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ADVISORY OPINION NO. 2005-04

**Issued On June 2, 2005 By The
WEST VIRGINIA ETHICS COMMISSION**

OPINION SOUGHT

A **State Agency** asks if it may enter into an agreement with a software company to promote sales of accounting software.

FACTS RELIED UPON BY THE COMMISSION

The State Agency promotes growth, attraction and retention of private businesses on a statewide basis. One division within the agency is dedicated to facilitating small business development. As part of this effort, the agency provides various specialized training courses to business people throughout the state. The agency charges fees for these classes.

One class involves bookkeeping for small businesses. Attendees receive training which includes how to use a particular accounting software program.

The company which produces this software has a standard "affiliate" agreement in which the agency places a link from its website to the software company. By clicking on the link, a person is connected to a company web page where they can purchase the accounting software program at a 20% discount. As part of this agreement, the agency receives a commission of 5 or 6% on each sale through the agency link. The agreement specifies that it is not exclusive and the agency is free to enter into similar arrangements with other software companies.

The agency anticipates that small businesses will purchase approximately 100 software packages annually, at a median price of \$300. A 20% discount would equate to \$6,000 in savings to small business owners and \$1,500 in commissions for the agency to reinvest in business development initiatives.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) *Use of public office for private gain*, provides in part that ... A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

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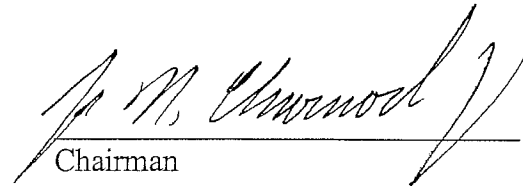
In Advisory Opinions 95-05 and 95-28, the Commission authorized a public servant or agency to enter into arrangements that provided certain benefits to private businesses. In each case, the Commission concluded that the agreements involved an overriding public benefit sufficient to

legitimize any resulting private gain. Thus, even where some element of private gain is involved, the Commission has discretion to conclude that the public benefit outweighs any potential for improper private gain.

In each of the previously referenced Advisory Opinions, the overriding public benefit arose in the context of an economic development initiative. That is also the case here, where the State Agency is pursuing an effort to promote small business growth, consistent with its broad responsibility to promote the State's economy.

No personal benefit will accrue to any public official. Small businesses benefit directly from the 20% discount on accounting software. The State Agency receives a commission on software sales that can otherwise be used to fulfil its statutory mission. Accordingly, the Commission finds that the proposed agreement to link the State Agency's website with a software company allowing individuals to purchase discounted accounting software would not be a violation of W. Va. Code § 6B-2-5(b)(1).

The Commission further finds that decisions on whether an overriding public benefit exists in situations such as this must be decided on a case-by-case basis. Therefore, this opinion is limited to the particular facts and circumstances presented by the requester, and may not be relied upon as a precedent by other persons.


Chairman