

ADVISORY OPINION NO. 94-13

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 7, 1994

PERSON SEEKING OPINION

A Candidate for a county Board of Education

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a member of a county Board of Education to be employed by the local telephone company?

FACTS RELIED UPON BY THE COMMISSION

A candidate for a seat on a county Board of Education is employed as an Engineering Assistant for the company that provides local phone service to that county. His job entails engineering work required to plan and design the company's distribution plant network. The Engineering Assistant prepares detailed engineering work orders and associated work prints for projects. He also negotiates and coordinates engineering matters outside the plant.

In the course of his employment he has negotiated with the School Board for rights-of-way several times and has dealt with individual schools regarding the placement of wire, cable, and poles.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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...

West Virginia Code Section 6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and 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 §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...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.

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Public Contracts

West Virginia Code §6B-2-5(d) prohibits public servants from having more than a limited interest in any public contracts over which they may have authority or control. If the requestor is elected as a member of the county Board of Education he would have direct authority and control over the Board's contracts for services.

For the purposes of this section "limited interest" is defined as an interest not exceeding ten per cent of the company or thirty thousand dollars interest in the profits or benefits of the contract. The interest of a salaried employee is a limited interest. The requestor, as an employee who does not have a 10% ownership interest in his employer, would not be prohibited by WV Code §6B-2-5(d) from voting or deliberating on contracts for local phone service.

Voting

Pursuant to WV code §6B-1-2(c) a public official should seek to be excused from voting, deciding, or otherwise acting on a matter that has become "personal" to him. In many prior opinions the Commission has defined "personal" as situations where the public official has a direct or indirect pecuniary interest in the matter, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must disclose his interest and physically remove himself from the room during the discussion and decision making process.

If the county Board of Education is called upon to consider matters relating to actions taken by the requestor on behalf of his employer he should refrain from voting or taking other official action on those matters since failure to do so would give the appearance of impropriety.

West Virginia Code §61-10-15

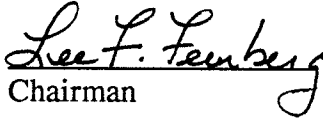
West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract.

The Court has held that under WV Code §61-10-15 a member of a school board has a pecuniary interest even if he is only an employee of the private entity which is the other party to the public contract. See *Summers County Citizens League, Inc. v. Tassos*, 367 S.E. 2d 209 (1988). Therefore the requestor is not insulated from the sanctions of WV Code §61-10-15 merely because of employee status with the private entity.

Further, the Supreme Court of Appeals, in *Fisher v. Jackson*, 107 W. Va. 138, 147 S.E. 541 (1929) held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15. This statute sanctions the mere existence of a pecuniary interest, thus the requestor may not obtain protection from the sanctions of the statute by abstaining from voting on any issues which affect the requestor's private employer.

The Commission finds that the requestor's position as an employee with current job responsibilities that include negotiations with the school board over rights of way and the placement of wire, cable and poles for a private company that provides services to the school board constitutes the type of financial interest sanctioned in WV Code §61-10-15.

Therefore, it would be a violation of WV Code §61-10-15 for requestor to serve as a member of the county Board of Education while also being an employee of the local phone company with the job responsibilities outlined in his request for this Advisory Opinion. It would not be a violation of WV Code §61-10-15 if he is not involved in negotiations with the county Board of Education on behalf of his employer.


Chairman