

ADVISORY OPINION NO. 96-10

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 7, 1996

GOVERNMENTAL BODY SEEKING OPINION

Superintendent of a County School System

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for the Superintendent of a County School System to own stock in a bank which has been designated as the depository for County Board of Education funds?

FACTS RELIED UPON BY THE COMMISSION

In 1986 a bank was designated as the depository for County Board of Education funds. The selection was based on a proposal made in response to a competitive Request For Proposal (RFP) issued by the Board of Education. In 1993 the Board Auditor recommended that a new RFP be issued to select a depository. This bank was again designated as a depository for County Board of Education funds following an evaluation of all proposals. The Board Treasurer recommends bank depositories for the school system.

In January 1996 the Superintendent of the County School System received a gift of shares of stock in this particular bank.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) provides in pertinent part that... 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...

West Virginia Code 6B-2-5(d)(1) provides in pertinent part that... no elected or appointed 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 which such official or employee may have direct authority to enter into, or over which he or she may have control...

West Virginia Code Section 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county board of education, supervisor or superintendent...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

West Virginia Code 18-9-6 states in pertinent part that...the Board of Education may open a bank account, or accounts, as required to adequately and properly transact the business of the district in a depository, or banks, within the county....In determining the depository for the Board of Education funds a Board member who has a pecuniary interest in a bank within the county shall not participate in the determination of the depository for such funds...

ADVISORY OPINION

The Ethics Act

Pursuant to WV Code 6B-2-5(b)(1) a public servant may not use his public office or the resulting prestige for his own private gain or for the private gain of another. Consequently, the requester may not use his status or influence as the Superintendent of a County School System to increase, obtain or promote his own private interests or the interests of the bank in which he owns stock.

West Virginia Code 6B-2-5(d)(1) provides that a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. For the purpose of this section, a "limited interest" is defined as an ownership interest not exceeding ten percent of a company or an interest in the profits or benefits of the public contract which does not exceed \$30,000.

Although County Superintendents of Schools are not members of the County Board of Education, they are the chief executive officer, the secretary of the Board and do recommend the appointment of an individual to serve as the treasurer of the Board of Education. Such responsibilities may establish a certain degree of influence and control over County Board of Education contracts, including the selection of a County Board of Education depository.

However, this bank has been designated as the depository for the County Board of Education since 1986. The requester did not have a pecuniary interest in this bank at that particular time or when it was again selected in 1993. Consequently, the Superintendent did not have a financial interest in the agreement between the County Board of Education and the Depository at the time such agreement was entered into.

Further, WV Code 6B-2-5(d)(1) prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which he has authority or control. Under this law a "limited interest" is an interest of less than ten percent of the shares of stock in the bank. The limited number of shares held by the requester would comprise less than ten percent of the available stock.

Therefore, it would not be a violation of WV Code 6B-2-5(d)(1) for the Superintendent to own shares of stock in a bank which has been designated as the depository for County Board of Education funds since the requester would have a limited interest in such contract.

WV Code 61-10-15

West Virginia Code 61-10-15 provides that it is a criminal violation for any county officer to have a direct or indirect financial interest in the proceeds of any contract if he has voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office.

As previously noted, although County Superintendents of Schools are not members of the County Board of Education, they are the chief executive officer, the secretary of the Board and do recommend the appointment of an individual to serve as the treasurer of the Board of Education.

In *Summers County Citizens League, Inc. v. Tassos*, 367 S.E.2d 209 (WV 1988), the West Virginia Supreme Court held that WV Code 18-9-6 carved out a narrow exemption to the application of WV Code 61-10-15. West Virginia Code 18-9-6 provides that a County Board of Education may open a bank account in a depository within the County and allows school board members to have an interest in that bank provided that the member does not participate in the Board's decision.

The Court further held a County Superintendent of Schools is not subject to removal from office for a violation of WV Code 61-10-15 as a result of owning stock in a bank acting as a depository for Board funds, unless such Superintendent exercised "any voice, influence or control" with respect to the selection of that bank for the Board's funds. See *Summers County Citizens League, Inc. v. Tassos*, 367 S.E.2d 209 (WV 1988).

In this instance, it is clear from the facts presented that the Superintendent of the County Board of Education did not exercise any voice, influence or control over the selection of that bank as the depositor for County Board of Education funds.

Therefore, it would not be a violation of WV Code 61-10-15 for the Superintendent of a County School System to receive shares of stock in a bank which was previously designated as the depository for County Board of Education funds.

The Commission notes that any person acting in good faith reliance upon an advisory opinion shall be immune from the sanctions of WV Code 61-10-15 and shall have an absolute defense to any criminal prosecution for any actions taken in good faith reliance upon the opinion. However, this opinion is limited to the precise facts and circumstances outlined in this opinion.


Chairman