ADVISORY OPINION NO. 2010-21

Issued On December 2, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** asks whether it may contract with a private club in which an Elected Board Member, Treasurer and spouse of the Superintendent own stock.

FACTS RELIED UPON BY THE COMMISSION

The Requester, a County Board of Education (BOE), holds training sessions for school personnel at a local country club. The country club is a privately owned corporation with 10,000 shares of stock. At times, when renting the facility, the BOE also contracts for food and beverage services for the training participants.

An Elected BOE Member owns 20 shares of the stock. The BOE's Chief Financial Office treasurer owns 10 shares of stock. The spouse of the Superintendent owns 30 shares of stock. The respective percentages of stock owned are .2%, .1 % and .3%.

Additionally, the County Superintendent's spouse serves on the country club's board of directors. He is not compensated for his service.

No information is provided in regard to the fair market value of the stock.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-1(f) reads: "Immediate family" with respect to an individual, means 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.

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. C.S.R. § 158-8-3 provides in part that a limited interest is an amount not to exceed $1,000.00 in a calendar year in the gross revenues of a public contract by a public official, family member or a business with which they are associated.

W.Va. C.S.R. § 158-8-4 states that... [P]ublic officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code§ 61-10-15(a) states in part that ... It is unlawful for any ... district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools ... 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, superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided,* That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

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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, including elected and appointed officials, 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. This prohibition also applies to interests incurring to a business with which public officials or their spouses are associated. Public officials are associated with a business if they or their immediate family members own five percent or more of the stock or if they or a family member serve as a director. W.Va.C.S.R. § 158-8-3 and 4. *See also* W.Va. Code§ 6B-2- 1(f).

In this case, the elected BOE Member and Treasurer own less than five percent of the

10,000 outstanding shares of stock. Hence, they do not own a sufficient number of shares to trigger the limitations in§ 6B-2-5(d); provided, that they recuse themselves from the consideration of decisions of the BOE relating to the country club.

However, additional limitations in the Ethics Act apply to the Superintendent due to her spouse's relationship with the private business. While her spouse owns less than five percent of the stock, he serves on the corporation's board of directors and is hence "associated" with a private business contracting with the BOE. This prohibited financial relationship under the Ethics Act could be "cured" by the spouse's resignation from the board of directors.

Still, the analysis under the Ethics Act is academic in light of the stricter provisions in W.Va. Code§ 61-10-15 which apply to school officials, including the Elected Board Member, Treasurer and Superintendent.

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 "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. This provision does not contain a $1,000.00 exception or an exception for those affected officials who own less than five percent of the outstanding shares of stock in a business.

The Commission must determine whether the Elected Board Member, Treasurer and Superintendent have a prohibited financial relationship. On two previous occasions the Commission has found that a de minimis ownership interest does not trigger the limitations in § 61-10-15; however, the Commission declines to make that finding here. *See* A.O.s 97-27 and 2004-08. The value of the country club's stock may be dependent upon the stream of revenue generated by the club. In a time when businesses are struggling, and even when they are not, the public's confidence may be undermined if a private business is receiving public dollars from a public agency in which the decision-makers have an ownership interest in the business.

Based upon the foregoing, the Commission finds that the BOE may **not** contract with the country club to use its facilities or food services for training sessions. The Commission grants the Requester a sixty (60) day transition period in which to allow previously scheduled events, if any, to take place at the country club. After this time period, if the BOE seeks to continue doing business with the club, then during the 60 day period, the affected public servants shall divest themselves of their financial

interests. In the alternative, the BOE may seek a contract exemption. If the BOE seeks a contract exemption, it should be submitted to the Commission no later than January 15, 2011.

In seeking a contract exemption, the BOE must demonstrate that imposing this restriction will result in excessive cost, undue hardship, or other substantial interference with the operation of the BOE. W. Va. Code§ 61-10-15. Further, the BOE must demonstrate that using this venue results in a significant cost savings over other venues or that there are no other venues able to accommodate the BOE's training needs. It must consider this matter during a properly noticed public meeting and the affected officers must recuse themselves from the discussion and vote. Further, both during and outside of meetings, they may not attempt to influence the BOE's decision regarding their decision to seek a contract exemption.

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/ R. Kemp Morton, Chairman
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