

ADVISORY OPINION NO. #92-08

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 2, 1992

GOVERNMENTAL BODY SEEKING OPINION

Members of a State Board

OPINION SOUGHT

Is it a violation of the Ethics Act for the Director of a State Board to lease office space to that Board?

FACTS RELIED UPON BY THE COMMISSION

A State Board currently occupies a building which contains four offices, a complete kitchen, rest room, storage space and free public parking. The total usable space is approximately 960 square feet. However, the State Board has been notified that they must vacate this building by June 1992.

The Director of the Board has offered to lease approximately 1660 square feet of new office space to the Board for \$975 per month which is approximately \$7.00 per square foot. This building has three large offices, two smaller rooms, two restrooms, a complete kitchen, an additional building for storage, central air conditioning and ample free parking space. The members of the Board feel that this building would fulfill the needs of the Board completely and that it is superior to the Board's present location and facility.

The Board was told that some rental space would be available at the Capitol complex for \$2,000 per month but this space is unacceptable since the area contains only three small offices and has no room for the storage of the Board's files.

The Board has checked several other rental properties in the same community as the space offered by the Director but has been unable to locate comparable space at a better price. For example, one piece of rental property could be leased for \$600 per month but it has only 900 square feet available (\$8 per square foot). The building would also require remodeling and has limited parking facilities.

Another facility could be leased for \$825 per month and has 1800 square feet available (\$5.50 per square foot). However, the building would require major remodeling since the area consists only of one large room. This building also has limited parking facilities.

A third facility in the area would rent for \$600 per month but only offers 1100 square feet of office space (\$6.55 per square foot). Although the office space is adequate, the parking and storage facilities are limited. Also, this facility is located on the second level of the building and would require the use of an outside staircase.

Several other locations have been considered but the Board was unable to find rental property in the area which offered comparable space at a similar price.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no...appointed public official...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 §6B-2-5(d)(2) states in pertinent part that...a...public official...shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner...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;
and
 - (ii) not exceeding thirty thousand dollars interest in the profits or benefits **of the contract**;

West Virginia Code §6B-2-5(d)(3) states in pertinent part that...where the provisions of...this subsection would result...in excessive cost...or other substantial interference with the operation of a state...agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption from...this subsection.

ADVISORY OPINION

Pursuant to West Virginia 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 such official has direct authority or control.

As a Director of the State Board, the public official would have authority or control over the Board's public contracts including the lease agreement for office space. Further, as the owner of the rental property, the Director would have more than a limited interest in the profits or benefits of such contract. Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the Director of the Board to lease office space to the State Board.

Pursuant to WV Code §6B-2-5(d)(3), however, the State Board has submitted a written application to the Commission for an exemption from the prohibition established in WV Code §6B-2-5(d)(1) citing excessive costs and undue hardship.

It is the Commission's opinion that the State Board has not fulfilled the requirements to satisfactorily show that excessive costs and undue hardship would result if an exemption from subsection (d)(1) is not granted. Although the State Board has provided the Commission with examples of available office space and the cost of such space, the Board has not clearly established that they have extensively researched all other comparable space and that the rental of such space would result in higher rental fees and excessive costs to the State Board.

Therefore, the Ethics Commission hereby denies the requested exemption.



Chairman