

ADVISORY OPINION NO. 99-01

Issued On February 4, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Commissioner of a State Regulatory Agency** asks whether it would be a violation of the Ethics Act for the Agency to contract with a training facility operated by a labor union to perform certification testing which the Agency lacks the expertise and equipment to perform.

FACTS RELIED UPON BY THE COMMISSION

A State Regulatory Agency is required by law to test and certify all crane operators who work in the State. The certification process includes a written examination and a practical, hands-on demonstration of an applicant's ability to operate a crane.

The Agency has neither the cranes nor the physical location necessary to conduct the practical examination. Its budget will not support the purchase or rental of appropriate equipment and premises.

The Agency has sought third parties qualified and equipped to conduct the practical tests. To date the only response from a qualified agency willing to administer the practical test at a reasonable cost has come from a local labor union which maintains a training facility for its apprenticeship program.

Because a large portion of those applying for certification would be union members, the Commissioner is concerned that the union's role in conducting the examinations might suggest bias to those applicants who are not members of the union and he asks whether it would be "proper and ethical" for the Agency to contract with the union to perform the testing.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) provides in pertinent 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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

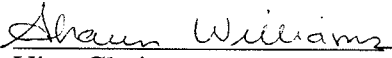
ADVISORY OPINION

The Legislature created the Ethics Commission to implement the code of conduct for public servants established by the Ethics Act. The Commission has no independent authority to create ethical rules and its authority to advise public servants is confined to determining whether their conduct violates the rules established by the Legislature.

No provision of the Ethics Act specifically prohibits the Agency from contracting with a labor union to administer tests or disqualifies a labor union from administering tests on behalf of the Agency.

The Act prohibits public servants from using their public positions or the influence of those positions for their own private financial gain or the private financial gain of others. Agency personnel who gave undeserved, preferential treatment to any person or entity in awarding contracts would be guilty of a violation of this prohibition. It would also be a violation for responsible Agency personnel to knowingly permit a third party, acting under contract to the Agency, to allow bias to influence the results of tests conducted on behalf of the Agency.

In the absence of any such misconduct by Agency personnel, it would not be a violation of the Ethics Act for the Agency to contract with the labor union to administer tests on behalf of the Agency. The potential for the appearance of bias could be avoided by having nonunion personnel conduct the tests using the union's equipment and premises. However, that is a management decision left to the discretion of the Agency, and in the absence of the misconduct described above, its failure to do so would not be a violation of the Ethics Act.


Vice Chairman