

ADVISORY OPINION NO. 95-44

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 5, 1995

PUBLIC SERVANT SEEKING OPINION

A County Commissioner

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for a steel corporation which employs a County Commissioner to serve as a contractor or a subcontractor on a County Commission project?

FACTS RELIED UPON BY THE COMMISSION

The requester serves as a member of a County Commission. The County Commission is currently planning the construction of a Judicial Building to house the Circuit Court, the Magistrate Court, the Prosecuting Attorney's office and other related offices. This project is of considerable size, approximately 50,000 square feet and could cost in excess of 4 million dollars.

The requester is also employed by a steel corporation as a project manager. As a project manager, his work is part-time and paid on an hourly rate. He does not hold any ownership interest in the steel company but does participate in its profit sharing program.

The requester inquires as to whether his position as a County Commission member would prohibit the steel company with which he is employed on a part-time basis from participating in the competitive bidding process for the steel portion of this project.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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 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 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

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 more than a limited interest in, a public contract over which they have the authority to award or control on behalf of their governmental agency.

Clearly as a County Commissioner, the requester has direct authority and control over all contracts entered into by the County Commission. However, the Ethics Commission previously determined that an **employee** of company which is involved in a public contract has only a limited interest in such contract.

Therefore, it would not be a violation of the Ethics Act for the County Commission to contract with a company which employs a County Commission member. **However, this is academic in light of the prohibition against all pecuniary interest in public contracts established in WV Code §61-10-15 and discussed below.**

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.

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 requester is not insulated from the sanctions of WV Code §61-10-15 merely because of employee status with the steel company.

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.

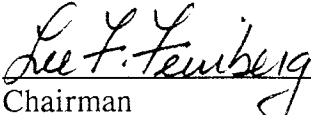
The Court also held, in Fisher v. Jackson, 107 W.Va. 138. 147 S.E. 541 (1929), that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15. West Virginia Code §61-10-15 sanctions the mere existence of a pecuniary interest, thus the requester may not obtain protection from the statute by abstaining from voting on any issues which affect his private employer.

The Ethics Commission, in Advisory Opinion #94-22, determined that the restrictions contained in WV Code §61-10-15 apply to contracts established directly between a private company and the public entity as well as services provided as a subcontractor on the public contract. This opinion was based upon the Supreme Court's ruling in Fisher, supra. In that case the Supreme Court rejected an argument that a school board member's work for a private employer with whom the school board had contracted was not a violation:

It is argued that defendant was in fact working for C.C. Herring, and not for the board. Even if this were true, the statute covers such a situation. A member of the board will not be permitted to participate in the letting of a contract to one and then derive benefit indirectly therefrom by working for the party obtaining the contract. The plain mandate of the statute denies him the right to receive a benefit by indirection where he may not profit directly. Fisher, supra at 542.

Therefore, it would be a violation of WV Code §61-10-15 for a steel corporation which employs a County Commissioner to enter into a public contract directly with the County Commission or indirectly as a subcontractor to perform work on a County Commission project.

Finally, the Commission notes that the West Virginia Supreme Court held, in Hunt v. Allen, 53 S.E.2d 509, that county 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 had no personal financial interests in the purchases voted upon.


Chairman