

ADVISORY OPINION NO. 91-20 Supp.

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON May 2, 1991

GOVERNMENTAL BODY SEEKING OPINION

A Superintendent of a County School System

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a County Board of Education to contract with a Company for services when the County Board of Education member's spouse has more than a limited interest in a Company which may be selected to act as the subcontractor?

FACTS RELIED UPON BY THE COMMISSION

A County Board of Education member's spouse has an ownership interest in a mechanical contracting Company. The spouse holds 48% of the outstanding shares of stock and is an officer and director of the Company. However, the County Board of Education member is not a shareholder, officer, director or employee of this Company.

The County Board of Education has entered into contracts with the Company both directly and indirectly through general contractors for which the Company was a subcontractor. It is not known what profits or benefits the spouse will receive in the contracts where her Company acts as the subcontractor. The Company has been involved in the construction of schools in the County and has also installed and/or repaired the mechanical systems of many County schools.

The requestor states that it is the practice of the County Board of Education to secure competitive bids (at least three whenever possible) both for construction projects, maintenance and repair work. When accepting a competitive bid from a general contractor and awarding the contract thereon, the Board of Education does not have the authority to dictate which subcontractors will be used to fill the requirements of the awarded contract. That decision is left to the general contractor.

After the issuance of Advisory Opinion #91-20 the Commission was informed that the Company which is owned in part by the County Board of Education member's spouse, has not contracted with the County Board of Education since the member was elected to public office.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected public official...or member of her immediate family or business with which she 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...she may have control...

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of her immediate family or a business with which 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;...

West Virginia Code Section 6B-2-5(e) states that no...public official...may knowingly and improperly disclose any confidential information acquired by...her in the course of...her official duties nor use such information to further...her personal interests or the interests of another person.

ADVISORY OPINION

Pursuant to subsection 6B-2-5(d)(1) of the Ethics Act, a public official, a member of her immediate family or a business with which she is associated may not have an interest exceeding \$30,000 in the profits or benefits of a public contract over which she has direct authority or control.

As an elected member of the County Board of Education, the public official has direct authority and control over the letting of the County Board of Education's public contracts.

In this instance, the spouse of a County Board of Education member owns 48% of the outstanding shares of stock of a company which is contracting either directly with the County Board of Education or as a subcontractor to the general contractor with the Board. It is not known what amount of profits or benefits the spouse would receive as a result of the public contracts where the Company acts as a subcontractor and does not directly contract with the County Board of Education.

West Virginia Code Section 61-10-15 provides that it is a criminal violation for any member of a County Board of Education to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract when he may have voice or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor.

However, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission shall be immune from the sanctions of West Virginia Code Section 61-10-15.

Although the County Board of Education does not select the subcontractor(s) to be used by the contractor it may have authority over the letting of the contract.

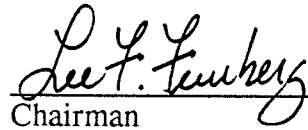
Therefore, it would be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for a Board member's spouse's company to contract with the County Board of Education if she has an indirect interest in the profits or benefits of the public contract, **and** that interest exceeds \$30,000.

The Commission would note that the affected governmental body may submit a written application to the Ethics Commission for an exemption if they can establish that the enforcement of the prohibition contained in subsection 6B-2-5(d)(1) of the Ethics Act would result in excessive costs, undue hardship, or other substantial interference with the operation of the County Board of Education.

The Commission can not prospectively grant a blanket exemption to the County Board of Education. Instead, the Commission must consider each contract and subsequent requests for exemptions on a case by case basis.

Confidential Information

The Commission would note that the County Board of Education member should be mindful of subsection 6B-2-5(e) of the Ethics Act which prohibits a public official from using any confidential information acquired by her through her public position to further the interests of her spouse.


Chairman