

## ADVISORY OPINION NO. 2010-06

Issued On March 4, 2010 By The

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

The Requester, a **Public Library** created by Special Act of the Legislature, asks:

- (1) Does it violate the Ethics Act's prohibition against having an interest in a public contract for a person, who is an equity member in a law firm which provides legal service to the Public Library Board as bond counsel, to serve on the board?
- (2) Is a Library created by a Special Act of the Legislature as a **joint** endeavor of a County Board of Education, County Commission and a City subject to W.Va. Code § 61-10-15?
- (3) If the person serves on the Library Board, what steps must he take to comply with W.Va. Code § 61-10-15, if applicable, and/or the West Virginia Ethics Act, W.Va. Code § 6B-1-1 et. seq.?

#### FACTS RELIED UPON BY THE COMMISSION

The Library was created by a Special Act of the Legislature. The Special Act states that it is hereby creating a "public library" which shall be supported by the County Board of Education, the County Commission and a City as a "joint endeavor of three governing authorities." The Library is also governed by the general provisions of the West Virginia Public Library Act, West Virginia Code § 10-1-1, *et seq.*, to the extent the provisions are not inconsistent with the Special Act creating the Library.

The Special Act provides that the Library Board will be governed by a board of eighteen (18) directors who serve without compensation. The directors are also called "board members." Board members serve for terms of six (6) years and are eligible for reappointment. All board members are appointed by the County Board of Education. The Bylaws of the Library Board provide that:

The Library Board shall submit to the Board of Education... not later than the 20th day of April in each year the names of three persons whom the Library Board nominates for appointment to the Library Board for the term beginning the next July first; and shall from time to time submit the names of nominees for appointment to fill vacancies on the Library Board.

In regard to funding, as required by the Special Act, the Requester states that the Library receives regular levy revenues from the County Board of Education, County

Commission and City. Pursuant to the language in the Special Act, the Library's employees are considered employees of the County Board of Education for certain sections of the West Virginia Code. There is no reference to West Virginia Code § 61-10-15 in the Special Law.

The Library intends to construct a new library building. The Library Board may fund this project, in part, through public revenue or general obligation bonds. Such bonds may be issued through the County School Board, County Commission or City, or a combination of these governmental entities. In approximately 2004, the Library solicited requests for proposals for bond counsel. A law firm was selected for that purpose and will continue to serve as bond counsel until a bond, if any, is issued.

The Library has recommended to the County Board of Education for appointment to its Board a member of the law firm. This member is not involved in providing legal representation to the Library on the bonds; instead, other members of his firm who specialize in that area of the law provide those services.

The Requester seeks guidance in regard to whether this individual may serve on the Library Board and, if so, what steps should be taken to comply with the West Virginia Ethics Act and W.Va. Code § 61-10-15, if applicable.

The Requester states that under the provisions of the Special Act and the West Virginia Public Library Act, the Public Library Board is *not* a part, division, or agency of the County Board of Education, the County Commission, or the City. The Requester further states that the County Public Library Board is *not* a part, division, or agency of West Virginia state government.

### **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 ... 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 member of any other county or district board or any county or district 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.

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. However, there are exceptions to this provision. Specifically, the provisions of this code section do not apply to part-time appointed officials so long as they do not participate in the review or evaluation of the contract and recuse themselves from voting on the contract. For recusal to be proper under the Ethics Act, public officials must disclose their interest and excuse themselves from participating in the discussion and decision-making process by physically removing themselves from the room during the discussion and vote on the matter. W.Va. Code § 6B-2-5(j)(3).

As such, pursuant to the Ethics Act, as the Library Board Members are part-time appointed public officials, there is nothing in the Ethics Act which prohibits a Member whose law firm provides services to the Board from serving on the Board. However, the affected Board Member may want to seek advice from the West Virginia State Bar to ascertain the application of the Rules of Professional Conduct, if any, to this situation.

## 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 part-time appointed members. As such, even if a part-time appointed official may serve in accordance with the Ethics Act, this is academic if he or she is subject to the stricter provisions of § 61-10-15.

This is the first time the Commission has been asked to consider whether a Member of a Library Board is subject to W.Va. Code § 61-10-15. The Commission notes that not all libraries are created in the same manner. The West Virginia Code states that “[A] governing authority either by itself or in cooperation with one or more other such governing authorities, shall have the power to establish...a public library, or to take over, maintain or support any public library already established.” W.Va. Code § 10-1-2. The Code also provides for the creation of regional libraries which are defined as libraries established and/or maintained by two or more counties, by action of their governing authorities.” W.Va. Code § 10-1-2.

