

ADVISORY OPINION NO. 2009-11

Issued On December 3, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Board of Education asks whether it may contract with the business of an Assistant High School Principal to provide an after-school driver's education program to students in the county school system.

FACTS RELIED UPON BY THE COMMISSION

State law requires that all public secondary schools in the State offer a driver's education course. W. Va. Code § 18-6-2. This course is currently being offered at the high schools in the Requester's county as an elective course. Students who take the course receive credits towards graduation.

The Requester states that many students are unable to take the course during the school day due to their busy class schedules. In order to allow more opportunities for students to participate in a driver's education course, the Requester seeks to offer an after-school program. Credits may or may not be offered for this course. The overriding purpose of allowing the after-hours program is to allow students the opportunity to obtain the necessary skills and training required to successfully pass the driver's test administered by the West Virginia Division of Motor Vehicles.

The Requester sought, through public advertising, proposals for a business to provide an after-school driver's education program. The request for proposals noted that the requirements for the program include classroom instruction and driving time.

The lowest bidder was a business owned by an Assistant Principal at a High School in the County. The West Virginia Code sets forth the duties of principals and assistant principals. In regard to principals, the Code states:

Under the supervision of the superintendent and in accordance with the rules and regulations of the county board of education, the principal shall assume administrative and instructional supervisory responsibility for the planning, management, operation and evaluation of the total educational program of the school or schools to which he is assigned. W. Va. Code § 18A-2-9.

The code further provides that a board of education shall, when needed, hire assistant principals to work under the direction of the school principal. *Id.* The principal's major area of responsibility is the general supervision of all the schools and all school activities involving students, teachers and other school personnel. W. Va. Code § 18A-1-1(c)(2). The Assistant Principal, who is required to work under the direction of the

Principal, also has responsibilities in regard to the general supervision of all school activities involving students or teachers.

The Requester, not the Assistant Principal, had responsibility and control over the letting of the contract. The Assistant Principal is responsible for assisting the Principal in supervising personnel and students at the high school where he is assigned. Enrollment in the after school hours program would be made available to students at his school. The Requester states that it would take steps to ensure that the Assistant Principal would not be the administrator in charge of the after-school program.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... 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 supervisor or superintendent principal or teacher of public schools... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... supervisor, superintendent, principal or teacher ... 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. 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. In the present case, the gross revenue exceeds \$1,000.00. Hence, this exception does not apply.

As the Assistant Principal has more than a limited interest, the Commission must next determine whether his position gives him direct authority or control over the contract in question. The Assistant Principal does not have direct authority or control over the letting of the contract by the County Board of Education. This fact may relieve him from the prohibitions in the Ethics Act, but the Ethics Commission elects to save the answer to this question for another day, as it finds that the stricter limitations imposed by W. Va. Code § 61-10-15 prohibit the Assistant Principal from having an interest in this contract.

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 Commission finds that an Assistant Principal, as a supervisor in the school system, is subject to this code provision. In determining whether a public official or employee has voice, influence or control over a public contract, the Ethics Commission must consider not only the letting of the contract, but the administration of the contract. In regard to the administration of the contract, it is the principals and their assistants who have responsibility for overseeing all activities at their schools, including after-school educational programs.

The Commission further finds that the responsibilities of the Assistant Principal relating to supervising all school activities conducted at his school constitute voice, influence or control for purposes of § 61-10-15. While the school board, not the assistant principal, lets the contract, it is the principal and assistant principal who have responsibility for overseeing school activities that the contract entails.

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).

While the Requester has stated that it will ensure that the Assistant Principal will have no administrative responsibilities in his official capacity in regard to the after-hours driver's education program, the Ethics Commission finds that this action does not alleviate the fact that the assistant principal has voice, influence or control in regard to ensuring that students at his school receive the quality of education to which they are entitled. The Assistant Principal has this responsibility regardless of: whether an educational program is provided by BOE employees or a third party hired by the school system; or whether a course is offered for credit.

This situation is different than the issue presented to the Commission in Advisory Opinion 2007-08 wherein a public school teacher asked if he could bid on a contract to provide vending machine services. In that case, the affected school system employee was a teacher. As a teacher, he did not have supervisory responsibility in regard to the general operations of his school or vending services offered therein.

By contrast, a principal and assistant principal are responsible for the day-to-day operations of the school. Further, they oversee their students not only during the school day, but at after school activities.

The Commission recognizes that sometimes in the chain of command there may be instances where a public employee lower in the chain may be relieved of job responsibilities to ensure that he has no voice, influence or control over a contract. However, applying the strict prohibitions in § 61-10-15, particularly as they historically relate to protecting the appearance of self-dealing in county school systems, the Commission finds that an assistant principal has voice, influence and control over the administration of a public contract with a third party provider in whose courses the students at his school may enroll.

As a result of the foregoing analysis, the Commission hereby finds that W. Va. Code § 61-10-15 prohibits the subject contract. The Commission further notes that this opinion is prospective only.

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.


R. Kemp Morton, Chair