

ADVISORY OPINION NO. 2006-15

Issued On December 7, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Solid Waste Authority asks if it may compensate one of its members for hauling waste collected by the Authority.

FACTS RELIED UPON BY THE COMMISSION

A County Solid Waste Authority recently purchased a compactor which will be used to compact bagged solid waste and other waste which is not delivered directly to the county landfill. Once the solid waste has been compacted and the compactor is full, the waste must be transported to the landfill for appropriate disposal. The Authority does not have any means to transport this waste from the compactor to the landfill.

One of the appointed Authority Members is the owner of a waste hauling business. That business has an exclusive tariff from the Public Service Commission to haul waste in certain parts of the county, including the area where the compactor will be located. The Authority asks if it may pay the Member's business to transport compacted waste from its compactor to the landfill.

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 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 be construed to prohibit . . . a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

W. Va. Code § 61-10-15 states in part that . . . It shall be unlawful for any . . . county or district officer . . . to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract . . . [over] which as such . . . officer . . . he may have any voice, influence or control . . .

ADVISORY OPINION

Both the Ethics Act and W. Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale over which their public position gives them control. The Ethics Act contains a specific proviso which authorizes a part-time appointed official, such as a County Solid Waste Authority Member, to be recused from participating in the contractual process, and thereby satisfy the limitations in the Act.

W. Va. Code § 61-10-15 applies a stricter standard of conduct. It prohibits certain county officials, including Members serving on a County Solid Waste Authority, from having a direct or indirect pecuniary interest in a public contract over which their public position gives them voice, influence or control. This prohibition applies to all contracts, purchases and sales between the public servant's

agency and any business in which the public servant has a pecuniary interest as an owner, shareholder, director or officer.

However, under the facts presented in this request, the Authority has no meaningful discretion in the selection of a waste hauler to remove waste from their compactor. Pursuant to W. Va. Code § 24A-2-5, the Public Service Commission has issued a certificate of convenience and necessity to the business owned by an Authority Member. As a result, the only waste hauler available to provide the services required by the Authority is owned by the Member.

The West Virginia Supreme Court of Appeals addressed application of W. Va. Code § 61-10-15 to a similar situation in Dials v. Blair, 144 W. Va. 764, 111 S.E.2d 17 (1959). In Dials, a county school system purchased water from a company in which a board member had an ownership interest. The Court ruled that it was not a violation of W. Va. Code § 61-10-15 for a county board of education to purchase water from the company inasmuch as water service could not be obtained from any source other than water companies in which a member of the board had an ownership interest.

This Commission has previously recognized that the Dials ruling established a set of circumstances where the criminal prohibitions in W. Va. Code § 61-10-15 do not apply. For example, in Advisory Opinion 2000-23 this Commission concluded that a County Board of Education could purchase electricity from a company that employed a Board Member's spouse. Similarly, in Advisory Opinion 2000-13, this Commission authorized a County Board of Education to purchase gas that was transported through pipelines owned and operated by a Board Member's employer. These rulings are proper under the Dials analysis because no violation of § 61-10-15 is present.

In Dials, the school board was required to obtain water for its schools and the water company, as a public utility, was required to provide water. Likewise, the Authority has a legal duty to properly dispose of its own waste and the Authority Member's business has a duty to haul the waste to the appropriate landfill. In these circumstances, the Authority Member has no 'voice, influence or control' in the matter, as contemplated in Dials. Accordingly, the County Solid Waste Authority may contract with the waste hauling business owned by an Authority Member, provided that the Member is recused from participating in the decision or vote regarding this matter.

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.


Chairman