

ADVISORY OPINION NO. 97-27

Issued September 4, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

Director of Technology for a County School System

OPINION SOUGHT

What degree of ownership interest are public servants permitted to have in a company that is a party to a public contract they have the authority to award or control?

FACTS RELIED UPON BY THE COMMISSION

The requester is the Director of Technology for a county school system. In that capacity she prepares specifications for bids for the county school's Technology Purchasing Committee which determines the winning vendors. The requester also serves on that Committee. In addition, she is responsible for implementing contracts after they are awarded and for determining whether the products and related services supplied comply with contract specifications.

Recently, the Technology Purchasing Committee met to award a contract for computer installations. The requester's spouse owned approximately 200 shares of stock, valued at \$8,000, in one of the competing companies. During the meeting, the requester announced this personal interest and abstained from voting on the award of the contract. The requester's spouse has since sold the stock.

The requester seeks to establish what percentage of ownership and dollar amount of investment she and her spouse may have in a company which is a party to a contract over which she, by virtue of her position, has authority or control. The requester further inquires as to the amount of personal interest permitted before a public official or employee should seek to be recused from voting on such a matter.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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 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-2-5(d)(2) provides in pertinent part that...an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

- (i) Not exceeding ten percent of the partnership or the outstanding shares of a corporation; or
- (ii) Not exceeding thirty thousand dollars interest in the profits or benefits of the contract;...

The Ethics Commission's Legislative Rules on Voting, at 158 CSR 2, provide in pertinent part that [a] public official or employee may not vote on or decide a matter that has become "personal" to that individual....a matter will be considered "personal" to a public official or employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety.

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...district school officer...supervisor or superintendent, principal or teacher of public schools, or any member of any other county or district board, or for any county or district officer 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

THE ETHICS ACT

Outright prohibition against contract.

The Ethics Act contains an outright prohibition against public servants having a personal financial interest in a public contract, purchase or sale which their public position gives them the authority to award or control. This prohibition extends to their spouses and businesses in which they or their spouses have an ownership interest of more than ten per cent.

It would be a violation of the Ethics Act for public servants, or their spouses, to have an ownership interest of more than ten per cent in a company which is a party to a public contract which they have the authority to award or control. There would be a violation, even if the public servant took no part in the decision to award the contract. The Legislature has provided an exception which permits part-time appointed officials to avoid this prohibition by recusing themselves. This exception is not available to the Requester.

Here the requester has both the required degree of authority in awarding the contract and control over the implementation of the contract once it is awarded. However, her ownership interest is only a tiny fraction of one per cent and is not sufficient to bring the Ethics Act's outright prohibition into play. It would not be a violation of the Ethics Act if the school board contracted for products and services with a company in which the Requester held an ownership interest of less than ten per cent.

Prohibition against voting on contract.

While the outright prohibition does not apply to businesses in which public servants have an ownership interest of less than ten per cent, other rules of the Ethics Act say that public servants should not vote on matters in which they have a "personal interest". This means that a public servant with a stock ownership in a company should not take part in the discussion of, or vote on, whether the company should receive a public contract, if the stock ownership is sufficient to constitute a "personal interest" as that term is defined by the rules.

The Commission's legislative rules consider three factors in deciding whether an interest is a "personal interest" which require recusal:

1. does the stock ownership give the public servant a pecuniary interest in the contract?
2. will the stock ownership influence the public servant's vote?
3. is the stock ownership of sufficient magnitude to give a clear appearance of impropriety to the public servant's vote?

The requester's pecuniary interest, if any, in the proceeds from the contract with the Board of Education is de minimis. The contract would have no affect on either the value of the requester's stock or the dividends she and her spouse would receive from the stock. However, the Commission finds that her joint ownership of \$8,000 worth of the company's stock is sufficient to create in the minds of some members of the public a sense that it is clearly improper for her to vote on the contract.

It is evident that many factors must be considered in determining whether a public servant's stock ownership is sufficient to require their recusal. Public servants should avoid official action on contracts involving businesses in which they or their spouses have an ownership interest, unless the interest is clearly insufficient to require recusal. In the event of uncertainty, public servants should consult with and act in accordance with advice from the Ethics Commission staff.

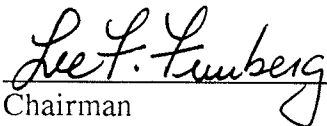
Prohibition against controlling implementation of contract.

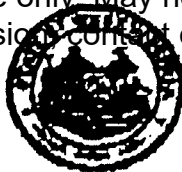
No provision of the Ethics Act prohibits a public servant from exercising control over the implementation of a contract simply because he or she has a minuscule ownership interest in a company which is a party to the contract. It would not be a violation of the Ethics Act for the requester to be involved in determining whether the products and services supplied comply with contract specifications or in instituting their use in the school system.

WEST VIRGINIA CODE 61-10-15

West Virginia Code 61-10-15 is a criminal misdemeanor statute which prohibits certain designated county personnel from being pecuniarily interested, directly or indirectly, in the proceeds of a public contract over which their public position gives them voice, influence or control. The requester's position is one covered by 61-10-15 and her job responsibilities give her influence over the school board's contracts for computer installations.

However, as stated above, the Commission finds that the requester's pecuniary interest in the contract, if any, is de minimis and the WV Supreme Court of Appeals has held that a de minimis interest is not sufficient to cause a violation of this criminal statute. The Commission's decision is based on the particular facts and circumstances of this request, including the fact that neither the requester nor her spouse are employees or officers of the corporation, and may not be relied upon by others. The Commission can not establish a formula to predict when an interest is de minimis, but must decide such questions on a case by case basis.


Chairman



STATE OF WEST VIRGINIA
OFFICE OF THE GOVERNOR
CHARLESTON 25305

ECIL H. UNDERWOOD
GOVERNOR

MEMORANDUM

DATE: September 18, 1997
TO: All Staff
FROM: Jim Teets
RE: Telephone Use

A recent state Ethics Commission ruling requires state employees to adhere to strict guidelines regarding the use of state telephones.

The Ethics Commission ruled on September 4 that state employees no longer could place personal long-distance phone calls from a state agency and then reimburse the state. In its ruling, the Ethics Commission observed that state employees would gain personally in making telephone calls from state telephones because state government enjoys less expensive rates than most other telephone users.

An exception to this rule does exist, however. State employees may make personal telephone calls in the event of emergencies. For example, employees may place long-distance calls to their families if their work results in their late arrival home.

State employees may make long-distance personal calls from state telephones as long as they use personal credit cards or place their calls collect.