

ADVISORY OPINION NO. 94-03

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 3, 1994

GOVERNMENTAL BODY 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 County Board of Education to continue to purchase vending services and products from a company which employs a member of that County Board of Education?

FACTS RELIED UPON BY THE COMMISSION

Currently the requestor is the district manager for a company which sells vending products in West Virginia. As a result, the requestor is involved with schools and various organizations within his county's school system. However, the company does not bid for contract work within the school system; instead it provides vending machines and/or products after inquiries from the schools or other organizations. Additionally, the company provides products on a donated basis to various organizations such as SADD, MADD, PTO, and athletic booster organizations. Of the total vending products distributed by the company last year, less than one percent were supplied directly to the county school system.

The requestor has filed as a candidate for the County Board of Education and, if elected, would like to continue to provide vending services and donate products to the county school system for his employer.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...state and local governments have many part-time public officials serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official, 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) states in pertinent part that...no elected public official...or business with which he...is associated may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which he...may have control...

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a 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

Public Contracts

Pursuant to WV Code §6B-2-5(d)(1), a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. For the purposes of this section "limited interest" is defined as an interest not exceeding ten percent of the company or thirty thousand dollars interest in the profits or benefits of the contract.

Although as a member of the County Board of Education the requestor would have control over the payment of invoices for vending services and products to his employer, the Commission previously determined that **employees** of companies which are involved in public contracts have only a limited interest in such contracts.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for a County Board of Education to continue to purchase vending services and products from a company which employs a member of the County Board of Education.

Private Gain

Pursuant to WV Code §6B-2-5(b)(1), a public official may not use his office or its resulting prestige for their own private gain or for the private gain of another. Therefore, the requestor may not use his position as a member of the County Board of Education to influence, obtain, increase or promote business for his private employer.

Voting

West Virginia Code §6B-1-2(c) provides that a part-time public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, 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.

Although the requestor's potential personal pecuniary interest in the profits or benefits of the public contract is not significant by itself, the Commission previously determined in Advisory Opinion #92-40-supp., that it is inappropriate for a public official who is an employee of an interested private party to vote on matters directly affecting his employer. The Commission considers an employment connection to be a "personal" conflict as that term is used in WV Code §6B-1-2(c).

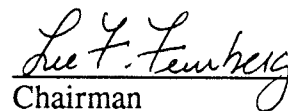
West Virginia Code §61-10-15

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 Supreme Court of Appeals 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 Court, 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. West Virginia Code §61-10-15 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.

Therefore, it would be a violation of WV Code §61-10-15 for the requestor, if elected to the County Board of Education, to continue to provide vending services and products to the County Board of Education for his employer. The Commission notes that it is without authority to grant exemptions to WV Code §61-10-15.


Chairman