Advisory Opinion 2017-15

Issued on May 4, 2017, by

The West Virginia Ethics Commission

Opinion Sought

A County Board of Education Member asks:

(1) May the Board of Education contract with an event services business when a Board of Education Member's spouse is the sole owner of a real estate limited liability company that is the lessor to the event services business?

(2) May the Board of Education contract with the event services business if the events are not located at the property rented from the spouse's real estate company?

(3) May the individual county schools contract with the event services business?

(4) May the individual county schools contract with the event services business if the events are not located at the property rented from the spouse's real estate company?

(5) May the Board of Education contract with the event services business if the spouse's real estate company does not charge rent to the event services business or gives a credit against rent for the time used by the Board of Education or schools?

Facts Relied Upon By the Commission

The Requester's spouse is the sole owner of a real estate limited liability company ("company"). The company leases commercial property to a local business that performs event services. The business pays $1,000 per month in rent to the real estate company regardless of the type or amount of work the business does at the rented property or elsewhere. The real estate company further does not share in the proceeds of any contract or service of the business.

Schools in the Requester's county have been using the event services business for school functions for approximately five years. The Requester became a County Board of Education Member on July 1, 2016. The Requester states that the schools would like to continue using the business for event services because there are no other businesses of its kind in the community. The Requester states that if it were possible to contract with vendors in other locations to perform event services, it would be at a significantly higher cost and likely cost prohibitive.

Provisions Relied Upon By the Commission

W. Va. Code§ 6B-2-5(d) provides, in relevant part:

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control ....
>
> (2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:
>
> (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
>
> (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.
>
> (4) Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code R. § 158-8-2 provides:

> Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 provides:

> The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.
>
> Public 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 provides, in relevant part:

> (a) It is unlawful for 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 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 ....
>
> (h) Where the provisions of subsection (a) of this section would result in the loss of a 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 written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Advisory Opinion

The Ethics Act prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code§ 6B-2-5(d).

In addition, certain county officials must abide by the stricter prohibitions contained in W. Va. Code§ 61-10-15. W. Va. Code§ 61-10-15, a separate criminal statute, imposes criminal penalties against certain county officials, including board of education members, who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Ethics Commission will first address W. Va. Code§ 61-10-15 given the more stringent standards contained therein.

Analysis under W. Va. Code§ 61-10-15

The Requester, as a county board of education member, is expressly subject to the prohibitions contained in W. Va. Code§ 61-10-15. W. Va. Code§ 61-10-15 ("It is 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 ...."). Accordingly, the Commission must determine whether W. Va. Code§ 61-10-15 operates to prohibit a public contract between the event services business and the county board of education or county schools when the event services business is a tenant of the company owned by the Requester's spouse. The Commission will first determine whether the Requester has voice, influence or control over the contracts of the board of education and individual county schools. The Commission will then address whether the Requester has a direct or indirect pecuniary interest in the public contracts of the event services business.

Voice, influence or control

The Commission finds that the Requester has "voice, influence or control" over the public contracts of the board of education. *See Jordan v. Mccourt,* 135 W. Va. 79, 87, 62 S.E.2d 555, 560 (1950) (finding that a board of education member had voice, influence or control over a board of education contract with a private company where the member served as president). The Commission also finds that the Requester has "voice, influence or control" over the public contracts of the individual schools within the school system the Requester serves. The Commission has consistently held that board of education members have voice, influence or control over all contracts in a county school system. In Advisory Opinion 2010-15, the Ethics Commission explained:

> Each county school district is under the supervision and control of the County BOE. W. Va. Code§ 18-5-1 et. seq. The BOE exercises control over school personnel, including coaches and the principals to whom they report. The Commission finds that an elected BOE Member may not contract with the County school system where he serves ... as his position as a BOE Member gives him voice, influence and control over all contracts in the County School System.

See also Advisory Opinion 2010-14 ("It appears that the clear intent of this statute is to prevent school board members from contracting with schools in their county for any purpose."); Advisory Opinion 2004-12 ("[W. Va. Code § 61-10-15] prohibit[s] county school board members, who clearly have control over their school systems' financial transactions, from having a personal financial interest in such transactions.").

Direct or indirect pecuniary interest

The Ethics Commission must now determine whether the Requester has either a direct or indirect pecuniary interest in the public contracts of the event services business when that business is a tenant of the company the Requester's spouse owns. The Commission initially finds that the Requester has a pecuniary interest in her spouse's real estate company. *See West Virginia Educ. Ass'n v. Preston County Bd. of Educ.,* 171 W. Va. 38, 41, 297 S.E.2d 444, 448 (1982) ("A superintendent's nomination of his wife for a central administrator's position violates Code, 61-10-15."). The real estate company, however, is not directly entering into a public contract with either the board of education or an individual school within the county. The real estate company is instead the lessor to an event services business which ultimately seeks to contract with either the board of education or an individual school within the county.

