

ADVISORY OPINION NO. 2004-16

Issued On August 5, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Multi-County Economic Development Authority asks if a County Commissioner can obtain a loan for his small business through the Authority's Revolving Loan Program.

FACTS RELIED UPON BY THE COMMISSION

The Development Authority was established to promote economic development in four counties and their participating municipalities. The Authority is governed by a 13-member Board of Directors who may be nominated by any County Commissioner or Mayor from a participating county or municipality. Any County Commissioner, Mayor, or current Board Member may veto any person so nominated.

The Authority operates a Revolving Loan Program financed with grant money from a federal commission. A County Commissioner from one of the four participating counties owns a small business and has expressed an interest in applying for a loan through the program, if it is permissible.

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. . . .

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. . . .

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WV Code § 61-10-15 is a criminal misdemeanor statute which applies to certain county officials, including County Commissioners. It prohibits any such public official from having a pecuniary interest, either directly or indirectly, in the proceeds from a public contract over which that official, by virtue of his public position, 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 applying the provisions of WV Code § 61-10-15, the Commission is obligated to follow the guidance of the WV Supreme Court of Appeals which has strictly interpreted this statute in prior published opinions. For example, in *Jordan v. McCourt*, 135 W. Va. 79, 62 S.E.2d 555 (1950), the Court explained the board 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. . . ."

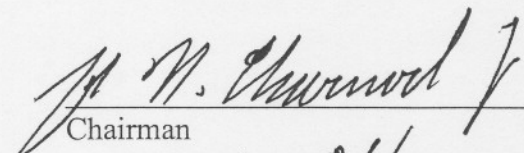
Further, in *Alexander v. Ritchie*, 132 W. Va. 79, 62 S.E.2d 735 (1949), the Court declared:

"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. . . ."

Consistent with this guidance, the Commission previously concluded in Advisory Opinions 2004-10A and 96-29 that a County Board of Education Member has sufficient voice, influence or control over the financial dealings of a multi-county vocational school that any public contracts between the Board Member and the vocational school are subject to the limitations in WV Code § 61-10-15. In each situation, the Board Member represented one member of a five-member governing body who was eligible to vote on which member would serve on a separate five or seven-member governing board of the multi-county vocational schools in question. In addition, each County Board provided financial support to operate these joint schools.

In this particular situation, each County Commissioner in the four participating counties has veto authority over the appointment or reappointment of the Multi-County Economic Development Authority's 13-member board. Further, although loans are financed through a special revolving fund supported by a grant, each County Commission provides general financial support for the Authority's operation. This gives the County Commissioner proposing to obtain a loan from the Authority sufficient voice, influence or control over the Authority's public contracts, including loans administered through the Revolving Loan Program, that such transaction is prohibited by WV Code § 61-10-15.

Because the loan transaction in question would be contrary to WV Code § 61-10-15, it is not necessary to determine if this contract would violate the Ethics Act.


Chairman
8-5-04