

ADVISORY OPINION NO. 89-26

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 7, 1989

GOVERNMENTAL BODY SEEKING OPINION

Legal Counsel on behalf of a Mayor

OPINION SOUGHT

Exemptions are sought on the following matters:

Case #1 - A Medical Records Transcriptionist for a local hospital lives at home with her parents. Her father is the owner of the only sanitation service available to the city. The sanitation service is the only such service available to the entire county area and provides garbage collection for the city.

The following information was supplied to the Commission upon request: There are no other sanitation services offered in either the City or County involved in this particular case. If the city was to terminate its present sanitation contract, all City divisions and the hospital would be required to utilize a landfill six (6) miles outside the city limits. The only remaining possibility would be for the city to purchase and run its own sanitation service. Such an alternative would be very costly and create additional tax burdens for the citizens.

Case #2 - A laboratory Technician at a local hospital is married to the owner of a newly purchased print shop. The hospital and the city have had work done by the printing company in the past.

The following information was supplied to the Commission upon request: The city does not use the print shop exclusively--it does business with other printing shops in the area. The city does approximately ten (10%) percent of its printing business with the print shop in this case. Many times when an immediate printing service is required, it is economical to employ the services of the local printing shop. The city contends that neither the hospital employee, nor her spouse have any input or direction with respect to the allocation of printing services. It would create a financial hardship on the city if it could not avail itself to the lower printing costs which may be offered by the print shop involved.

Case #4 - An Oil Company has supplied the City with fuel for a great many years. The owner of a petroleum company which delivers the product to the city for the Oil Company was elected City Recorder at the last election.

The following information was supplied to the Commission upon request: The Commission inquired as to what interest the City Recorder had in the petroleum company. The Commission was informed that the City Recorder is the owner of the petroleum products company. He is the sole distributor for the Oil Company in the area. In turn, through the City Recorder's affiliation with the Oil Company, the City has access to the distributing equipment for the oil products in question at no additional costs to the City. The City pays the Oil Company directly for their oil products purchased and in turn the Oil Company pays the petroleum company to deliver them. However, if the present affiliation is terminated between the City, the Oil Company and the petroleum company, the City would have to purchase the appropriate oil products distributing equipment from another supplier. The City contends such purchases and maintenance would create a hardship which would ultimately be passed on to the citizens of the City.

Case #8 - The City Mayor owns stock in three of the automobile dealerships in the city. Effective July 1, 1989, the Mayor issued an order to comply with the new legislation, whereby no parts were to be purchased from any dealership with which he was associated. This has caused undue burden upon the city as some parts are only available from new car dealerships. Fortunately, there has not been an emergency situation which would limit the use of the police cruisers or fire trucks because of the lack of parts being available.

The following information was supplied to the Commission upon request: The city's motor vehicle fleet is made up almost exclusively of Ford and Chrysler motor vehicles. There are no other Ford or Chrysler dealers with appropriately trained factory mechanics in the city. There is a Chrysler dealership approximately twenty-six (26) miles from the city. The city has motor vehicle mechanics who perform repair and maintenance work on city vehicles; however, there are times when the need requires a more specialized factory trained mechanic. Also, when it is necessary to obtain factory parts, the city must now look to out of town and/or out of county dealers to provide such parts.

#### OTHER FACTS RELIED UPON BY THE COMMISSION

The hospital is owned by the city, but is a separate entity. The hospital operates from its own separate budget and all hiring and other business transactions are carried out through the administrative offices of the hospital.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected 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 with the governmental body over which he or she has direct authority or with which he or she is employed: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body...

West Virginia Code Section 6B-1-3(d) defines "immediate family" with respect to an individual as meaning a spouse residing in the individual's household and any dependant child or children and dependant parent or parents.

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...One having a limited interest in a public contract is an interest not exceeding ten percent of the partnership or the outstanding shares of a corporation or thirty thousand dollars, whichever is the lesser.

ADVISORY OPINION

1. Since the public employee resides with her father, who is the owner of the sanitation service business provided for the City pursuant to a public contract she is in violation of subsection 5(d)(1) of the Act.

However, the City has applied for a exemption of this subsection citing excessive cost, undue hardship and substantial interference. The City has no other Sanitation Service available, the only alternatives to using this service is transporting the refuse to a landfill six miles away or to purchase and operate its own sanitation service. Both of these alternatives would prove to be costly and impractical.

Because the enforcement of this subsection would result in undue hardship, substantial interference and excessive cost the Commission hereby grants the City's request for an exemption of subsection 5(d)(1).

2. Since the laboratory technician is a public employee neither she nor her spouse may be a party to a contract with a governmental body with which she is employed.

However, the City has applied for a written exemption citing excessive cost, undue hardship and substantial interference. The City does not use this printing service exclusively but many times the printing services are required immediately and it is more economical for the City to avail itself to a local printing shop.

Additionally a hardship would be placed upon the City if it could not make use of the lower printing costs which may be offered by this printing service.

The Commission finds that excessive cost, undue hardship and substantial interference would result from the enforcement of subsection (d)(1) and therefore, the Commission hereby grants the City's request for an exemption.

4. The City Recorder is a public official within the meaning of subsection 5(d)(1), and he appears to have more than a limited interest in the contract since he is the sole distributor for The Oil Company products in the area.


The City has applied for a written exemption from this subsection citing excessive cost. Through the City Recorder's affiliation with the Oil Company, the City has access to the distributing equipment for oil products at no extra cost to the City. If the present affiliation is terminated the City would have to purchase the appropriate oil products distributing equipment from another supplier. The purchase and maintenance of such products would result in a substantial increase in cost to the citizens.

However, the Commission requires more information detailing the excessive cost that would result before an opinion can be rendered on this matter.

8. The Mayor of the City has more than a limited interest in the automobile dealerships which contract with the City. Therefore, it is a violation of subsection (d)(1) for the City to continue to purchase parts from these dealerships.

However, the City has made a written application for exemption from this subsection, citing undue hardship and excessive cost. The dealership in question is the only dealership within a twenty-six mile radius of the City. On the occasion when the City automobiles require specialized maintenance work or repair they must be sent to a factory trained mechanic at the dealership. The City would lose a discount previously afforded to it by the Mayor's dealerships. Therefore, there would be a serious increase in cost, both in time and funds if the City could no longer contract with the automobile dealerships.

The Commission finds that undue hardship and excessive cost would result if the provisions of this section are enforced, therefore, the City's request for an exemption is hereby granted.

  
Executive Director