sole discretion, exercised only after the Requester has taught the class.

The State Department of Education is responsible for enrollment. The Requester is paid a flat rate per course. Her rate of reimbursement is not tied to the number of participants in a class or whether they receive certification credits.

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, That nothing herein shall be construed to make unlawful the employment of any person with any governmental body...

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 ...county... 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 district school officer... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member, officer… he may have any voice, influence, or control.

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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. A limited interest is less than one thousand dollars per year.[1]

In this case, the Requester's contract is with the State Department of Education not the County BOE or one of the accrediting institutions. Teachers enroll in the program through the State Department of Education, not the county school system.

Her compensation for facilitating the courses is not tied to the number of participants or any decision by the County BOE's Director of Curriculum to reimburse teachers for the cost of obtaining credits from institutions of higher education. She does not profit or benefit by the decision of the County BOE's Director of Curriculum to authorize reimbursement to teachers for fees they have paid to an accrediting institutions for certification credits. Hence, it does not violate the Ethics Act for her to contract with the State BOE to facilitate on-line learning classes.

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

[1] The Requester receives more than one thousand per year from the State Department of Education. Hence, the $1,000.00 exception in the Ethics Act is inapplicable. Even if it applied, it is academic since no similar exception exists in W.Va. Code§ 61-10-15.

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.

The test under§ 61-10-15 is whether the public official exercises voice, influence or control over the subject contract. The Commission finds that under the circumstances described, the Requester does not exercise voice, influence or control over a contract in which she has a financial interest. Her financial interest is in her contract with the Department of Education. The Commission finds it is too attenuated, even for purposes of§ 61-10-15, to find that she exercises voice, influence or control over her contract with the State Department of Education because her County BOE's Director of Curriculum **may** elect to reimburse teachers for fees the teachers pay to institutions of higher education for certification credits.

The Commission finds that this holding is consistent with its ruling in A.O. 2004-02. In that case, a candidate for a county board of education asked whether she could continue her employment as the Director of a private daycare facility. The county school system employed a pre-kindergarten teacher who was placed in the requester's facility. The Commission stated in its opinion:

> The Ethics Commission finds, however, that the collaborative effort to provide educational services to eligible children does not involve the type of transaction governed by WV Code§ 61-10-15 or the Ethics Act's prohibition against private interests in public contracts.

Similarly, here, the Commission finds that the contract in question is not prohibited.

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.

/s/ Jonathan E. Turak
Jonathan E.Turak,Acling Chairperson