

ADVISORY OPINION NO. 2004-10A

Issued On June 3, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** asks if a newly-elected Board Member may continue to be employed by a multi-county vocational school after taking office.

FACTS RELIED UPON BY THE COMMISSION

The County Board of Education jointly operates a multi-county vocational center with two other County Boards of Education. Pursuant to WV Code § 18-2B-2, this vocational center is governed by a seven-member administrative council comprised of a Board Member and the Superintendent of Schools from each of the three participating counties, and an official from the WV Department of Education.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV 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, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body. . . .

WV Code § 61-10-15 states in part that . . . It 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 . . . he may have any voice, influence or control. . . .

ADVISORY OPINION

The Ethics Act

Pursuant to WV Code § 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. As an elected member of one of three County Boards of Education that jointly operate the center where he is employed, a Board Member would at least have indirect authority over his own employment contract.

However, WV Code § 6B-2-5(d)(1) specifically provides that nothing contained therein shall be construed to prevent or make unlawful the employment of any person with any governmental body. Therefore, it would not be a violation of the Ethics Act for an employee of a multi-county vocational center to serve on a County Board of Education that jointly operates that vocational center.

West Virginia Code § 61-10-15

WV Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any County official, including school board members, who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which those officials may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. The Ethics Commission does not have authority to grant exemptions from this provision.

In Advisory Opinion 96-29, the Commission determined that a Board of Education Member had sufficient voice, influence or control over the financial dealings of a multi-county vocational school to prohibit a company he owned from doing business with that school. Moreover, the WV Supreme Court of Appeals determined in *Cimino v. Board of Education*, 158 W. Va. 267, 210 S.E.2d 485 (1974), that the prohibitions in WV Code § 61-10-15 are equally applicable to employment contracts.

In *Jordan v. McCourt*, 135 W. Va. 79, 62 S.E. 2d 555 (1950), the WV Supreme Court recognized the broad purpose of WV Code § 61-10-15 as follows:

"The public policy of this State, is not directed against actual fraud or collusion, but is for the purpose of preventing those acts and eliminating any opportunity therefore..."

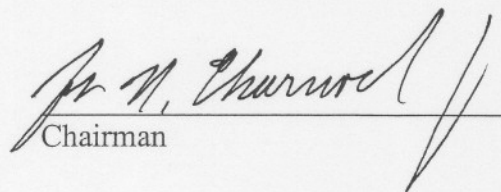
In *Alexander v. Ritchie*, 132 W. Va. 865, 53 S.E.2d 735 (1949) the WV Supreme Court further held that:

"The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot 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. . . ."

In another example of the strict construction applied to WV Code 61-10-15, the WV Supreme Court held, in *Fisher v. Jackson*, 107 W.Va. 138, 147 S.E. 541 (1929), that whether or not they choose to exercise it, board of education members have voice, influence or control over board contracts by virtue of their public position. Thus, the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest is not sufficient to immunize that official from the sanctions contained in WV Code 61-10-15.

The vocational school considered in Advisory Opinion 96-29 was managed by a five-member administrative board. Each participating county designated a Board Member and their County Superintendent of Schools to serve on that board. In this matter, three counties jointly operate a vocational school through a seven-member board which includes a Board Member and School Superintendent from the County Board where the vocational school employee will be serving.

The Commission finds there is no meaningful difference between this situation and the circumstances addressed in Advisory Opinion 96-29. Thus, although the newly-elected Board Member's employment contract with the vocational school is already in existence, once he takes office, his position on the Board will give him indirect voice, influence or control over the renewal, modification or enforcement of his employment contract, generating a potential violation of WV Code § 61-10-15. Moreover, as the Commission previously concluded in Advisory Opinion 92-11, any future renewal, modification or enforcement of this particular employment contract, while the requestor is a Board Member, would also bring about a potential violation of WV Code § 61-10-15 by all members of the Board of Education.


Chairman