

ADVISORY OPINION NO. 89-76

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 4, 1990

GOVERNMENTAL BODY SEEKING OPINION

Counsel on behalf of a Center

OPINION SOUGHT

1. Whether it is a violation of subsection 5(c)(1) of the Act for a public employee or official to solicit a grant or gift for a State Educational Institution when the individual is acting in the course of his employment?
2. Whether the Commission should grant an exemption from subsection 5(d)(1) of the Act for public contracts of affiliation between a State Educational Institution and nonprofit corporations, when certain public employees may receive a direct pecuniary benefit by rendering services pursuant to the contract?
3. Whether it is a violation of subsection 5(b)(1) for a public official or employee to recite or list his position or affiliation with a state office or agency when the individual receives private gain as a result?

OTHER FACTS RELIED UPON BY THE COMMISSION

The Center (a non-profit corporation affiliated with a University) performs a series of projects with a multitude of sponsors which advance its educational activities. The Center occasionally solicits grants from foundations, including grants received through the University Foundation. The bulk of the Center's revenue is derived from project revenues for services rendered to interested business and organization sponsors.

The Center performs research and other scientific and educational projects for the University. It provides funds for faculty instruction of courses and graduate student research at the University, including contracts with the University for the use of facilities and equipment, payments to undergraduate and graduate students, reimbursement for direct expenses and other like arrangements. Officers, employees and independent contractors at the Center have been or are faculty members, employees or students at the University. Faculty members and students are compensated for their work at the Center.

In fact, the stated purpose of the Center, well fulfilled through its various programs, includes the advancement of opportunity for faculty research and practical "hands on" experience, production of case studies and classroom materials, enriched experience of the University faculty and students, economic development or stability of depressed areas of the state and other programs designed to assist the University.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

PRIVATE GAIN

West Virginia Code 6B-2-5(b)(1) states in pertinent part that a public official or public employee may not 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 6B-2-5(b)(2) states that relating to the use of public office or public employment for private gain, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. Such persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by such persons may have its own inherent prestige, it would be unfair to such individuals and against the best interests of the citizens of this state to deny such persons the right to hold public office or be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them. Accordingly, the commission is directed, by legislative rule, to establish categories of such public officials and public employees, identifying them generally by the office or employment held, and offering persons who fit within such categories the opportunity to apply for an exemption from the application of the provisions of the subsection. Such exemptions may be granted by the commission, on a case by case basis, when it is shown that: (1) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (2) the office held or the employment engaged in is such that it normally or specifically required a person who possesses personal prestige; and (3) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

PUBLIC CONTRACTS

West Virginia Code 6B-2-5(d)(1) states in pertinent part that no... public employee or member of his or her immediate family or business with which he...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...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 6B-2-5(d)(3) states that where the provisions of subdivision (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

1. It is the Commission's opinion that West Virginia Code section 6B-2-5(c)(1) does not prohibit the solicitation of or application for a grant or gift to an educational institution of this state or to a nonprofit entity qualified as tax exempt under the Internal Revenue Code of the United States, by a public officer or public employee of the state, acting in the course of employment with the state educational institution or such nonprofit entity, or acting in the conduct of the public office, where such office or employment by it's very nature contemplates that such gifts or grants will be solicited or applied for from time to time.

2. It is the Commission's opinion that an exemption from subsection 5(d)(1) should be granted in instances where (i) contracts of affiliation between a state educational institution and nonprofit corporations which support and assist the educational objectives of the educational institution and (ii) contracts between such parties for specific services, studies, reports or similar assistance exist, notwithstanding that one or more state employees may derive direct pecuniary benefit by the rendering of services pursuant to the contracts or the contract may be seen to yield some benefit to the nonprofit corporation.

3. An analysis of the pertinent facts and statutory provision (b)(1) follows:

a. A public employee may not intentionally use his office or prestige for his private gain.

b. When a public employee participates in a symposium where he receives compensation and is advertised using his official title such as, "John Doe, professor of Law, WVU" he is intentionally using his office and prestige for his private gain as set out in subsection (b)(1).

c. However, subsection (b)(2) recognizes that there may be certain employees who bring to their respective employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities or other personal traits.

The employment held has certain inherent prestige and it would be unfair to such individuals and against the best interests of the citizens of the state to deny such persons the right to be publicly employed on the grounds that they would in addition to the emoluments of their employment be in a position to benefit financially from the personal prestige which otherwise inheres to them.

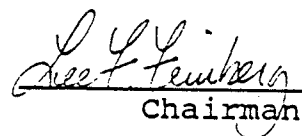
d. It must be shown for such individuals to qualify for exemption under (b)(2) that:

1. The employment is not available to large numbers of citizens. The Center's faculty and classified staff are limited in number.

2. The employment engaged in is such that requires a person who possesses personal prestige. Obviously the Center's faculty and classified staff possess personal prestige.

3. The person's employment contract anticipates that the employee will benefit financially from activities which are not a part of his employment which is true in the case of the Center's faculty and classified staff members.

e. Therefore, it is the Commission's opinion that the Center's faculty and classified staff members are individuals who qualify as exempted persons under (b)(2) and may list or recite their position or affiliation for private gain.


Chairman