

ADVISORY OPINION NO. 2001-12

Issued On April 5, 2001 By The

WEST VIRGINIA ETHICS COMMISSION

COPY

OPINION SOUGHT

A County Board of Education Assistant Superintendent asks whether the Board may buy fuel from a company she owns pursuant to a contract entered into prior to her employment by the Board.

FACTS RELIED UPON BY THE COMMISSION

The Requester has been employed as Superintendent of Schools effective July 1, 2001. She currently is employed as an Assistant Superintendent.

In July 2000, prior to her employment with the Board, a business in which the Requester has a substantial ownership interest bid and received the contract to supply diesel fuel and gasoline for the Board. The contract was for one year beginning in August 2000 and ending in August 2001.

The Requester asks if her employment as Assistant Superintendent or as Superintendent will prevent the Board from continuing to purchase fuel under the terms of the existing contract. She understands that her association with the Board prevents the Board from contracting with her company in the future and a new contract with another vendor will be entered into.

CODE PROVISIONS RELIED UPON BY 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 ...supervisor or superintendent, principal or teacher of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... supervisor or superintendent, principal or teacher, he may have any voice, influence or control ...

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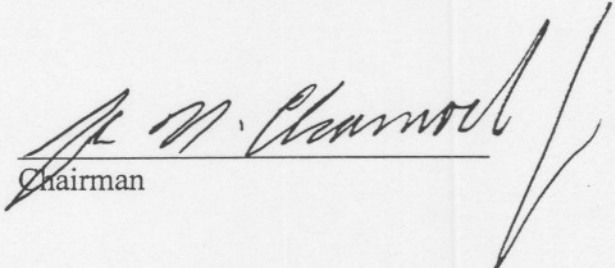
Both the Ethics Act and WV Code 61-10-15 prohibit public servants from being a party to, or having a financial interest in, a public contract, purchase or sale which their public position gives them authority to award or control. WV Code 61-10-15 is a criminal misdemeanor statute which applies only to certain county personnel, including county school personnel.

These provisions are designed to prevent both actual misconduct in awarding public contracts and the appearance of impropriety inherent in public servants awarding public contracts to themselves. The provisions steer public servants away from situations where they might need to consider their own financial interests in awarding agency contracts. Both prevent the Board from entering into a new contract with the Requester's company, while she serves as Superintendent.

However, the Commission has recognized instances in which agencies may continue to do business under the terms of a contract in which an agency member has an otherwise prohibited personal financial interest, **if** the contract was OK when entered into - where, for example: (1) the public servant had no control over the contract at the time of its execution and (2) the public servant's interest in the contract arose after the contract was entered into.

In A.O. 91-66 the Commission ruled that it would not be a violation for a County Commission to pay for gasoline purchased under a contract between the County and a business in which a County Commissioner had an ownership interest, since the contract was entered into before the County Commissioner's election to office. The Commission ruled that he "did not have any voice, influence, authority or control over the awarding or letting of that particular contract."

In this case, the Board entered into the fuel contract before the Requester's employment by the Board. She held no public position which gave her influence over the Board's award of contracts. The Commission therefore rules that it would not be a violation of WV Code 61-10-15 or the Ethics Act for the Board to continue purchasing fuel from the Requester's company under terms of the existing contract, so long as there is no modification of its terms and conditions.


Chairman