

**ADVISORY OPINION NO. 93-20**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON JUNE 3, 1993**

**GOVERNMENTAL BODY SEEKING OPINION**

A County Commission Member

**OPINION SOUGHT**

Is it a violation of the Ethics Act for a County Commission Member to have a pecuniary interest in the profits or benefits of a City contract?

**FACTS RELIED UPON BY THE COMMISSION**

The County is currently leasing a building to house the County Magistrates from the City Building Commission. This agreement provides that the County rent a portion of the first floor of the building and affords the County the option to purchase the office space at a reduced rate at the conclusion of the lease.

The second floor of this building has been empty for several years. Although the City has the opportunity to lease this space, the prospective tenant would require additional office space. To facilitate that effort, the City asked the County Commission to permit the prospective tenant to use the area occupied by the Magistrates. The County Commission agreed and moved the Magistrates to other, less expensive, property also owned by the City. The County Commission will continue its responsibilities and rights under the lease agreement, including its right to purchase the premises at the conclusion of the lease term.

The building will require some renovations in order to meet the needs of the new tenant. The City will pay the entire cost of such renovations, has advertised for bids, and will retain a certified engineer to oversee the renovation contract. The requestor, President of the County Commission and also a local building contractor, would like to bid on the City's renovation contract.

**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...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...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

#### The Ethics Act

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 no provision of the Ethics Act per se prohibits a County Commissioner from having a pecuniary interest in the City's renovation contract.

West Virginia Code §6B-2-5(d)(1) prohibits a public official from having a pecuniary interest in the profits or benefits of any public contract over which he has direct authority or control. However, in this instance, the County Commission would merely act as the sub-lessor of part of the office space. All renovation work will be contracted and funded by the City. The requestor, as a County Commissioner, does not have direct authority or control over the letting of the City's contracts. Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for the County Commissioner to have a pecuniary interest in the profits or benefits of the City's renovation contract.

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

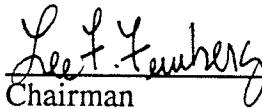
#### WV Code §61-10-15

The Commission previously determined that the County Commission Member does not have **direct** authority or control over the City's renovation contract. However, WV 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 role of the County Commission as the sub-lessor of the City's building would not give the County Commission President the degree of voice, influence or control contemplated by WV Code §61-10-15. Although this was a difficult issue to resolve, the Commission was ultimately persuaded by the degree of separation between any action of the requestor and the awarding of the contract.

Therefore, it would not be a violation of WV Code §61-10-15 for the County Commission President to have a pecuniary interest in the City's renovation contract provided that the contract does not arise out of any prearrangement between the requestor and any other party.

The Commission would note that any person acting in good faith reliance upon a written advisory opinion of the Commission is afforded an absolute defense to any criminal prosecution under West Virginia Code §61-10-15 for actions taken in good faith reliance upon such opinion.

  
Chairman