ADVISORY OPINION NO. 2010-04

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney for a County Board of Education** (BOE) asks whether the BOE may contract with a private non-profit charitable organization when one of the BOE members sits on the board thereof.

FACTS RELIED UPON BY THE COMMISSION

A member of the BOE was elected in 2002. Since at least 1998 he has been a member of the board of directors of a private non-profit charitable organization. Although he briefly served as interim executive director, he was not compensated therefor. Other than reimbursement for expenses, he receives no compensation as a director.

The BOE contracts with the non-profit for the use its facilities. The non-profit contracts with other entities as well. The common member abstains from discussion and voting on issues involving the other entity and a separate, unrelated representative from the other organization is always present to discuss issues that relate to it. The minutes of the meetings reflect the common member's abstention from discussion and voting.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

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

W. Va. Code § 6B-2-5(d)(1) provides, in part, that no elected 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 prevent or 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) would result in excessive cost, undue hardship, or other substantial interference with the operation of a county school board, it may make written application to the Ethics Commission for an exemption therefrom.

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

> (1) Public officials… may not vote on a matter:

(A) In which they… or a business with which they… [are] associated have a financial interest. Business with which they are associated means a business of which the person … is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

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(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

W. Va. Code § 61-10-15(a) states, in part, that it shall be unlawful for any member of a county board of education 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, he may have any voice, influence or control.

W. Va. Code § 61-10-15(e) provides:

The provisions of subsection (a) of this section do not apply to any person who is a **salaried** employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee…:

(1) Is not a party to the contract;

(2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;

(3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;

(4) Does not participate in the deliberations or awarding of the contract; and

(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

(emphasis supplied)

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 board members 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 an amount not to exceed one thousand dollars in the gross revenues in a public contract or contracts per calendar year.

The non-profit's interest in the contracts exceeds $1,000. Since the subject BOE member himself, however, does **not** have a financial interest in the non-profit's contracts, this prohibition does not apply to the situation presented herein.

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 school officials or employees 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 West Virginia Supreme Court, in analyzing this code provision has stated, "The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself." Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209, 210 (W. Va. 1988). The Commission recognizes that BOE members are subject to this code provision since they have voice, influence or control over the BOE's public contracts.

Thus, the Commission must determine whether the common member has a pecuniary interest, either directly or indirectly, in the contracts between the entities. Clearly the non-profit has a financial interest in the contracts. May that interest be imputed to the common member by virtue of his position on the board of directors? Further, given the common member's former employment as interim executive director of the non-profit, would the combination of his employment and board membership create a prohibited relationship under 61-10-15?

Taking the second issue first, W. Va. Code § 61-10-15(e) provides that the statute's prohibition does not apply to salaried employees so long as they do not fit into any of the subsections 1-5. Subsection 2 applies to a salaried employee who is not an owner, a shareholder, a **director** or an officer of a private entity under the contract. The subsection does not distinguish between profit and non-profit entities; neither does it distinguish between compensated and uncompensated directors.

Notwithstanding the foregoing, since the common member's employment with the non-profit was uncompensated, he does not fall within the above proviso since he was/is not a salaried employee. The Commission has conducted this analysis as part of its continuing efforts to provide guidance to members of governing bodies as it relates to interests in public contracts. *See also* Advisory Opinion 2009-14.

Finally, the Commission must determine whether the non-profit's financial interest in the contracts may be imputed to the common member by virtue of his position on the board of directors. As a penal statute, 61-10-15 should be strictly construed. Where, as here, there is no evidence that the common member receives any financial benefit himself by virtue of the contracts between the two entities, the Commission is reluctant to find that the common member has a pecuniary interest therein.

As a result of the foregoing analysis, the Commission hereby finds that W. Va. Code § 61-10-15 does **not** prohibit the subject contract. Notwithstanding this conclusion, the Commission's analysis does not end here, as there are other statutory provisions to consider.

Private Gain

Pursuant to W. Va. Code § 6B-2-5(b), public officials may not use their office or its resulting prestige for personal private gain or for the private gain of another. Therefore, the Requester, if elected, may not use his position as a member of the BOE to obtain, increase or promote the interests of the non-profit.

Voting

The Ethics Act sets forth specific rules regarding when elected and appointed public servants may vote. Although the overriding purpose of the voting provision is to ensure that a public official does not vote on a matter in which he has a financial interest, it contains other prohibitions.

The Requester should be aware that W. Va. Code § 6B-2-5(j) specifically states that:

> (1) Public officials… may not vote on a matter:
>
> (A) In which they… or a business with which they… [are] associated have a financial interest. Business with which they are associated means a business of which the person … is a director, officer, owner, employee …

As earlier noted, the subject BOE member is a member of the board of directors of the non-profit which contracts with the BOE. Findlaw.com law dictionary defines director as "any of a group of persons usually elected by shareholders and entrusted with the overall control of a corporation". Thus, the subject BOE member **is** covered by this prohibition.[1]

The Requester has stated that the common member abstains from discussion and voting on issues involving the other entity and a separate, unrelated representative from the other organization is always present to discuss issues that relate to it. While the Ethics Commission commends him for doing so, this action does not completely cure the conflict of interest.

Therefore, the Commission finds that the common member should not vote on any matters related to any contract or other transaction between the BOE and the non-profit. Although he has been **abstaining** from such discussion and votes, the Ethics Act requires that he must **recuse** himself from such matters.

The Commission has determined that in order for a public official's recusal to be effective he must disclose his interest and physically remove himself from the room during the discussion and decision making process.

CONCLUSION

The Commission further notes that other laws may apply. Specifically, Article 12, Section 9 of the West Virginia Constitution states that "No person connected with the free school system of the State… shall be interested in the sale…of any …other thing used therein…." Thus, the Requester should consult with, and/or request a legal opinion from, the Attorney General's Office regarding the applicability, if any, of Article 12, Section 9 of the West Virginia Constitution to the situation presented herein.

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
R. Kemp Morton, Chairman

[1] Subsection (D) would appear to authorize the common member to vote on the non-profit's contracts since he is not an **employee**. This analysis is academic, however, in light of the prohibition imposed by subsection (A).