

ADVISORY OPINION NO. 93-06

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 4, 1993

GOVERNMENTAL BODY SEEKING OPINION

A County Commission

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a County Coordinator to have a pecuniary interest in a contract awarded by the County Commission?

FACTS RELIED UPON BY THE COUNTY COMMISSION

The Subject of this opinion was hired as the County Coordinator in 1992. As the County Coordinator, he is under the direct supervision of the County Clerk and his duties consist of keeping the County's books and financial records, paying approved bills and invoices, assisting with grant administrations, and other general administrative functions as may be directed by the County Clerk or the County Commission. He is not a member of the County Commission and has no voting power or other direct authority to commit the County Commission to any obligations.

To facilitate efficient operation of the offices in the County Courthouse and to prevent the County Commission from falling into a delinquent status, the County Coordinator does have the authority to pay balances due for existing utilities, taxes, insurance, bonds, employee retirement fund, and postage. However, the Coordinator has no authority to procure any of the aforementioned goods or services without the prior approval of the County Commission.

The requestor has described the County Coordinator's indirect control concerning the County Commission's decision making process as advisory, inconsistent, and indefinite.

The County Coordinator is also an independent insurance agent and the owner of an insurance agency located in the county. This agency provides flood insurance to the County Commission and public official bonds to the County Commissioners and some of the other county officials. This has been an ongoing contractual agreement existing for many years prior to the hiring of the agent as the County Coordinator.

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.

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 commission...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

Ethics Act

Pursuant to WV Code §6B-2-5(d)(1) a public employee may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. However, the County Coordinator is not a member of the County Commission and has no voting power or other direct authority to commit the County Commission to any obligations. Although the County Coordinator does have the authority to pay balances due for existing utilities, taxes, insurance, bonds, employee retirement fund, and postage, he has no authority to procure any of the aforementioned goods or services without prior approval of the County Commission.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for a County Coordinator to have a pecuniary interest in a contract awarded by the County Commission since he does not have authority or control over the letting of such contracts by the County Commission. However, should the County Commission delegate any authority to the County Coordinator to make such decisions, then the conclusion stated herein would not apply.

The Ethics Commission notes that WV Code §6B-2-5(b)(1), provides that a public official may not use his public office or resulting prestige for his own private gain or for the private gain of another. Therefore, the requestor may not use his position as the County Coordinator to influence, obtain, increase, or promote his personal interests as an independent agent or owner of an insurance company.

WV Code §61-10-15

As previously noted, the County Coordinator has a pecuniary interest in a contract awarded by the County Commission which employs him. 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.

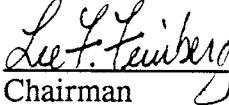
The essential characteristics of a "public official" are the creation of the position by law, a fixed tenure of office, and the authority to exercise some portion of the sovereign power of government. The County Coordinator position is not specifically created by statute. Rather, WV Code §7-1-3(m) merely authorizes the County Commission to **employ**, fix compensation for and **discharge** such personnel as may be necessary to aid the Commission in discharging their duties, coordinating their activities, and to do such other things as the Commission may direct. This position also has no fixed tenure since the County Coordinator serves at the will and pleasure of the County Commission. Finally, although the County Coordinator does have the authority to pay balances due for existing utilities, taxes, insurance, bonds, employee retirement fund, and postage, he has no authority to procure any of the aforementioned goods or services without prior approval of the County Commission. The County Coordinator simply performs general administrative functions as directed by the County Clerk or the County Commission and therefore exercises no sovereign power.

Consequently, the County Coordinator would not be considered a public official since his position is not created by statute, he is an at-will employee of the County Commission, and he does not exercise sovereign functions of government.

There are several other statutes which indicate that the County Coordinator would not be considered a county officer. WV Code §6-2-10 provides that county officers are required to secure "public official" bonds. The County Coordinator position is not included within this section and is not required to secure a bond. Similarly, WV Code §6-1-8 provides that the County Clerk must file a certified list of all county officers, showing the name of the officer and the title of the office with the Secretary of State. The County Coordinator is not included on such list. Finally, the County Coordinator is not required to file a financial disclosure statement with the WV Ethics Commission as set forth in WV Code §6B-2-6(a).

Therefore, for the reasons outlined above, the County Coordinator would not be considered a county officer and would not be subject to the prohibitions established under WV Code §61-10-15.

Pursuant to WV Code §6B-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of section fifteen, article ten, chapter sixty-one, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.


Chairman