

ADVISORY OPINION NO. 2006-11

Issued On September 7, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Prosecuting Attorney** asks whether it is a violation for her to lease to the county commission an office building she and her husband own.

FACTS RELIED UPON BY THE COMMISSION

A recent fire destroyed the building the county commission leased as office space for the county 911 Mapping and Addressing Coordinator. There is insufficient space in the courthouse to house the 911 Coordinator's office. The requester and her husband own one of the only two buildings in the immediate vicinity of the courthouse. The other one, owned by the president of the county commission and his son, is not suitable for the needed office space. According to the requester, there is limited commercial space in the county seat; the only other vacancies are a restaurant and a video store.

The Prosecuting Attorney is statutory counsel to the Commission. Further in her position as Prosecuting Attorney, the requester sits on the 911 Advisory Board, as does the 911 Coordinator who is employed by the county commission.

CODE PROVISIONS RELIED UPON BY 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

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

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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 positions give them control. The Ethics Commission has the power to grant an exemption from the Ethics Act where it appears that the prohibitions of W.Va. Code § 6B-2-5(d) would result in undue hardship. Understandably, the county commission needs to obtain adequate office space for its 911 Coordinator, and the county prosecutor appears to be the only land owner whose property meets the requirements. As there is no feasible alternative available, the Commission finds that prohibiting the county commission from contracting with the prosecuting attorney would create an undue hardship. Based upon these facts, the Commission would ordinarily grant an exemption under the Ethics Act. Although authorized to grant exemptions to W. Va. Code § 6B-2-5(d)(1), we decline to do so here since the exercise would be purely academic.

It is also necessary to analyze whether the contract is in violation of W.Va. Code § 61-10-15. The public contract prohibition in W.Va. Code § 61-10-15 is more comprehensive, prohibiting covered persons, such as a prosecuting attorney, from having a personal financial interest, directly or indirectly, in public contracts, purchases and sales over which her public position gives her "voice, influence or control". The requester asks that, should the Commission determine that the proposed lease violates §61-10-15, she be granted an exemption "under these circumstances".


But, as we stated in Advisory Opinion 99-07, the Prosecutor's statutory responsibilities as counsel for the County Commission vest in her the degree of "voice, influence and control" over the contracts of the Commission contemplated by W. Va. Code § 61-10-15. And, as we have stated in Advisory Opinions 92-48 and 93-14, the Ethics Commission is without authority to grant exemptions to § 61-10-15. As the West Virginia Supreme Court wrote:

Code, 61-10-15, implements the public policy of this State, and its provisions are clear and unambiguous. **Although harsh, its objects and purposes are salutary.** The purpose of the statute is to protect public funds, and give official recognition to the fact that a person can not properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 53 S.E.2d 735, 739 (1949). (emphasis added)

While we mean to cast no aspersions on the motives of the county prosecutor or the county commission, we note that the statute simply prohibits the contract; the conduct itself is not inherently wrong or evil.

To the extent that any advisory opinions we have issued in the past have suggested that we have the authority to grant exemptions to the provisions of W. Va. Code § 61-10-15, those advisory opinions are hereby revoked, and may not be relied on as precedent. This opinion does **not** revoke any exemption previously granted by the Commission. This opinion is prospective only.


Chairman