

ADVISORY OPINION NO. 95-25

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 1, 1995

GOVERNMENTAL BODY SEEKING OPINION

A County Health Department

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a County Health Department to finance the purchase of a building through a non-profit corporation?

FACTS RELIED UPON BY THE COMMISSION

A County Health Department would like to purchase a building and finance it with a conventional loan from a local bank. The West Virginia Code allows local health departments to accept or own real estate but does not explicitly provide whether they may finance a real estate purchase with a bank loan.

Other local entities, such as the County Commission and County Building Authority, are unable to finance and purchase a building on behalf of the Health Department. Therefore, the Department's attorney is considering forming a non-profit corporation for the sole purpose of purchasing and financing the property.

This non-profit corporation's directors and incorporators would be identical to the members of the County Health Department. They would also serve the same term lengths as their appointments to the Health Department.

The non-profit corporation would purchase the real estate, borrow the necessary funds for the purchase, sign the note, deed of trust, and any other supporting documentation needed. It would then lease the building and real estate to the Health Department for the same time frame as the loan and for the amount of money needed to pay the loan, insurance, and taxes. The Health Department would be responsible for maintenance and utilities.

As part of the proposed lease agreement, the Health Department would have an absolute right to purchase the property for \$1.00 when the loan was paid off.

If necessary, the Health Department also requests an exemption from the provisions of WV Code §6B-2-5(d)(1) on the grounds that application of that provision to these facts would result in the loss of a quorum in the public body.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 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...Provided, however, that nothing herein shall be construed to prohibit a...a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...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,...the affected governmental body or agency may make a written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...or any member of any other county or district board, or for any county or district officer 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

The Ethics Act

West Virginia Code §6B-2-5(d)(1) prohibits a public official or a business with which he or she is associated from being a party to a public contract over which the public official may have direct authority or control.

In this instance, the members of the County Health Department would like to establish a non-profit corporation for the sole purpose of purchasing and financing real property on behalf of the County Health Department. This non-profit corporation's directors and incorporators would be identical to the members of the County Health Department.

Clearly, the members of the County Health Department are part-time appointed public officials who have direct authority and control over all public contracts entered into by the County Health Department. Further, as directors and incorporators of the non-profit corporation, the members of the County Health Department are "associated" with a business which is a party to a public contract with the County Health Department as that term is used in WV Code §6B-2-5(d)(1).

Although normally such action would constitute a violation of WV Code §6B-2-5(d)(1), this subsection contains a provision which allows a part-time appointed public official to enter into a contract over which he may have direct authority or control when he has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract. In this instance, such an exemption is not feasible since the members of the County Health Department are considered part-time appointed public officials and all of these individuals would be required to be recused from the discussion and excused from voting on the contract between the County Health Department and the non-profit corporation.

However, pursuant to WV Code §6B-2-5(d)(3), the County Health Department has submitted a written request for an exemption from the prohibition against a public official having an interest in a public contract over which he has authority and control citing a loss of quorum in a public body. The Commission finds that a loss of quorum would occur if the members of the Health Department are prohibited from voting on the contract between the County Health Department and the non-profit corporation. Therefore, the Commission grants the requested exemption from the prohibition established by WV Code §6B-2-5(d)(1).

The Commission notes that while this financing arrangement is not a violation of the Ethics Act, this is not an opinion on the underlying legality of the proposed financing arrangement or a determination that the County Board of Health has the authority to enter into such an arrangement. This opinion should not be viewed as a finding that the financing proposal falls within the powers of the Health Department's enabling legislation.

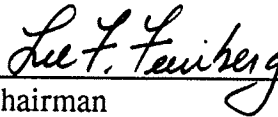
West Virginia Code §61-10-15

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.

However, the West Virginia Supreme Court of Appeals held, in Jordan v. McCourt, 62 S.E. 2d 555 (1950), 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 WV Code §61-10-15 exist, it is not the type of pecuniary interest which triggers the sanctions of WV Code §61-10-15.

In this instance, the Health Department members' interest in the contract is, at most, \$1.00. The Commission considers this to be a *de minimis* interest in a public contract. Therefore, it is not a violation of WV Code §61-10-15 for members of a County Health Department to establish a private, non-profit corporation designed to finance, purchase, lease, and ultimately sell property to the County Health Department provided the interest remains *de minimis*.

Pursuant to WV Code §6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of WV Code §61-10-15, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.


Chairman