The fact that the real estate company is not directly contracting with the county school system is not enough to insulate the Requester from W. Va. Code § 61-10-15. For example, the Ethics Commission has consistently maintained that public officials who enter into subcontracts to perform work for a private employer with whom the public body has entered into a public contract remain subject to the prohibitions in W. Va. Code§ 61-10-15. In Advisory Opinion 95-44, the Commission held that it would be a violation of W. Va. Code § 61-10-15 "for a steel corporation which employs a County Commissioner to enter into a public contract ... indirectly as a subcontractor to perform work on a County Commission project."[1] The Commission relied upon the decision of the Supreme Court of Appeals of West Virginia in *Fisher v. Jackson,* 107 W. Va. 138, 147 S.E.541 (1929), from which it quoted:

> It is argued that the defendant was in fact working for C.C. Herring, and not for the board. Even if this were true, the statute covers this situation. A member of the Board will not be permitted to participate in the letting of a contract to one and then derive benefit indirectly therefrom by working for the party obtaining the contract. The plain mandate of the statute denies

[1] The Ethics Commission notes that the Legislature subsequently amended W. Va. Code§ 61-10-15 regarding salaried employees of vendors or suppliers. W. Va. Code§ 61-10-15(e) states:

> (e) 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, his or her spouse or child:
>
> (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.

him the right to receive a benefit by indirection where he may not profit directly.

The Requester here is in a different posture, however, than those public officials who serve as subcontractors on county projects. Subcontractors' financial interests are tied to whether the contractor can secure the public contract with the subcontractors' respective public agency. *See, e.g.,* Advisory Opinion 2017-02. The contractor at issue here, the event services business, pays a monthly rent of $1,000 to the real estate company regardless of the type or amount of work the business performs, including work performed for the county school system. Nonetheless, the real estate company still has an interest in its tenant's ability to pay rent.

In Advisory Opinion 2001-17, the Commission considered whether a county commissioner's husband may rent to tenants whose rent is subsidized by a federal housing program administered by a county housing authority. The Commission first determined that the county commissioner had voice, influence or control over the housing authority's contracts due to the county commission's authority to create housing authorities, to appoint and remove the members of the authority's boards and to generally oversee the fiscal responsibility of subordinate county agencies. Advisory Opinion 2001-17. The Commission subsequently found that it would be a violation of W. Va. Code§ 61-10-15 for a county commissioner's spouse to lease to tenants who are receiving rent subsidies from a county's housing authority. *Id.* The Opinion did not provide any further analysis of the Requester's pecuniary interest. *Id.*

The West Virginia Supreme Court has offered the following guidance regarding W. Va. Code§ 61-10-15: "The public policy of this State, as evidenced by Code, 61-10-15, as amended, is not directed against actual fraud or collusion, but is for the purpose of preventing those acts and eliminating any opportunity therefor." *Jordan v. Mccourt,* 135 W. Va. 79, 86, 62 S.E.2d 555, 560 (1950). 'The statute forbids a county officer from engaging in business transactions on behalf of the public if, by virtue of his or her private interests, he or she ***may*** benefit financially, directly or indirectly, from the outcome of those transactions." Syl. pt. 4, in part, *Summers County Citizens League, Inc. v. Tassos,* 179 W. Va. 261, 367 S.E.2d 209 (1988) (emphasis added). "The question is not whether the county officer was certain to benefit from the contract, but whether the likelihood that the county officer might benefit was so great that he or she would be subject to those temptations which the statute seeks to avoid." *Id.*

Here, the Ethics Commission finds that the Requester, by virtue of the real estate company her spouse owns, has an indirect pecuniary interest in the public contracts of the event services business. As lessor to the event services business, the real estate company has an interest in the event services business being able to pay rent. Thus, while the real estate company the Requester's spouse owns is not certain to benefit from the public contracts of the event services business, the real estate company may benefit indirectly from the outcome of those transactions when the company is owed rent each month. *See Tassos,* supra.

Conclusion

Given the foregoing, the Ethics Commission finds that W. Va. Code § 61-10-15 prohibits the board of education and the individual schools from contracting with the event services business as outlined in the Requester's first four questions. It is immaterial whether the school functions are held on the property rented from the real estate company. As the Requester explained, the real estate company receives $1,000 per month in rent regardless of the type or amount of work the business performs at the rented property or elsewhere. While the Commission's decision may seem harsh, "[t]he policy so clearly expressed by the statute leaves no room for equitable considerations. If that policy is to be limited by exceptions, it is usually the function of the legislature ... to spell out such exceptions." *Tassos,* 179 W. Va. at 268, 367 S.E.2d at 216.

The Requester additionally asks whether the Board of Education can contract with the event services business if the spouse's real estate company does not charge rent to the event services business. **The Commission finds that in the absence of rent or any other current or future direct or indirect pecuniary benefit to the Requester, the Board of Education or individual schools may contract with the event services business for school functions.** The Requester alternatively asks whether the Board of Education can contract with the event services company if the real estate company gives a credit against rent for the time used by the Board of Education or schools. **The Commission finds that a credit given against rent would not serve to cure the Requester's indirect pecuniary interest in the public contracts of the event services business.**

Finally, the Commission acknowledges the Requester's representations that contracting with other vendors would result in a significantly higher cost for school functions. The Commission notes that W. Va. Code§ 61-10-15(h) provides that "[w]here the provisions of subsection (a) of this section would result ... 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 written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section."

Analysis under the Ethics Act

There is no need to address the Ethics Act's prohibition on public contracts since the Commission has determined that the Requester's proposed conduct is prohibited by W. Va. Code§ 61-10-15.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-

*17-1 through 68-3-11, and **W** Va. Code§ 61-10-15, and does not purport to interpret other laws or rules.*

In accordance with W Va. Code § 68-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe, Chairperson
Robert J. Wolfe, Chairperson