

ADVISORY OPINION NO. 2000-19

Issued On September 7, 2000 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Manager of a State Agency** asks if it would be a violation for a Vendor to pay the expenses of training several Agency employees in the advanced use of the Vendor's software.

FACTS RELIED UPON BY THE COMMISSION

The Agency uses a complex software system provided by a Vendor located in France. The Agency is one of the Vendor's principal customers using this software and is identified by the Vendor as an "advanced user," possibly the most advanced user, of its products in the United States. The Vendor has asked the Agency to become a "reference account" - an account the Vendor will "cite in dealings with other existing and potential customers."

If the Agency agrees to become a reference account, the Vendor will provide the Agency an enhanced level of support for the software, provide more direct and influential access to its development of new products and give several Agency employees advanced training in the use of the software, which would increase its value and utility to the Agency.

The Vendor has agreed to provide the advanced training without charge at the company's headquarters in France and to pay the cost of travel and lodging. The Agency would be required to pay for meals, ground transportation and miscellaneous expenses. The training is not currently offered to the general public and the Agency explains that "The only other way to obtain this training today would be to engage and pay for a trainer to travel to Charleston to teach our staff. The training, obtained in this fashion, would cost at a minimum, \$3,000 - \$4,000."

The agency describes its role as a reference site as "completely voluntary, and carries no obligation or promise of performance of any kind." However, it is clear that the Vendor is investing in "the increased success of its premier user, and potential reference" with the expectation that the Agency's success and satisfaction with the software "is something that we will be able and willing to share."

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV 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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There are two facets to the Agency's request. The first is whether the Agency may agree to act as a reference account, i.e. may it agree to actively endorse and promote the Vendor and its products. The second is whether the Agency may accept the Vendor's inducements, including its offer to pay the expenses involved in training Agency personnel at its headquarters in France.

The Ethics Act prohibits public servants from using their public positions for their own private financial gain or the private financial gain of others. An agency's endorsement and promotion of a Vendor's product could constitute a use of office for private gain and might be a violation of the Ethics Act.

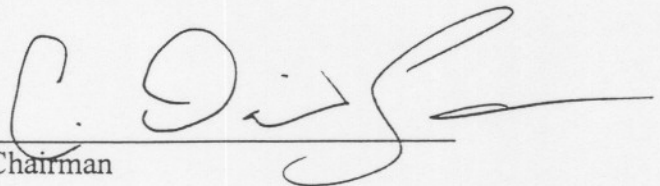
The Commission has dealt with this issue in two other cases. In A.O. 95-05 the Commission ruled that a State Official could give a book publisher a letter to be sent to State businesses encouraging them to buy a business profile in a book promoting the State's culture and history. In A.O. 95-28 the Commission ruled that a State Official could use the influence of his public position to help celebrate the opening of a new privately owned golf course located in the State.

In each of these cases, the Official's actions were an effort to further economic development in the State. Public benefit was the paramount goal. The benefit to private business interests was incidental and secondary. The Commission ruled in each case that the overriding public benefit from the projects being endorsed was sufficient to legitimize the financial benefit to private companies.

If the Agency agrees to act as a reference account and recommends or endorses the Vendor's software, it will be promoting the Vendor's private business interests. The promotion of the product will bring no corresponding public benefit to the State's businesses or its citizens, beyond the product concessions the Vendor is using to pay the Agency for its time and trouble.

Since there is no public benefit sufficient to override the private benefit to the Vendor, the Commission finds that the Agency should not agree to act as a reference account in exchange for the product concessions offered. It would be a prohibited use of office for private gain.

The Commission notes that this opinion does not prohibit or restrict the free exchange of ideas among software users. Agency personnel may, subject to their own Agency's rules and regulations, discuss the merits of the Vendor's software or other comparable software with other current or potential users.


Chairman