

ADVISORY OPINION NO. 95-14

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 6, 1995

GOVERNMENTAL BODY SEEKING OPINION

Director of a State Division

OPINION SOUGHT

Is it a violation of the Ethics Act for a public employee to purchase merchandise through a State contract when the merchandise is intended for the employee's personal use or for use in the employee's private business?

FACTS RELIED UPON BY THE COMMISSION

Advisory Opinion #92-15, issued on May 7, 1992, provided that it would be a violation of the Ethics Act for public employees to purchase merchandise through a State contract when the merchandise is intended for their own personal use or for use in a private business which they may conduct on their own time.

The requester has asked the Commission to reconsider Advisory Opinion #92-15 in light of the additional facts provided below:

- 1.) Personal purchases from State contracts will be limited to specific purchase orders/contracts as determined by the State Division with the agreement of the vendor.
- 2.) It will be the vendor's sole decision as to whether it will allow a specific purchase by a public employee from the State contract.
- 3.) No state funds will be expended for employee purchases. Such purchases will be billed directly to the employee and will include all applicable taxes.
- 4.) Merchandise purchased by the employee is intended for the personal use of that employee and cannot be purchased for resale. Further, an item may not be purchased in quantities beyond what is considered reasonable for the employee's use.
- 5.) Applicable terms and conditions governing employee purchases from specific state contracts would be provided to the vendor and any vendor or employee who violates these provisions would be subject to disciplinary action.

6.) The decision of the vendor to accept or reject employee purchases will have no effect upon the award or cancellation of any state contract.

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.

ADVISORY OPINION

Pursuant to WV Code §6B-2-5(b)(1), public officials and public employees may not intentionally use their official or public employment position for their own private gain or for the private gain of another.

Advisory Opinion #92-15 provided that it would be a violation of the Ethics Act for public employees to purchase merchandise through a State contract when the merchandise is intended for their own personal use or for use in a private business which they may conduct on their own time.

The purpose of the Ethics Act is to maintain public confidence in the integrity and impartiality of the governmental process and to promote and strengthen the faith and confidence of the people of this state in their public officials and public employees. The Commission believes that allowing public officials and public employees to purchase merchandise at a discount rate through a state contract undermines that objective by creating a strong appearance of impropriety and establishing the potential for the creation of a quid pro quo.

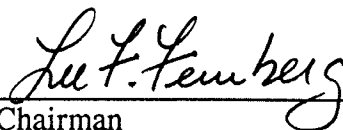
The Commission has considered the additional restrictions offered to be implemented by the requester when allowing a public official or employee to purchase from a state contract. However, the purpose of securing a contract and awarding such contract on a low bid basis is to procure the best service, materials and prices available to the State and consequently economize the expenditure of taxpayers' money. The issue of whether public employees may also make personal purchases from the vendor and receive state discount prices should not be incorporated into the bidding process regardless of whether such a practice is a consideration when awarding a vendor contract.

Many vendors will accept unusually low profit margins to supply a large volume customer like the State. They benefit from bulk transfers of merchandise supplied in relatively few transactions. The economies of scale are reflected in the competitive prices they offer the State.

No matter how carefully the issue is presented, it is inherently coercive to offer a vendor the "opportunity" to sell to public employees at the State's low prices. Some vendors may conclude that they will not be competitive if they do not accept the "opportunity" to sell to public employees - some of whom will be involved in deciding which bids are accepted. The

Commission finds that it would be a use of office for private gain to encumber the State's bidding process by requiring potential vendors to determine whether they can afford to sell to individual public employees at State prices.

The Commission also affirms its earlier finding in A.O. #92-15 that, since the public generally is not permitted to buy at State prices, it would be a use of office for private gain for a public employee to use his or her position to make personal purchases at State contract prices.


Chairman