

ADVISORY OPINION NO. 91-83

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 5, 1991

GOVERNMENTAL BODY SEEKING OPINION

A Public Employee

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a public employee to be employed part-time as a consultant with a company which conducts business with his governmental agency?

FACTS RELIED UPON BY THE COMMISSION

The requestor is the Administrative Assistant for a County Board of Education. As such he reports to the Assistant Superintendent in charge of curriculum and instruction. His primary duty is to oversee middle childhood education for the school system.

With declining enrollments in the County and the down-sizing of the administrative staff, the requestor has assumed other curricular responsibilities. For the past five years he has acted as the Drug Coordinator for the school system and has acquired expertise in this curricular area.

During the 1987-1988 school year, drug monies became available for programs of a prevention and intervention type for the students in the County. During the 1988-89 school term the Board of Education purchased program materials from a nonprofit, tax exempt Foundation. The program is only one of the forty-one on-going substance abuse programs which the requestor oversees.

This program was implemented in the County schools by a group of local citizens who volunteer their time and have formed a partnership with the school system.

In January, 1990, the requestor was approached by the executive director of an education committee for an Association, inquiring if he would be willing to work for the Association promoting a drug program across the Country. This work is performed after his regular employment day and during his time away from work. These days are used to work at home and for traveling across the Country speaking on behalf of the drug program.

In September, 1990, the requestor was placed on a \$1,000 monthly retainer to act as a consultant for the Association. He does not receive any royalties and the retainer is not based on the sale of non-profit drug program materials.

As a consultant he is required to assist the Association in the task of providing leadership in developing, achieving and maintaining the best possible educational drug programs and services available.

In May, 1991, the requestor's employing Association took over the responsibilities of overseeing and directing the work of the non-profit Foundation and now handles all inquiries into the Foundation's drug program. Consequently, any drug program materials which are needed by the County Board of Education would be purchased from the Association which employs the public employee as a consultant.

These drug program materials are made available to all school systems at a nominal cost. Orders for the County schools are placed through the Purchasing Department. These orders are for supplies which supplement the drug program and over the past four years the County Board of Education has spent an average of \$3,000 to put these materials into the hands of over 10,000 students per year.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public employee may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain...

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no public employee...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...employee may have direct authority to enter into, or over which he or she may have control...

West Virginia Code §6B-2-5(h)(1) states that no...full-time public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself...to be employed by any person who is or may be regulated by the governmental body which he...serves while he...is employed or serves in the governmental agency...

ADVISORY OPINION

Private Gain

Pursuant to WV Code §6B-2-5(b)(1) of the Ethics Act a public employee may not use his office or the resulting prestige of his office for his own private gain. However, in Advisory Opinion #91-02 the Commission determined that the use of general knowledge and experience gained through an employment position would not be considered a use of public office for private gain as meant by WV Code §6B-2-5(b)(1) of the Ethics Act. In this instance, it is clear that the requestor has gained invaluable experience in this curricular area through his employment as an administrative assistant which has included the supervision of the County's substance abuse program for 5 years.

Therefore, entering into a consulting contract as described above would not be a violation of WV Code §6B-2-5(b)(1) of the Ethics Act.

Interest in Public Contracts

Pursuant to WV Code §6B-2-5(d)(1) of the Ethics Act a public employee may not have more than a limited interest in the profits or benefits of a public contract over which he has direct control.

As an Administrative Assistant of the County Board of Education the requestor does not have authority or control over the purchasing contracts for the County Board of Education. Also, in his capacity as the County Drug Coordinator for the school system he does not approve or control the purchase of the drug program related materials for the County Board of Education. All such materials are requisitioned through the Purchasing Department and are approved by the County Board of Education upon recommendation of the superintendent.

Further, the requestor does not have a pecuniary interest in the profits or benefits of any potential public contract between the Association sponsoring the drug program and the County Board of Education. He is on a \$1,000 monthly retainer to act as a consultant and would be considered an employee of the Association. The monthly retainer is not based on the sale of drug program materials and he does not receive any royalties from the sale of such materials.

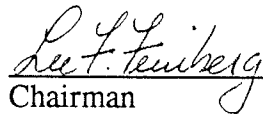
Therefore, the requestor would not be in violation of WV Code §6B-2-5(d)(1) of the Ethics Act since he has no authority or control over the County Board of Education's decision to purchase materials sold by his part-time employer.

Employment

Pursuant to WV Code §6B-2-5(h)(1) of the Ethics Act, a public employee who exercises nonministerial or policymaking authority may not seek employment with persons who are or may be regulated by his governmental agency.

The requestor does have the requisite authority contemplated by this subsection as it relates to the coordination and supervision of drug programs for the County Board of Education. However, neither the Association which is responsible for overseeing and directing the work of the non-profit Foundation nor the Foundation itself is regulated by the requestor's governmental agency.

Therefore, it would not be a violation of WV Code §6B-2-5(h)(1) of the Ethics Act for the requestor to be employed part-time as a consultant with a company which, although it conducts business with his governmental agency, is not regulated by such governmental agency.


Chairman