

ADVISORY OPINION NO. 90-163

ISSUED BY

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 4, 1990

GOVERNMENTAL BODY SEEKING OPINION

Director of a Housing Authority

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a Housing Authority to purchase real estate from a Corporation when one of its creditors is a Housing Authority member?

OTHER FACTS RELIED UPON BY THE COMMISSION

Members of a County Housing Authority are part-time, appointed public officials. A County Housing Authority is in need of additional office space and has located an office building and real estate in the County.

One piece of property was purchased in 1983 by a West Virginia partnership from several individuals, one of whom is a member of the Housing Authority. A deed of trust was executed to secure the purchase price of the lot and the Partnership remains obligated to the individuals (including the Housing Authority member) for the installment payments.

A second site was transferred by a land contract to a Corporation in which the housing authority member had a twenty-five percent interest. The interest of the Corporation was then acquired by the Housing Authority member's business of which he owns fifty percent.

The Director of the Housing Authority negotiated the purchase price for these two parcels of real estate. The Housing Authority member's relationship to the transaction is involuntary and inadvertent. His position is basically one of a creditor to the proposed seller of the real estate.

The member has not participated in any vote taken by the Housing Authority regarding the transactions for the purchase of the property, in any of the negotiations or other matters concerned with the transaction.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-1-2(c) states that...there are many part-time public officials...serving in...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...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(d)(1) states in pertinent part that...no appointed public official...or business with which he...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...may have control: Provided that nothing herein shall...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...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:

(B) An interest as a creditor:

(i) Not exceeding ten percent of the total indebtedness of a business; or

(ii) Not exceeding thirty thousand dollars interest in the profits or benefits of the contract.

ADVISORY OPINION

Pursuant to subsection 6B-1-2(c) of the Ethics Act, certain conflicts of interest are inherent to part-time public service and such conflict does not necessarily prohibit a part-time public official from serving in his capacity as a public official.

This subsection also provides that a part-time appointed 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.

Further, subsection 6B-2-5(d)(1) of the Ethics Act provides that nothing shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority or control over 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. Recusal is defined as refraining from participating in the discussion process or deciding a matter. The Ethics Commission has determined that in order to have a legitimate recusal the appointed part-time public official must physically remove himself from the room during the discussion and voting process.

Therefore, the Commission finds that it would not be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for a County Housing Authority to purchase real estate from a Corporation when one of the **creditors to the proposed seller** of the real estate is a **part-time appointed member of the County Housing Authority** (the proposed purchaser) if the part-time appointed public official follows the procedures outlined above in subsection 6B-2-5(d)(1) of the Ethics Act.


Chairman