

ADVISORY OPINION NO. 2002-17

Issued On October 3, 2002 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County School Treasurer asks whether the Board of Education may buy supplies from the company by which his spouse is employed?

FACTS RELIED UPON BY THE COMMISSION

The Treasurer's spouse is employed as a sales representative by a company which sells school supplies. The Treasurer asks whether the recent amendment to WV Code 61-10-15 will permit the Board to accept bids from, or award contracts to, his spouse's employer.

The Treasurer supervises the Board's purchasing director and approves requisitions from all departments before they are sent to the purchasing department. The Treasurer's signature is on all Board checks, but "he does not approve or vote for the supplies furnished" by vendors.

The Treasurer's spouse would receive no commission from sales to this Board because the county is not in her sales territory. Neither she nor the Treasurer are an owner, shareholder, director or officer of the company by which she is employed.

CODE PROVISIONS RELIED UPON BY COMMISSION

WV Code 61-10-15 (a) states in part that ... It shall be unlawful for any ... supervisor ... of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over which] she may have any voice, influence or control:

WV Code 61-10-15 (e) added in 2002, exempts any person subject to the above-stated prohibition if the employee or his or her spouse is a salaried employee of a vendor or supplier under a contract and, 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, vote for or otherwise authorize the payment for any services performed or supplies furnished under the contract.

ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15 prohibit public servants from having a personal financial interest in a public contract over which their public position gives them control.

The Ethics Act's prohibition, WV Code 6B-2-5(d), applies not just to public servants, but also to their spouses and businesses in which they, or their spouses, have an ownership interest of more than 10%. It does not apply to businesses which employ public servants or their spouses.

WV Code 61-10-15 is a criminal statute governing the activities of certain county personnel, including school board members, superintendents and treasurers. Like the Ethics Act, it applies to public servants, their spouses and the businesses in which they have an ownership interest. Unlike the Ethics Act, it applies to businesses which employ public servants and their spouses.

The Legislature amended WV Code 61-10-15 in 2002 to allow agencies to do business with companies that employ agency personnel or their spouses - where they take no official action in regard to the business and receive no financial benefit from it. Five conditions are established by the amendment. The Treasurer's situation clearly satisfies the first three conditions, but subsections (e) (4) and (5) are subject to question.

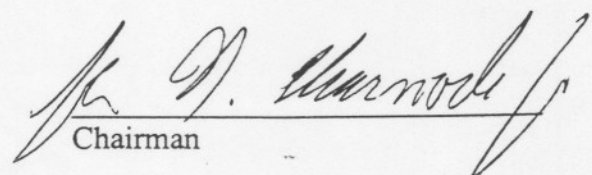
(e)(5) Does the Treasurer "approve, vote for or otherwise authorize the payment of any services performed or supplies furnished" when his signature appears on the Board's checks.

In A.O. 2002-10 the Commission found that subsection (e)(5) is not intended to cover mandated ministerial actions in regard to contracts. The Commission ruled that the subsection does not encompass action which a Superintendent is required to take, such as countersigning checks, which require no personal judgment or discretion. The Commission makes the same ruling here. The Treasurer's signature on Board checks is not a problem.

(e)(4) Does the Treasurer "participate in the deliberations or awarding of" contracts when he supervises the purchasing director and approves requisitions from all departments before they are sent to the purchasing department.

Supervising the purchasing director and approving requisitions involve the exercise of personal judgment and discretion. These are not ministerial duties and it would be a problem for the Treasurer to personally discharge them in regard to matters involving his spouse's employer.

Therefore, if the Treasurer is to have the benefit of (e) he must arrange with the Board to have such duties, in regard to purchases involving his spouse's employer, handled by someone else - preferably someone of equal rank or authority, rather than a subordinate.


Chairman