

ADVISORY OPINION #91-72

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 3, 1991

GOVERNMENTAL BODY SEEKING OPINION

A City Official

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a City Council member's computer company to sell computer supplies and hardware to the City?

FACTS RELIED UPON BY THE COMMISSION

A City Councilman is the owner of a computer store located within the City. This computer store has supplied the City with computer hardware and maintenance for several years prior to the Council member's election to office. Further, the City has used this store to maintain and upgrade its equipment since it was purchased.

The City currently owns two different brands of computers which were purchased from this computer store prior to the Council member's election and his purchase of the computer store.

This computer store is the only factory authorized dealer in the State for one brand of computer used by the City and the closest dealer for the other brand. The computer store is located within 150 feet of City Hall, making it very convenient for fast service. If the City is not allowed to use this computer store, City personnel will be forced to travel a total of 4 hours round-trip to obtain service for one model and ship the other model to a factory authorized service center. Such arrangements would result in higher costs and a loss of time and productivity.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and 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 Section 6B-2-5(b)(1) states in pertinent part that...a public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code Section 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...

West Virginia Code Section 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**;

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

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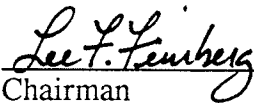
Pursuant to subsection 6B-2-5(d)(1) of the Ethics Act a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. As a City Council member, the computer store owner would have direct authority and control over the letting of public contracts by the City. Further, as the sole proprietor of the computer store, he would have more than a limited interest in the profits or benefits of such contracts. Therefore, it would be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for the City Councilman to sell computer hardware and supplies to the City since he would have more than a limited interest in the profits or benefits of a contract over which he has direct control.

However, the City has applied for an exemption from the prohibition established in subsection 6B-2-5(d)(1) citing excessive costs and substantial interference with its operations since enforcement would create unnecessary hardships, increased expenses, loss of productivity and increased travel time if they are forced to contract with computer stores that are located in a distant County and outside the state.

The Commission finds that excessive cost, undue hardship and substantial interference with City operations would result if the provisions of subsection 6B-2-5(d)(1) of the Ethics Act were enforced. Therefore, the Commission hereby grants the requested exemption. However, this exemption is limited to service, maintenance and incidental parts or supplies which are not otherwise conveniently available at a competitive cost from other area sources.

The Commission notes that subsection 6B-1-2(c) of the Ethics Act provides that a part-time elected official 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 that has become "personal to him". The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly 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 fully disclose his interest in the contract and physically remove himself from the room during the discussion and decision making process.

Further, the City Council member should be mindful of subsection 6B-2-5(b)(1) of the Ethics Act which prohibits a public official from using his public office for private gain. Simply, the City Council member may not use his prestige or position on the City Council to solicit business for his private computer company.


Chairman