

ADVISORY OPINION NO. 91-93

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON FEBRUARY 21, 1992

GOVERNMENTAL BODY SEEKING OPINION

A Superintendent of a County School System

OPINION SOUGHT

May an exemption be granted to allow a County School Board to contract with a company owned in part by a Board member's spouse?

FACTS RELIED UPON BY THE COMMISSION

During the next three years, the County Board of Education will be involved in a substantial number of major construction projects. A bond issue will make funds available for such projects and these funds must be spent within three years from the sale of the bonds.

Neighboring County Boards of Education will also be involved in construction projects during this period and the County will have a number of major private construction projects as well.

A County Board of Education member's spouse has an ownership interest in a mechanical contracting company. The spouse owns 48% of the outstanding shares of stock and is an officer and director of the Company.

The County Board of Education is requesting an exemption to allow the Board to contract with this Company either as a contractor or a subcontractor since the prohibition would result in excessive costs to the Board. In most cases, the Company will be a sub-contractor selected directly by the general contractor who is awarded the bid. All contracts will be awarded through a competitive bid process.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §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 he or she may have control...

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

West Virginia Code §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...serving in elected... 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...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 §6B-2-3 states in pertinent part that...A person subject to the provisions of this chapter may rely upon an advisory opinion of the Commission, and any person acting in good faith reliance on any such 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 §6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use his... office or the prestige of his...office for his...own private gain or that of another person.

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

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county board...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.

ADVISORY OPINION

Interest Public Contracts

Pursuant to WV Code §6B-2-5(d)(1), public officials, members of their immediate families or a business with which they are associated may not have more than a limited interest in the profits or benefits of a public contract over which such officials have direct authority or control.

The Commission finds that an elected member of the County Board of Education, is a public official with direct authority and control over the letting of the County Board of Education's public contracts.

In this instance, a County Board of Education member's spouse owns 48% of the outstanding shares of stock of a Company which may contract either directly with the County Board of Education or indirectly as a subcontractor to a general contractor with the Board.

Although, it would be a violation of WV Code §6B-2-5(d)(1) for the County Board of Education to contract with the Company, the County Board of Education has submitted a written request for an exemption. The exemption request states that enforcement of the prohibition contained in WV Code §6B-2-5(d)(1) would result in excessive cost and undue hardship since the public contracts are awarded through a competitive bid process. The Board points out that all public contracts are awarded through a competitive bid process and the law of supply and demand would increase costs if this Company is barred from bidding.

The Commission finds that enforcement of the provisions of WV Code §6B-2-5(d)(1) would result in excessive costs to the County Board of Education and, ultimately, the County taxpayers and would unreasonably limit the options available to the Board in the competitive bidding process. Therefore, the Commission hereby grants the exemption. The County Board of Education may contract directly with the company in which a Board member's spouse has more than a limited interest, provided the spouse's company submits the lowest bid.

The Commission also grants an exemption to allow the Board to contract with another company that may use as a subcontractor the company in which a Board member's spouse has more than a limited interest.

The exemptions granted herein are limited to the projects which will be put out for bid during the three year period following the projected sale of bonds.

Voting

Pursuant to WV Code §6B-1-2(c), 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". 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 a vote or would give the appearance of impropriety. The Commission has previously determined that in order for a public official's recusal to be effective, it is necessary for the official to refrain from participating in the discussion and decision-making process by physically leaving the room during that period.

The awarding of a construction contract involving the spouse's company as a contractor or subcontractor is a matter that would be considered personal to the Board member. Therefore, the member should recuse and refrain from deliberating and voting on the possible award of such a contract.

Private Gain

Pursuant to WV Code §2-5(b), public officials may not use their office or the resulting prestige for their own private gain or for the private gain of another. Therefore, the Board member should not use his or her position on the Board of Education to try to obtain, influence, increase or promote business for his or her spouse's private Company.

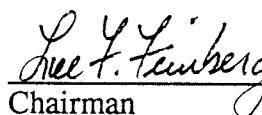
Confidential Information

The County Board of Education member should also be mindful of WV Code §6B-2-5(e) which prohibits public officials from using confidential information acquired by them during the course of their official duties to further their personal interests or the interests of another. Therefore, the public official may not use any confidential information acquired as a County Board of Education member to assist any private Company to secure a public contract through a competitive bid process or otherwise.

61-10-15

West Virginia Code §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, pursuant to WV Code §6B-2-3, 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 §61-10-15. The requestor may so rely on this opinion provided all provisions of the opinion are followed.


Chairman