ADVISORY OPINION NO. 2013-22

Issued On June 6, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Employee** asks whether it is permissible for his private trucking business to subcontract with a contractor of his State Agency.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed as a Transportation Worker/Equipment Operator by a State Agency which is statutorily charged with, among other things, constructing, improving and maintaining state roads. The Commissioner of the Agency is authorized to contract with private companies for this work. The Requester has no supervisory duties nor is he involved in any way in the selection process of state contractors or subcontractors. Neither he nor his supervisor have direct authority or control over the State Agency's contractors or subcontractors.

The Requester is currently assigned to a county's road maintenance crew. He owns and operates a private trucking business, and asks if it is permissible for his trucking business to serve as a subcontractor to haul materials for his State Agency.

The Requester states that he would perform work for his private company only during his time off from the State Agency. He would have an employee of his private company perform the work at times when the Requestor is working for his State Agency.

His supervisor is aware of his request for an advisory opinion and has no objection.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(b) reads in relevant part:

> 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.

W. Va. Code§ 68-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he ... is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he ... may have control...
W. Va. Code§ 6B-2-5(h)(6) reads:

A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

ADVISORY OPINION

First, the Commission must determine whether a subcontractor of a State Agency is subject to the restrictions in the Ethics Act. Indeed, the Ethics Commission has subjected subcontractors of public agencies to the Ethics Act in previous advisory opinions. In Advisory Opinion 94-22, the Commission held that the prohibitions against having an interest in public contracts extend to subcontractors. Specifically, a County Board of Education member asked whether his contracting company could serve as a subcontractor for the County Board of Education (BOE). The Ethics Commission found that it would violate the Ethics Act, W. Va. Code §6B-2-5(d)(1), to enter into a public contract with the BOE directly, or indirectly as a subcontractor, to perform private work for his agency because, as a member of the BOE, he has direct authority and control over any construction contract.

Further, in Advisory Opinion 2012-40, the Ethics Commission subjected a subcontractor for a BOE to the Act. Again, the Commission addressed whether a BOE member's spouse's subcontract with the BOE was prohibited under the Act. The Commission found that the subcontract was prohibited because the BOE member would have voice, influence and/or control over the contract, in violation of W. Va. Code§ 61-10-15. Finally, in Advisory Opinion 2012-06, the Commission subjected a subcontractor for the State to W. Va. Code§ 6B-2-5(c) which generally prohibits public servants from accepting gifts from interested persons. Therefore, the prohibitions of the Ethics Act apply to subcontractors of public agencies.

The Ethics Commission has considered the relevant prohibitions of the Ethics Act. The Commission hereby finds it does not violate the Ethics Act for the Requester to contract with a company who has contracts with his State agency since:

(1) The Requester's private subcontract would not constitute the use of public office for private gain;
(2) The Requester does not exercise direct authority or control over the selection of the contracts with his State agency; and,
(3) The Requestor states that he will not perform work for his private company while working for his State agency.

In closing, there is nothing in the Ethics Act which prohibits the Requester from contracting with a contractor of his State Agency. The Requester must perform this work on his own time; not during his State Agency work hours. The Requester may not use agency resources, including staff, to perform work for his private company.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* and does not purport to interpret other laws or rules. The Requester is encouraged to consult with legal counsel for his agency for compliance with any agency rules and restrictions which may prevent his private company from performing work as a subcontractor. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman