

ADVISORY OPINION NO. 97-30

Issued on November 6, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

Town Recorder

OPINION SOUGHT

Is it a violation of the Ethics Act if a Town Recorder, directed by the Town Council, writes checks paying for services under a contract she knows to be a violation of the Ethics Act?

FACTS RELIED UPON BY THE COMMISSION

The requester holds the elected position of Town Recorder. One of the duties of the Recorder is to pay bills for goods and services supplied to the Town after payment is authorized by the Town Council. In this case the requester has been presented with approved bills for Town purchases made from a business owned by a Council member. The requester is concerned to establish whether she would violate the Ethics Act if she pays the bills.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) states 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.

West Virginia Code 6B-2-5(d)(1) states 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: Provided, That nothing herein shall be construed to... prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code 6B-2-5(d)(3) states in pertinent part that...where the provisions of subdivisions (1) and(2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

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The Ethics Act prohibits 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 the authority to award or control. This prohibition also applies to their spouses, their dependent parents and dependent children, or a business in which any of them have an ownership interest of 10% or more.

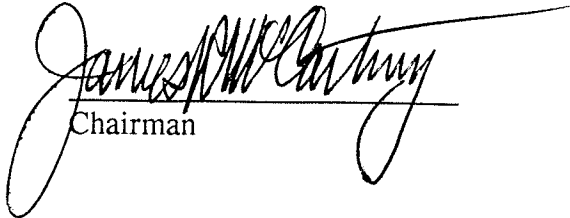
Members of municipal councils have authority and control over the contracts, purchases and sales of the municipalities they are elected to serve. They, their relatives and associated businesses are bound by this prohibition and cannot escape its application by recusing themselves from action on a particular contract, purchase or sale. They may not avoid the prohibition by not voting on or otherwise taking part in council's action on the matter.

The Ethics Commission is authorized to grant an exemption from this prohibition to a governmental agency which demonstrates that its imposition would result in financial hardship or substantial interference with the agency's operation. However, unless the municipality has first obtained an exemption from the Ethics Commission, it is a violation of the Ethics Act for a council member or a business he owns to sell goods or services to the municipality.

The requester is aware of the Ethics Act's prohibition against having a private interest in a public contract and is unaware of any exemption from this law for the benefit of any Town Council member. She is concerned to determine whether her payment of the bills associated with such contracts would expose her to liability under the Act.

If the requester pays the bills as approved, this would result in the Council member receiving public funds he or she would not have a legal right to receive. The Commission finds that under these facts, if the requester pays the bills from a Council member as approved by Council in the absence of an exemption from the Ethics Commission, she would be guilty of using her office for the private gain of another in violation of WV Code 6B-2-5(b)(1).

The Commission notes that the other Council members who vote to approve purchasing the goods and services from another Council member without first obtaining an exemption from the Commission may also be in violation of the ban against use of public office for the private gain of another.


Chairman