

ADVISORY OPINION NO. 92-44

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 5, 1992

GOVERNMENTAL BODY SEEKING OPINION

Secretary of a State Department on behalf of an Authority Board Member

OPINION SOUGHT

Is it a violation of the Ethics Act for the President of a local Bank to serve as a State Authority member when such Authority conducts business with that Bank?

FACTS RELIED UPON BY THE COMMISSION

A State Authority's principal liability and sole permanent financing is revenue bond financing. The Authority's current bond issue has a term of fifteen years, bears interest at prevailing rates, and was secured by a pledge of Authority revenues, including annual legislative appropriations.

An Authority Board member recused himself from the Authority's meeting when the resolution authorizing the bond form and structure and directing the underwriter to conclude the bond sale transaction was adopted. He did not participate in any discussion or vote regarding these matters. He expects to recuse himself from discussion and abstain from voting on future matters directly related to the bond issue.

In his private life the Authority member serves as the President and CEO of a local bank. Also, he is an officer, director and a less than one percent shareholder of the holding company which owns and operates the bank. This bank recently purchased a portion of the Authority's revenue bond issue. During the Bank's Directors meeting the Authority member abstained from voting regarding the bond issue purchase.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part 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.

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, 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 §6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

- (i) not exceeding ten percent of the partnership or the outstanding shares of a corporation;
or
- (ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

ADVISORY OPINION

Public Contract

Pursuant to WV Code §6B-2-5(d)(1) public officials may not have more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control. Obviously the Authority member would have authority and control over all public contracts entered into by the Authority including financing and bond issues.

However, according to the information provided in the request letter, the Authority member does not own more than ten percent of the outstanding shares of stock in the individual parent holding company of the area bank that is conducting business with the State Authority. Also, considering the diminutive percentage of shares owned by the Authority member it is unlikely that he would have a pecuniary interest which would exceed thirty thousand dollars in the profits or benefits of a public contract.

Therefore, it would not be a violation of the Ethics Act for the President of a local bank to also serve as a member of the State Authority when such bank may conduct business with the Authority since the Authority member has such a limited interest in the bank and its parent holding company.

Further, pursuant to WV Code §6B-2-5(d)(1), part-time appointed public officials may enter into a contract which the official may have direct authority to enter into or over which he has direct 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.

If the Authority member is determined to have a pecuniary interest of more than \$30,000 in the profits or benefits of the public contract, the member should recuse himself from deciding or evaluating and excuse himself from voting on such contract and fully disclose the extent of his interest in the contract as outlined above.

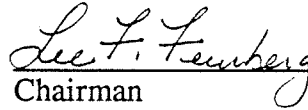
Personal Conflicts

West Virginia Code §6B-1-2(c) provides that part-time public officials 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 would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must disclose his interest and physically remove himself from the room during the discussion and decision making process.

Although the Authority member's potential personal pecuniary interest in the profits or benefits of the public contract is not significant by itself, the Commission has held that it is inappropriate for a public official who is an employee of an interested private party, to vote on the contract. The Commission considers an employment connection to be a "personal" conflict as that term is used in WV Code §6B-1-2(c).

Therefore, the Authority member should not discuss or vote on matters **directly** related to the sale of Authority bonds to his Bank. The Commission notes that this prohibition is limited to Authority decisions regarding the status of the bonds with the Bank. It would not include the Authority's decisions on any official Authority use of the funds obtained through the bond sale.

The Commission notes that this opinion is strictly limited to an analysis of the facts presented under the provisions of the Ethics Act. The Commission is without authority to provide advisory opinions on the application of other statutes.


Chairman