

**ADVISORY OPINION NO. 91-66**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON SEPTEMBER 13, 1991**

**GOVERNMENTAL BODY SEEKING OPINION**

A County Commission Member

**OPINION SOUGHT**

Whether it would be a violation of the Ethics Act for a County Commission to pay for gasoline purchased pursuant to a contract in which a Commission member has a limited interest, when such contract was entered into prior to the effective date of the Ethics Act and prior to the County Commission member's election?

**FACTS RELIED UPON BY THE COMMISSION**

On April 29, 1988, a purchasing agent for a County Commission was advised by the Sheriff that the County's gasoline tank was empty and the officers could not perform their law enforcement duties without the fuel necessary for transportation. The Sheriff's Department did not have credit cards to use to purchase gasoline from local stations.

One local supplier of gasoline indicated that he could not deliver the fuel until after the weekend. When the usual supplier could not fill the County's order immediately, another Oil Company was contacted and agreed to deliver a quantity of gasoline that evening.

When the invoice in the amount of \$2,056.02 was submitted by the Oil Company, the County Commission did not pay the invoice because of their concern of a possible conflict of interest pursuant to West Virginia Code §61-10-15 since the County Clerk was an officer and stockholder in this Company. However, the County Clerk did not have any voice, influence or control over the purchase of the County's gasoline.

On January 1, 1989 an employee and minor stockholder (5% or less) in the Oil Company was elected to serve on the County Commission. Even though this employee/stockholder was not a member of the County Commission at the time the order was placed for the fuel in 1988, the County Commission has refused to pay the Oil Company's invoice.

A lawsuit seeking payment on the contract is pending before the Circuit Court of the County.

### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code Section 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.

West Virginia Code Section 6B-2-3 states in pertinent part that... A person subject to the provisions of this chapter may rely upon the published guidelines or an advisory opinion of the Commission, and any person acting in good faith reliance on any such guideline or opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of the code and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion or guideline in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.

West Virginia Code Section 6B-2-4(v) states in pertinent part that...the provisions of this section shall apply to violations ...occurring after the thirtieth day of September, one thousand nine hundred eighty-nine...

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

West Virginia Code Section 6B-1-2(c) states that...certain conflicts of interest are inherent in part-time public service...when such conflict becomes personal to a particular public official...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.

### **ADVISORY OPINION**

#### **Public Contracts**

The agreement between the County Commission and the Oil Company was entered into in April, 1988, prior to the County Commission member's election to office. Consequently the County Commission member did not have any authority or control over the letting of that particular contract.

Further, as an employee and minor stockholder (5% or less) of the Oil Company, the County Commission member would have a limited interest in the profits or benefits of the contract for the purchase of gasoline.

Therefore, it would not be a violation of subsection 6B-2-5(d)(1) of the Act for the County Commission to pay for gasoline purchased pursuant to a contract in which the Commission member has a limited interest, when such contract was entered into prior to the effective date of the Ethics Act and prior to the County Commission member's election.

### Voting

The County Commissioner should be mindful of subsection 6B-1-2(c) which provides that certain conflicts of interest are inherent in part-time service and the public official should not vote on a matter which becomes personal. The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, or is affected in a manner which may influence his vote or would give the appearance of impropriety.

Therefore, the Commission finds that the County Commissioner should not vote on the payment of the invoice for the purchase of gasoline. Although this contract was entered into before he was elected, the Commission considers the matter to be personal to him.

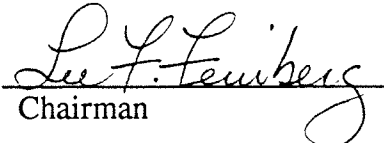
### 61-10-15

The Commission notes that West Virginia Code §61-10-15 provides that it is unlawful for any member of a County Commission to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service over which as such member he may have any voice, influence or control.

However, the agreement between the County Commission and the Oil Company was entered into in April, 1988, prior to the County Commission member's election to office. Consequently the County Commission member did not have any voice, influence, authority or control over the awarding or letting of that particular contract.

It could be argued that the Commission member has voice, influence authority or control over the payment aspect of this contract; however, the Commission does not consider the belated approval of payment under a contract which was entered into prior to the County Commission member's election to office to be the type of voice, influence or control over a contract covered by West Virginia Code §61-10-15. This is particularly true since a timely payment would have predated the requestor's election to the County Commission and since the requestor presumably will not vote on the approval of payment.

Further, pursuant to subsection 6B-2-3 of the Ethics Act, any person acting in good faith reliance on any advisory opinion issued by the Ethics Commission shall be afforded immunity from the sanctions of West Virginia Code §61-10-15.

  
Chairman