

ADVISORY OPINION NO. 90-121

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON AUGUST 2, 1990

GOVERNMENTAL BODY SEEKING OPINION

A State Commissioner

OPINION SOUGHT

- a. Whether it is a violation of the Act for employees of the State Alcohol Beverage Control Commission (hereafter referred to as the ABCC) and the State Tax and Revenue Department (hereafter referred to as the Tax Department) to bid for and receive a retail liquor license from the State Retail Liquor Licensing Board?
- b. Whether it is a violation of the Act for the ABCC and the Tax Department employees to be employed on a contract basis to assist persons outside State government in the bidding process to obtain a State liquor license?
- c. Whether it is a violation of the Act for appointed or elected State public officials to bid for and receive a State retail liquor license?

OTHER FACTS RELIED UPON BY THE COMMISSION

The State Retail Liquor Licensing Board was recently created and provided statutory procedures for the State to divest itself from retail alcohol sales. The Board members have been appointed and are in the process of delineating retail liquor market zones. Licenses will be offered within each market zone. This is not a direct sale of the State's liquor stores but rather a ten-year license to sell liquor from such locations as grocery stores, pharmacies and convenience stores.

The Board has published the required legal advertisements, and all who respond will receive a packet of detailed information concerning the bidding process, the market areas available, the cost and sales information for each market area.

State ABCC employees at the store level do not possess any particular information that would allow them to construct a bid which would allow them to be the required highest qualified bidder. The requestor does state that certain employees who engage in detailed discussions and planning concerning the location of market zone boundary lines, and the number and types of liquor licenses to be awarded within a market zone may possess some competitively advantageous information which would not be apparent in the upcoming bid information and document.

The Licensing Board questions whether appointed or elected state officials are in any way ethically restricted from obtaining through competitive bid procedures one or more retail liquor sales licenses.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE STATE

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...

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:...Provided, however, that nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body...

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

West Virginia Code Section 6B-2-5(h)(1) states in pertinent part that...no full-time public official or full-time public employee who exercises policymaking, nonministerial or regulatory authority may...allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official or public employee whether rendered as an employee or as an independent contractor.

ADVISORY OPINION

Liquor License

a. The Commission finds that pursuant to subsection 6B-2-5(d)(1) public employees may contract with or have an interest in the benefits or profits of a public contract as long as they do not have any direct authority or control over the letting of that contract. Here, the public contract would be the receiving of a State license for ten years through a bidding process.

In this instance, the public employees (ABCC and Tax Department) would not have any authority over the letting of public contracts by the State Licensing Board. Therefore, the Commission finds that it would not be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for public employees to bid for and receive a State retail liquor license.

The Commission would note that the public employees should be mindful of subsection 6B-2-5(e) of the Ethics Act which prohibits public employees from disclosing or using confidential information obtained by them during the course of their official duties for private gain.

Assisting Others in the Bidding Process

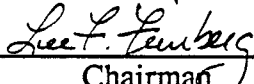
b. Subsection 6B-2-5(b)(1) prohibits a public employee from using his or her position or prestige for the private gain of another. Also, subsection 6B-2-5(e) prohibits a public employee from disclosing or using confidential information he or she acquires during the course of his or her official duties. The Commission believes that in the circumstances described there is a strong appearance that ABCC and Tax Department employees would be using their position while assisting private individuals in the bidding process. There is an exception in subsection 6B-2-5(b)(1) that allows public employees to perform, without compensation, usual and customary duties associated with their position or to perform constituent services. However, in this instance the public employees would appear to be using information gained through their position and knowledge of the retail liquor business for compensation.

State Officials

c. Subsection 6B-2-5(d)(1) of the Ethics Act states that a public official may contract with or have an interest in the profits or benefits of a public contract as long as he does not have direct authority or control over the letting of that public contract.

However, all public officials should be mindful that the use or disclosure of confidential information which was obtained through the performance of the public official's duties for his or her own private gain or for that of another would be a violation of subsection 6B-2-5(e) of the Ethics Act.

Further, the Commission would remind the public officials that subsection 6B-2-5(b)(1) of the Ethics Act prohibits the use of public office or prestige for the individual's private gain or for that of another.



Chairman