

ADVISORY OPINION NO. 2008-10

Issued On January 8, 2009 By The WEST

VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks whether the County Airport Authority may continue a lease agreement with his rental car business, in accordance with terms and conditions that were established prior to his election to the County Commission.

FACTS RELIED UPON BY THE COMMISSION

The requester currently owns a business which has been operating a car rental concession at the County Airport since 1948. The current lease agreement was entered into in 2001. The contract provides that a specified percentage revenue, based upon gross time and mileage from each rental, be paid to the Airport Authority. The business also pays a set monthly fee for the use of a wash bay. The Airport Authority provides gasoline for use in the rental car operation at a set mark-up price. The terms of the agreement provide for automatic renewal every two years, unless the number of passengers transiting the airport reaches 30,000.

The requester was elected to the County Commission in 2006. Upon assuming office in 2007, he was appointed by his fellow Commissioners to serve on the County Airport Authority. The requester agreed to be recused from any discussion or vote regarding rental car matters, although no such matters arose during his tenure on the Board. In early January, another Commissioner was appointed to serve on the Airport Authority and the requester was appointed to serve on an unrelated county board.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1), *Interests in public contracts*, provides in part that "... no elected or appointed official or 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 ... a contract which the official or employee may have direct authority to enter into, or over which he or she may have control"

W. Va. Code § 61-10-15(a) states in part: "It is unlawful for any member of a county commission ... or any member of other county or district board ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract [over which] he or she may have any voice, influence or control"

ADVISORY OPINION

Both the Ethics Act and W.Va. Code§ 61-10-15 prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale which their public position gives them authority to award or control. W. Va. Code§ 61-10-15 is a criminal misdemeanor statute which applies only to certain county personnel, including County Commissioners.

These provisions are designed to prevent both actual misconduct in awarding public contracts, and the appearance of impropriety inherent in public servants awarding public

contracts to themselves. These provisions steer public servants away from situations where they might need to consider their own financial interests in awarding agency contracts. Under W. Va. Code § 6B-2-5(d), the requester's position as a County Commissioner does not give him authority or control over a lease agreement between his business and the Airport Authority. Therefore, the Ethics Act would not prohibit the requester from entering into or modifying a contract between his business and the Authority.

However, W. Va. Code § 61-10-15 prohibits the requester from entering into any public contract with a public agency over which his elected position as a County Commissioner gives him voice, influence or control. This is a broader standard than the limitation in the Ethics Act. It would apply to this situation because the County Commission has the authority to appoint members to serve on the County Airport Authority Board.

Nonetheless, the Commission has recognized situations in which agencies may continue to do business under the terms of a contract in which a public servant has an otherwise prohibited financial interest, in circumstances where the contract was lawful at the time it was agreed to. For example, where the public servant had no control over the contract at the time of its execution, or where the public servant's interest in the contract arose after the contract was already in effect.

The Commission initially addressed this question in Advisory Opinion 90-19, before the Commission received authority to advise public servants on the meaning and application of W. Va. Code § 61-10-15. There, the Commission decided that a school system could continue doing business with an employee under a contract that was entered into prior to the effective date of the prohibition in the Ethics Act.

More recently, in Advisory Opinion 2000-16 the Commission applied these principles to permit a County Board of Education Member to continue performing a service contract for the repair and maintenance of a television satellite system he installed for the Board. This five-year service contract was entered into before the Board Member was elected to serve on the Board.

Similarly, in Advisory Opinion 96-49 the Commission ruled that a County Board of Education could continue purchasing text books under a contract that had been negotiated to provide set prices for books from 1993 to 1999. The Superintendent's spouse became an employee of the textbook vendor after the contract had been entered into. This situation was found not to violate W. Va. Code § 61-10-15 because neither the Superintendent nor his spouse had an interest in the contract at the time it was created.

These same principles have likewise been applied to permit a Board of Education to continue purchasing dairy products under a contract that was established before the Board appointed a person whose spouse was employed by that business as its Interim Superintendent (Advisory Opinion 2001-11) and a County Commission to continue purchasing gasoline from a business owned by a newly-elected County Commissioner where the contract was created prior to his election to office (Advisory Opinion 91-66).

In this particular situation, the Airport Authority entered into this lease agreement with the requester's business nearly six years before he was elected to the County Commission. There has been no change in the terms of the contract since the requester's election.

Consistent with our previous Advisory Opinions, the Airport Authority may continue its lease agreement with the requester's rental car business, so long as there is no modification in its terms and conditions, and so long as the requester does not serve on the County Airport Authority, or participate in the appointment of members to serve on the Airport Authority. Further, the requester should be mindful of the Ethics Act voting provisions in regard to voting on matters regarding the County Airport.

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. Pursuant to W. Va. Code§ 6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of W. Va. Code§ 61-10-15, and shall have an absolute defense to any criminal prosecution to actions taken in good faith reliance upon such opinion. Further, in accordance with W. Va. Code§ 6B-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.

/s/ R. Kemp Morton, Chairman
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