ADVISORY OPINION NO. 2013-27

Issued on July 11, 2013

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney for a County Board of Education** asks whether teachers who served on the Textbook Adoption Committee may contract with the private textbook company the Committee chose to receive paid training on a newly adopted textbook, and if so, whether the company may pay those teachers to train other teachers within the State.

FACTS RELIED UPON BY THE COMMISSION

Sometime in late 2012 or early 2013, the Textbook Adoption Committee of a County Board of Education undertook to replace the social studies textbook for kindergarten through fifth grade students. While investigating their options, the Committee found no adequate textbooks within the approved list adopted by the West Virginia Department of Education. After receiving a waiver from that agency, the County Board of Education began to explore other textbook options.

Sometime later, the Committee settled on the textbook of a private company. The company agreed to work with members of the Committee to arrange the text to meet the standards necessary and to include information specific to West Virginia. After completion, the Committee unanimously voted to adopt the new textbook which had been put together by members of the Committee and the private company. Thereafter, the West Virginia Department of Education Review Committee examined and approved the materials. After adoption, other County Boards of Education learned of the new textbook and opted to purchase the same text.

Generally the textbook company provides training in the county as a part of their services when the textbooks are purchased. In this instance, the company, after the Committee adopted the textbook, has offered to train the members of the Textbook Adoption Committee to train the other teachers in the counties that have purchased the textbook. The teachers would be paid to attend training by private company and would be paid to train other county teachers. All the training would take place outside the teacher's contract term. The teacher's would not be paid in excess of $1,000.00 by private company for their services.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits a public servant from knowingly and intentionally using his or her office or the prestige of his or her office for his or her own private gain or that of another person.

Further, W. Va. Code§ 6B-2-5(d)(1) prohibits a public servant from being a party to or having an interest in a contract over which s/he may have direct authority to enter into, or over which s/he may have control.

Finally, W. Va. Code§ 61-10-15(a) reads, in pertinent part:

> It is unlawful for any ... teacher of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service... if, ... he or she may have any voice, influence or control....

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests.

Pursuant to W. Va. Code§ 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which s/he has direct authority or control. A limited interest is an amount not to exceed one thousand dollars in the gross revenues in a public contract or contracts per calendar year. In the present case, the gross revenue does not exceed $1,000.00.

W. Va. Code§ 61-10-15, a criminal provision, prohibits covered persons, such as teachers, from having a personal financial interest, **directly or indirectly,** in public contracts over which their public positions gives them voice, influence or control. Unlike the Ethics Act, there is no set dollar amount to trigger the prohibition.

Here, a text book company has a contract with a state agency. It seeks to subcontract one component of that contract with teachers employed by a County Board of Education. These teachers all served on the committee that unanimously approved the text book company's materials. The Commission has consistently applied the Ethics Act's prohibitions to relationships with subcontractors as well as contractors, and the same principle applies underW. Va. Code§ 61-10-15. *See* Advisory Opinions 94-22, 95-44, 2012-40 and 2013-12.

The Commission must next determine whether the positions of the teachers as Textbook Adoption Committee members gives them direct authority or control over the contract in question. Although the Committee members do not have the final say, the members unanimously voted to adopt the textbook. This fact may relieve them from the prohibitions in the Ethics Act, but the stricter limitations imposed by W. Va. Code§ 61-10-15 require additional analysis.

In Advisory Opinion 2006-16, the Commission held that the spouse of a County Board of Education Superintendent could not contract with the County Board of Education to provide specialized training to teachers. The Commission found that the provisions of

W. Va. Code§ 61-10-15 prohibited the contract as the Superintendent would have a direct or indirect interest in his wife's contract.

In Advisory Opinion 2009-11, the Commission found a prohibited contract where an Assistant Principal sought to provide after-hours driving instruction to students through his private business. The Commission determined the position of Assistant Principal to be such that his regular supervisory duties would place the provider in a position of control over the contract. The Commission recognized that although an assistant principal is responsible for the day-to-day operations of the school, they also oversee their students at after school activities. As the Assistant Principal also had control over after-hours activities, the Commission found the contract to be improper.

By contrast, in Advisory Opinion 2007-08 a public school teacher asked if he could bid on a contract to provide vending machine services. There, the affected school employee was a teacher. The Commission ruled that as a teacher, s/he did not have supervisory responsibility in regard to the general operations of his school or vending services offered therein. As a result, the Commission found that the teacher could bid on the vending machines.

In the current situation, the Commission hereby finds that the teacher members of the Committee had voice, influence, or control over the selection, compilation and adoption of the company's textbook. As a result of the foregoing analysis, the Commission hereby finds that W. Va. Code§ 61-10-15 prohibits the proposed subcontract. The Commission further notes that this opinion is prospective only.

This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W. Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak
Jonathan E. Turak, Acting Chairperson