

ADVISORY OPINION NO. 90-98
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON JULY 12, 1990

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a Public Service District

OPINION SOUGHT

Whether an exemption is necessary to allow a Public Service District to continue to contract with a Bank when a Public Service District Board member is on the Board of Directors of that Bank?

OTHER FACTS RELIED UPON BY THE COMMISSION

The Public Service District was established in 1967 for the purpose of supplying water services to area residents. The Public Service District does not have any full time employees but does have a three member Commission.

Since the Public Service District's inception it has conducted its banking business with the local bank. One of the Public Service District members has been a member since 1967. In 1978 that Board member was elected to the Board of Directors of the local Bank and now has an equity position in the Bank valued in excess of \$30,000.

If the Ethics Commission finds that there is a conflict of interest the Public Service District has requested an exemption on the basis of undue hardship and substantial interference. Since the Public Service District has no full-time employees all banking matters must be conducted by the Board members. If they are unable to conduct business with the local Bank they would be forced to commute to an out-of-town location to conduct banking business. Also, the Board of Directors has compared interest rates at various other banking institutions in surrounding areas and discovered that the local bank offers a higher rate of return to the Public Service District.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no appointed public official...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....Nothing within this section should be construed to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...an appointed public official...shall not be considered as having an interest in a public contract when such a person has a limited interest as a...shareholder. A limited interest for the purposes of this subsection is:

- (A) An interest:
 - (i) not exceeding ten percent of the outstanding shares of a corporation; or
 - (ii) thirty thousand dollars interest in the profits or benefits **of the contract**;

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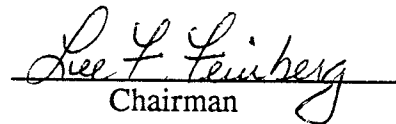
As an appointed public official the Public Service District Board member has direct authority and control over the letting of public contracts between the Public Service District and the Bank.

However, as a member of the Board of Directors for the Bank with an equity position in excess of \$30,000 (which is less than 10% of the outstanding shares of stock issued by the Bank) the Board member has a limited interest in the profits or benefits of the public contract. Also, the Board member will not receive \$30,000 interest in the profits of benefits of the **contract between the Bank and the Public Service District.**

For the purpose of this section "limited interest" is defined as an interest not exceeding 10% of the outstanding shares of issued stock in a corporation or \$30,000 interest in the profits or benefits of the public contract.

Therefore, the Commission finds that an exemption is not required since it would not be a violation of subsection 6B-2-5(d)(1) of the Act for the Public Service District to contract with a local Bank when a member of the Public Service District's Board has a limited interest in that Bank.

The Commission would note that the Public Service District Board member should be mindful of the second proviso of subsection 6B-2-5(d)(1) of the Act which states that a part-time public official may enter into a public contract over which he has direct authority or control but should seek to be recused from deciding or evaluating and excused from voting on such contract and fully disclose the extent of such interest in the contract. It is also the Commission's opinion that the public official must leave the room for the recusal to be effective.


Chairman