

ADVISORY OPINION NO. 99-16

Issued On July 8, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education Member** asks whether the Board may contract with a company owned by her brother and with which her husband has a business relationship.

FACTS RELIED UPON BY THE COMMISSION

The Board Member's brother owns a company which has submitted a bid for construction work to the County Board of Education. Her husband has recently entered into an agreement with her brother's company to do bid estimating work on a contract basis.

The Board Member's husband will be engaged, on a contingency basis, to prepare construction cost estimates upon which her brother's company's bids will be based. If the company secures a bid for which the Board Member's husband had prepared the estimates, he will receive a percentage of the contract price.

The Board Member's husband did no work on the bid submitted to the Board and, if the contract is awarded to the company, he will take no part in performing the work and will receive no income from the project.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) provides in pertinent part that...no elected or appointed public official or public 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 the profits or benefits of a contract which such official or employee may have direct authority to enter into, or over which he or she may have control.

West Virginia Code 6B-1-2(c) provides in pertinent part that...certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code Section 61-10-15 states in pertinent 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 or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or

control.

ADVISORY OPINION

Both the Ethics Act and WV Code 61-10-15 prohibit public servants from having a personal financial interest in a public contract that their public position give them the power influence or control. Neither prevent the Board from contracting with a company owned by a school board member's brother.

WV Code 61-10-15 applies only to certain county personnel, including members of county boards of education. It prohibits them from having a personal financial interest, directly or indirectly, in a public contract over which their public position gives them voice, influence or control.

The WV Supreme Court of Appeals has ruled in regard to 61-10-15 that people have a financial interest in their spouses' employment contracts and that employees have a financial interest in the contracts of their employers. It would be a violation of 61-10-15 for the Board to contract with the company, if a Board Member's spouse were a company employee.

It would also be a violation of 61-10-15, if a Board Member's spouse were to act as a subcontractor on a project which the Board had awarded to a general contractor. In such a situation the Board Member would have an indirect financial interest in the construction contract through the payments made to her subcontractor spouse. Thus it would be a violation for the Board to award the contract to a company, if the Board Member's spouse had performed the bid estimate work for the bid submitted by the company.

However, the situation presented in this request differs from those described above. The Board Member's husband is not employed by her brother's company and did no work on the bid submitted to the Board. If the company secures the contract he will not be involved in the project and will receive no income from it. Under these circumstances, it would not be a violation of WV Code 61-10-15 or of the Ethics Act for the contract to be awarded to the company owned by the Board Member's brother. It would be a violation for the Board Member's spouse to receive any financial benefit from the contract, if it were awarded to her brother's company.

It would, of course, be inappropriate for the Board Members to use the influence of her position on the Board to secure unwarranted benefit for her brother's company. In addition, one of the Commission's legislative rules requires that the Board Member recuse herself from the process by which the Board considers and awards the contract because one of the bids being considered is from her brother's company.



Chairman