ADVISORY OPINION NO. 2010-24

Issued On January 13, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

(1) A **County BOE** asks whether it may purchase property owned, in part, by a part-time Assistant Prosecutor.

(2) A **County BOE** asks whether it may purchase property owned, in part, by a Chief Tax Deputy.

FACTS RELIED UPON BY THE COMMISSION

The County Board of Education (BOE) seeks to build a new elementary school. The proposed site is located on property owned, in part, by a part-time Assistant Prosecutor and the Chief Tax Deputy for the Sheriff's Department.

The part-time Assistant Prosecutor, at times, represents the BOE in employee grievances and expulsion matters. Assistant Prosecutors are appointed by the elected Prosecutor and take an oath of office. W.Va. Code§ 7-7-8.

As a public entity, the BOE does not pay real or personal property taxes. As such, the BOE has no official interaction with the Sheriff's Department or its Chief Tax Deputy.

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 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.

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 school board... 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. § 158-8-4 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 ... 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, 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.

West Virginia Code§ 6B-2-5(h) reads in relevant part:

(1) No full-time official or full-time public employee may seek... to purchase, sell or lease... real... property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or,

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition ...

West Virginia Code§ 6B-1-3(g) defines person as:

Any individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club or other organization or group of persons...

ADVISORY OPINION

(1) Part-Time Appointed Prosecutor

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 public officials and employees from having an

interest in public contracts over which they exercise control. The Ethics Act contains an exception for part-time appointed officials; § 61-10-15 does not. The application of these statutes to the purchase in question follows.

In examining the Ethics Act, the Commission finds that an Assistant Prosecutor falls within the class of public servants who exercise control over BOE contracts as he provides legal representation to the BOE. In making this finding the Commission relies upon its holding in A.O. 2008-08 wherein it found that a municipal attorney exercises control over the contracts of the City by which he was employed.

However, the analysis under the Ethics Act does not end here; instead, the Commission must examine whether a part-time prosecutor falls within the "part-time appointed public official" exception to the public contract limitation. A public official is normally one whose position is created by law, has a fixed tenure of office and takes an oath of office. State ex rel. Key v. Bond, State Auditor, 118 S.E. 276, 277 (W.Va. 1923). *See also,* State ex rel. Ralich v. Millsop, 76 S.E.2d 737 (W.Va. 1953).

As the position of an assistant Prosecutor is specifically created by statute, and as he takes an oath of office, the Commission finds that he is an "appointed public official" as contemplated by this exception in the Ethics Act.[1] As such, in accordance with the Ethics Act, the BOE may purchase property from him so long as he does not participate in the review or evaluation thereof, and does not participate in the decision-making process. Still, the analysis under the Ethics Act is academic in light of the stricter provisions in W.Va. Code§ 61-10-15 which apply.

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 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 part-time appointed official exception

The Commission has never had occasion to consider whether a part-time appointed Prosecutor is a county officer/official for purposes of§ 61-10-15. Based upon the preceding analysis concluding that a part-time prosecutor is a "public official", the Commission finds that he is a public official for purposes of§ 61-10-15 as well. *See also* A.O. 2010-06 analyzing which public officials fall within the purview of this statute.

Further, the Commission finds that he exercises voice, influence and control over BOE contracts. *See* A.O. 2009-05 finding that an elected Prosecutor exercises control over the contracts of a local extension service agency. As such, the BOE may only seek to purchase property from him if it seeks and receives a contract exemption.

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[1] W.Va. Code § 7-7-8 states that a Prosecutor may appoint assistant prosecutors and that they shall take an oath of office.

Chief Tax Deputy

Next, the Commission must determine whether the BOE may purchase property owned in part by a Chief Tax Deputy employed by the Sheriff's Department. In analyzing this matter, the Commission must determine whether a Chief Tax Deputy exercises control over the public contracts let by a County BOE for purposes of the Ethics Act.

The Commission finds that a Chief Tax Deputy does **not** exercise control over County BOE contracts for purposes of the Ethics Act nor is she subject to§ 61-10-15.[2] Hence, the BOE may purchase property owned, in-part, by a Chief Tax Deputy.

Still, another portion of the Ethics Act must be examined. Specifically, West Virginia Code§ 6B-2-5(h) prohibits public servants from selling property to persons over whom either they or a subordinate are taking regulatory action or have taken regulatory action in the last twelve months. The Commission finds that this section does not apply in the instant case as the Chief Tax Deputy does not exercise regulatory control over the County BOE. Specifically, the BOE does not pay county property taxes nor is there any evidence that the BOE has been involved in any tax dispute or other matter involving the Chief Tax Deputy or her subordinates. *See* A.O. 97-07 wherein the Commission ruled that a Chief Tax Deputy does not regulate all taxpayers in the County when only performing ministerial functions. As such, there is nothing in the Ethics Act or§ 61-10-15 which prohibits the BOE from purchasing property in which the Chief Tax Deputy has an ownership interest. [3]

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
Kemp Morton, Chairman

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[2] The Commission finds that a Chief Tax Deputy does not fall within the purview of§ 61-10-15 as her position is not statutorily created nor does she take an oath of office. Similarly, in State ex rel. Key v. Bond, State Auditor, 118 S.E. 276, 277 (W.Va. 1923), the Supreme Court found that the Chief Clerk for the Office of the Secretary of State was not a public official as term of office, powers and duties were not fixed by general law. This conclusion is consistent with the Commission's opinion in A.O. 93-06 wherein it found that a County Coordinator is not a county officer for purposes of this statute.

[3] It is also arguable that this section does not apply as it involves the sale of property to a public entity which does not fall within the definition of "person" for purposes of applying§ 6B-2-5(h) of the Ethics Act. *See* AO 91-91.