ADVISORY OPINION 2016-06

Issued on March 3, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Public Service District** requests a contract exemption in order to obtain easements and land acquisitions from two of its board members.

FACTS RELIED UPON BY THE COMMISSION

The Requester owns and operates a sanitary sewage system that serves approximately 1,500 customers. The Requester anticipates filing an application for a certificate of convenience and necessity to construct a sanitary sewer extension project which will serve approximately 160 new customers. An engineering firm hired by Requester has determined that Requester must obtain approximately 102 easements and three land acquisitions in order to construct the necessary improvements for the project.

The Requester has a three-member board. According to the engineering firm's determination, two of the easements to be obtained by Requester are from one of its board members. Moreover, an additional five easements and two separate tracts of land must be obtained from another of Requester's board members. These acquired tracts will serve as pump stations that are necessary for the project. According to Requester, it will incur excessive costs and delays in the completion of the project if it is required to redesign the project and obtain easements and land acquisitions from other land owners. The engineering firm has determined that the most economically feasible design for the project includes obtaining the above-mentioned easements and land acquisitions from two of Requester's board members.

Both board members have agreed to donate the seven total easements to Requester in exchange for the sum of $1.00 per easement. The board member owning the two tracts of land has also agreed to donate the two tracts to Requester in exchange for $1.00 per tract. Requester attached copies of the proposed easements and draft deeds reflecting the transfers.

During meetings held on November 12, 2015, and January 13, 2016, the Requester's board voted to seek contract exemptions from this Commission in order to obtain two easements from one board member for the sum of $1.00 per easement and to obtain five easements and two land acquisitions from another board member for the sum of $1.00 per easement and $1.00 per land acquisition.

PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(d) states in relevant part:

> (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, 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 the official or employee may have direct authority to enter into, or over which he or she may have control: ... *Provided, however,* That nothing herein shall be construed to ... prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.
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> (4) 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 written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code § 61-10-15 states in relevant part:

> (a) It is unlawful for any member of a ... county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control.
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> (h) Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or

agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

ADVISORY OPINION

Both the Ethics Act and W.Va. Code§ 61-10-15 prohibit county public officials from having a pecuniary interest in public contracts. However, the Commission has consistently found that where the pecuniary interest is *de minimis,* the prohibitions relating to public contracts in both the Ethics Act and W.Va. Code§ 61-10-15 are not triggered. In Advisory Opinion 2005-03, the Commission found "that there are certain instances where the pecuniary interest in a public contract is so small as to be deemed *de minimis* and, although a technical violation of W.Va. Code§ 61-10-15 may exist, it is not the type of pecuniary interest which triggers the sanctions of W. Va. Code§ 61-10-15." Advisory Opinion 2005-03 (quoting *Jordan v. Mccourt,* 62 S.E.2d 555 (1950)). The Commission went on to hold that a County School Board Member "would not violate the Ethics Act or W.Va. Code§ 61-10-15 by voluntarily serving as a coach in his school system for the nominal salary of $1.00 annually." Advisory Opinion 2005-03.

In this case, the Commission finds that the nominal amount of $1.00 the members of Requester's board would receive per each of their proposed transactions is *de minimis.* Therefore, the board members' pecuniary interests do not trigger the sanctions within either the Ethics Act or W.Va. Code§ 61-10-15. Given that neither of these provisions is triggered by Requester's proposed conduct, a contract exemption is not required for the Requester to proceed with its proposed conduct.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Commission for further advice as *it may alter the analysis and render this opinion invalid.*

This Advisory Opinion is limited to questions arising under W. Va. Code§ 61-10-15 and the Ethics Act, W Va. Code§ 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 68-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ Robert J. Wolfe, Chairperson
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