

ADVISORY OPINION NO. 95-38
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON SEPTEMBER 7, 1995

GOVERNMENTAL BODY SEEKING OPINION

A Member of a County Board of Education

OPINION SOUGHT

1. Is it a violation of the Ethics Act or WV Code §61-10-15 for a County Board of Education to conduct business with a company in which the spouse of a Board member has an ownership interest, provided that member votes against such contract?
2. Is it a violation of WV Code §61-10-15 if a subcontractor of a County Board of Education contractor purchases materials for use in a board project from a corporation in which the spouse of a Board member has an ownership interest?

FACTS RELIED UPON BY THE COMMISSION

The requester is a member of a county board of education. Her spouse owns more than 10% of the stock of a building supply corporation located within the county. This corporation has been in operation for many years and has previously conducted business with the school system.

The county board of education acts as the purchasing agent for the county school system. The normal process of purchasing for the school system does not require board action on routine purchases. These purchases are usually made by the superintendent's office, department heads and other authorized personnel. Ordinarily, the board is informed only after the purchase and merely votes to approve the payment for the purchase.

However, purchases above a certain dollar amount are required to be made on a bid/contract basis. Normally, the purchasing agent of the superintendent's office presents a recommendation and the board acts upon that recommendation.

The requester inquires whether it would be a violation of the Ethics Act or WV Code 61-10-15 if the Board, over the requester's vote to the contrary, purchased materials from the company in which the requester's spouse has the ownership interest described above. The requester is also concerned that a violation of WV Code §61-10-15 could occur if a subcontractor of a Board contractor purchased materials for use on a school board project from the corporation in which her spouse has an ownership interest, even though the Board instructed its contractor not to purchase from the spouse's corporation and the spouse requested the corporation not provide materials for school board projects.

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 §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county board of education... 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

1. Purchases by the Board

The Ethics Act. WV Code §6B-2-5(d)(1) provides that public servants, the members of their immediate family and businesses with which they are associated may not be a party to, or have an interest in, a public contract which they have the authority to award or control for their agency. This prohibition does not apply to a contract between their agency and a company in which their ownership interest, or that of a member of their immediate family, is less than 10% - unless the contract would result in a profit in excess of \$30,000.

As a member of the county board of education, the requester has direct authority and control over all contracts entered into by the county board of education. Her spouse's ownership interest in the building supply corporation is more than 10%. This prohibition against private interests in public contracts contains no exceptions for public servants who have recused themselves from voting on, or have voted against, such contracts.

Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the county board of education to conduct business with the corporation in which the spouse of a Board member has an ownership interest greater than 10%, even if she has voted as a Board member against such action and voted not to pay invoices from the corporation.

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. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office. The Commission is without authority to grant exemptions from this provision.

WV Code §61-10-15 does not specifically say whether a violation could be avoided by a public official who voted against a contract in which he or she had a pecuniary interest. However, the statute requires only that the public official **may** have voice, influence or control over such contract in order to constitute a violation. The West Virginia Supreme Court, interpreting WV Code §61-10-15, has held that whether or not they choose to exercise it, board of education members have voice, influence or control over board contracts by virtue of their public position.

Further, the West Virginia Supreme Court, in State v. Neary, 365 S.E.2d 395, held that the law does not require the showing of an actual exercise of influence, and that a violation of the conflict of interest statute can be proven by a showing that the public official became or remained interested in the proceeds of a contract, in which, by virtue of his office, he may have voice, influence or control.

The Court also held, in Fisher v. Jackson, 107 W.Va. 138. 147 S.E. 541 (1929), 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.

Considering the intent of the legislature as reflected by the broad language of the statute and the WV Supreme Court's precedents interpreting it, the Commission finds that it would be a violation of WV Code §61-10-15 for the board of education to conduct business with a company in which the spouse of a Board member has an ownership interest, regardless of whether the member votes against such contract.

The Commission notes that the WV Supreme Court held, in Hunt v. Allen, 53 S.E.2d 509, that county school board members who voted to pay for goods known to have been sold to the board by another board member in violation of WV Code §61-10-15, were guilty of official misconduct and subject to removal from office, even though they themselves had no personal financial interests in the purchases voted upon.

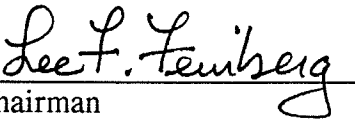
2. Purchases by Board Contractors' Subcontractors

WV Code §61-10-15 forbids county school board members from having a personal financial interest, directly or indirectly, in public business transactions over which they have voice, influence or control. The requester has taken precautions to prevent transactions which might give rise to any such personal financial interest. She asks if the steps taken will protect her, if a subcontractor of a Board contractor were to purchase materials for use in a Board project.

The requester outlines reasonable steps which have been taken to ensure that the corporation in which her spouse has an ownership interest does not supply materials for use in county school board projects. The Board has instructed its own personnel and its contractors not to make purchases from the corporation. The requester's spouse, although a minority stockholder, has requested the corporation not to sell materials for use on board of education projects.

The Commission finds that it would not be a violation of WV Code §61-10-15 if, despite such precautions, a subcontractor for a Board contractor, exercising independent judgment in its choice of material supplier, purchased materials from the spouse's corporation for use on a Board project. The Commission's decision on this question is unaffected by whether the requester votes to approve any payment to the Board's contractor on the project.

The Commission cautions that this opinion is not a blanket grant of immunity from the sanctions contained in WV Code §61-10-15 for transactions involving suppliers and materialmen to subcontractors of a county contractor. Situations could arise where the board of education, collectively or through the efforts of an interested member alone, exercised voice, influence or control over a subcontractor's choice of material supplier for use on a board project. If such voice, influenced or control were established, then a violation of WV Code §61-10-15 would exist.


Chairman