

ADVISORY OPINION NO. 93-15

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 8, 1993

GOVERNMENTAL BODY SEEKING OPINION

A Member of a County Parks and Recreation Commission

OPINION SOUGHT

- 1.) Is it a violation of the Ethics Act for an officer who also owns 39% of a private business involving recreational activities to serve as a member of a County Parks and Recreation Commission?
- 2.) Is it a violation of the Ethics Act for an officer of an Association which promotes certain recreational activities and has a contract with a County Parks and Recreation Commission to serve as a member of that Commission?
- 3.) Is it a violation of the Ethics Act if the Parks and Recreation Commission member votes, makes motions, or participates in discussions on matters relative to the contract between that Commission and the Association?
- 4.) Is it a violation of the Ethics Act if the Parks and Recreation Commission member votes or participates in Commission discussions on matters relating to a specific recreational activity not directly involving the contract between the Commission and the Association?
- 5.) What effect would resignation from membership in the Association have on possible violations of the Ethics Act?

FACTS RELIED UPON BY THE COMMISSION

The requestor is the Vice-President and General Manager of a franchised company which is engaged in the retail, wholesale and service trade of motorcycles, ATVs, outdoor power equipment and related products. He also owns 39% of the corporation's stock. The company is one of six businesses in the area which provide products and services for this recreational activity.

In 1990 the Requestor was one of nine incorporators of a non-profit Association. He currently serves as the treasurer of the Association and is a registered lobbyist for this Association. All officers of the Association are volunteers and serve without pay or compensation. The

membership of the Association, comprised largely of individual citizens, is between two hundred and three hundred members locally and over one thousand members statewide. The purpose of the Association is to create and provide adequate, managed public trails and better riding opportunities for off road motorcycles and ATVs.

In 1990 this Association entered into a contractual agreement with the County Parks and Recreation Commission to develop, maintain, and operate a recreational trail system for off road motorcycles and ATVs in a County Park operated by the Commission. The lease provides that the Association, at its own cost, shall improve and develop the trails and maintain the same, and in addition shall pay to the Commission the sum of \$750 per year.

The Association maintains a designated area of the park, comprised of picnic shelters and a playground, that is open to the public on a reservable basis. The park rents the shelters to the public but the Association does not charge for the use of any facilities. All park facilities are available to the general public, subject to the requirements of the park. Operating motorcycles and ATVs on the designated trails is, however, restricted to members of the Association and accompanied guests. Membership in the Association is open to the general public.

In 1991 the requestor was appointed by the County Commission to serve as a member of the County Parks and Recreation Commission.

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...Provided, however, that nothing herein shall be construed to prohibit...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-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public

representative charged with deciding or acting on a matter.

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1. and 2.) In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which per se prohibits a County Parks and Recreation Commissioner from managing and owning 39% of a business relating to a specific recreational activity. Further, there is no provision of the Act which per se prohibits this person from simultaneously serving as an officer/lobbyist for an Association which promotes that specific recreational activity and has a contract with the Parks and Recreational Commission.

This does not mean, however, that the requestor is not subject to the code of conduct established by the Act. For example, pursuant to WV Code §6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he may have direct authority or control. Obviously, as a member of the County Parks and Recreation Commission the requestor would have authority and control over all public contracts entered into by the Commission.

However, in this instance the lease agreement between the non-profit Association and the Parks and Recreation Commission provides that the Association will, at its own cost, improve, develop and maintain a recreational trail system for off road motorcycles and ATVs, and in addition pay to the Commission the sum of \$750 per year. Clearly, there is no monetary gain afforded to the Association through the lease agreement.

The Commission also notes that even if the requestor's private company or the Association of which he is member were determined to have a monetary interest in the lease agreement, WV Code §6B-2-5(d)(1) permits a part-time appointed public official to have an interest in a public contract over which he has authority or control provided the official seeks to be recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

3. and 4.) Subsection 6B-1-2(c) of the Ethics Act provides that a part-time public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

Although the requestor's potential personal pecuniary interest in the public contract is not significant by itself, the Commission holds that it is inappropriate for a public official who is a member of a non-profit Association and part owner of a business with an indirect interest in a public contract, to vote on that contract. The Commission considers this connection to be a

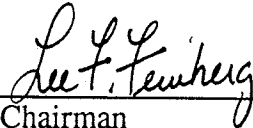
"personal" conflict as that term is used in WV Code §6B-1-2(c).

Therefore, the requestor, as a member of the County Parks and Recreation Commission should not vote or take other official action on specific matters directly affecting or relating to the lease agreement between the Association and the Parks and Recreation Commission.

Further, this prohibition would include voting or taking other official action on any other matter not related to the lease agreement but associated with the recreational activity served by his business.

5.) As noted above, there is no provision of the Ethics Act which prevents the requestor from serving on the County Parks and Recreation Commission while he is an officer and lobbyist for an association. Therefore it is not necessary that he resign from the Association.

As a member of the Commission, he is subject to the code of conduct established by the Act. The Ethics Commission, however, cannot speculate as to what future acts the requestor could take in his official capacity which might violate the Ethics Act.


Chairman