Some libraries are formed as county or city libraries. Other libraries may be non-profit entities which are supported, in part, by taxpayer funds. The Library in the present case was not created by a City or County. Instead, it was created by a Special Act of the Legislature.

To determine whether the Members of the Public Library Board are subject to W.Va. Code § 61-10-15, the Commission must examine the plain language of the statute. Specifically, the Commission must determine whether a member of the Public Library Board in question is a “member of a county or district board” and/or a “county or district officer,” and/or a county officer.

The Public Library was created as a joint venture between a County Board of Education, County Commission and City by virtue of a Special Law. The Commission finds that as it is a joint venture between County Government and a City, it does not fall within the definition of a County Board. Instead, it is a hybrid public corporation which does not fall squarely within the common definition of a county agency.

For example, a County Parks Board is a County Agency as the Legislature has specifically authorized county commissions to create a county parks and recreation commission and to appoint the Commission Members. W.Va. Code § 7-11-1. As such,

County Parks Board Members are subject to § 61-10-15 as a Parks Board, while having a degree of independence, is still a County Agency, it having been created by the county. In contrast, the Public Library has not been created by the County or School Board, nor does the Special Act state that it shall be created by the County or School Board. Instead, the Special Act creates the Public Library and requires two county entities and one municipal entity to fund it. While the school board has the power of appointment, it is the opinion of the Commission that under the facts presented, this appointment power does not make it an agency of the county or school board.

The Commission believes that this finding is consistent with the rules of statutory construction. West Virginia Code § 61-10-15 is a criminal misdemeanor statute. The Supreme Court has stated that it must be strictly construed. State ex rel. John D. Anderson v. Board of Education of Mingo County, 233 S.E.2d 703, 708 (W.Va. 1977) and, State v. Neary, 365 S.E.2d 395, 399 (W.Va. Code 1987). Strict constructionism is defined as:

The doctrinal view of judicial construction holding that judges should interpret a...statute (esp. one involving penal sanctions) according to its literal terms, without looking to other sources to ascertain the meaning.

Black's Law Dictionary 356 (9<sup>th</sup> ed. 1990).

While it may be argued that the statute is remedial to the extent it seeks to prohibit an unlawful interest in a public contract, the Commission finds that in determining which officials fall within its purview, strict construction or at least a reasonable degree of strictness is warranted. See generally Department of Transportation, Division of Highways v. Sommerville, 412 S.E.2d 269 (W.Va. 1991) and ACME Fireworks Corporation v. Bibb, 126 N.E.2d 688 (Ill. 1955).

The Commission further notes that while § 61-10-15 has been around since 1879, it can find no published Supreme Court opinion wherein this statute was analyzed in regard to its application, if any, to libraries, or used as a means of removing a library board member. In the absence of plain language in the statute stating that it applies to a library created by a Special Act as a joint venture of the county, school board and a city, the Commission declines to extend the application of this code section to the public library in question. However, the Commission cannot exclude that a County Library specifically created by a County is not subject to § 61-10-15.<sup>1</sup>

Based upon the foregoing, the Commission finds that the Requester is not subject to § 61-10-15. Even if it were, as the contract was in place before the Requester's

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<sup>1</sup> The Commission also does not consider the Public Library in question to be a District for purposes of 61-10-15. The term "district" is not in its enabling legislation nor is the term "district" generally associated with libraries. Further, it is not defined in § 61-10-15.

appointment, the contract is permissible so long as there is no modification in its terms or conditions. A.O. 2008-10 (In this opinion the Commission found that a County Commissioner could continue to serve on a County Commission even though the County Airport Authority had a contract with his rental car business as the contract was entered into before his election. This opinion also summarizes other opinions of the Commission wherein it analyzes this principle).

### **Other**

The Requester asks what other steps a Board Member whose law firm represents the Library Board on a bond matter must take to comply with the Ethics Act. As set forth above, he may **not** vote on matters relating to the contract between the law firm and Library Board, including reviewing or approving bills. See W.Va. Code §§ 6B-2-5(d) and (j). Further, he may **not** be involved in any matters relating to evaluating the performance of the law firm. To the extent the Public Library Board seeks to retain other law firms for additional legal services, if the Board Member's firm may be asked to be considered for that work, the Board Member may **not** be involved in drafting request for proposals, determining the rate of pay for such legal services or in the ultimate selection of the law firm.

### **Conclusion**

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. Further, this opinion is limited in application to the particular facts and circumstances presented, and may not be relied upon as precedent.

/s/ Kemp Morton

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R. Kemp Morton, Chairperson