

ADVISORY OPINION NO. 96-11

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 4, 1996

PUBLIC SERVANT SEEKING OPINION

County Commissioner/Economic Development Authority Member

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for a County Development Authority to purchase stock in a private company which receives financial assistance from that Authority?

Is it a violation of the Ethics Act or WV Code 61-10-15 for a County Commissioner who is also a member of a County Economic Development Authority to invest in a private company which receives financial assistance from the Development Authority?

FACTS RELIED UPON BY THE COMMISSION

The County Development Authority was created to develop and advance the business prosperity and economic welfare of the county and is authorized to assist such development through loans, investments or other such business transactions. To assist the Authority in meeting its responsibilities, the County Commission, as well as any other person, firm or business, may make monetary contributions to the Authority. Management and control of the County Authority is lodged with a Board whose members are selected and appointed by the County Commission.

A private Corporation currently occupies land and a building which is owned by the Development Authority. Also, the Authority purchased \$650,000 of preferred stock in that Corporation and provided some additional start-up capital. A portion of this capital was provided to the Authority by the County Commission and it is likely that additional monies will be required to assist this corporation in the future. The private company is also soliciting investors by offering to sell stock to the general public.

In this instance, the requester is a member of the County Development Authority as well as a member of the County Commission. He is interested in personally purchasing shares of stock in this private Corporation.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) states 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) states 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...Provided, however, that nothing herein shall be construed to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code 6B-2-5(e) states that no present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...or any member of any other county or district board, or for any county or district officer 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.

ADVISORY OPINION

Investment by County Economic Development Authority

Pursuant to West Virginia Code 7-12-2, the purpose of the County Economic Development Authority is to promote, develop and advance the business prosperity and economic welfare of the County, its citizens and its industrial complex. To accomplish this goal, the Authority may offer companies loans, investments or other business transactions such as financial assistance, land and industrial sites, technical assistance or other similar support.

Since the requester provides no facts which would indicate otherwise, it would not be a violation of the Ethics Act or WV Code 61-10-15 for the County Development Authority to purchase stock in a private company which receives financial assistance from that Authority and the County Commission. The Authority's purchase of stock in the private company would be considered an investment to promote and develop business activity within the County and, as such, is specifically authorized under WV Code 7-12-2.

Investment by an Authority Board Member/County Commissioner

The Ethics Act

The requester is a County Commissioner and a member of the County Economic Development Authority, which is a part-time appointed position. He would like to purchase stock in a corporation which receives financial assistance from that Development Authority.

Based on the limited facts provided by the requester, the Commission has determined that there is no provision of the Ethics Act which would prohibit a County Commissioner, who is also a member of a County Economic Development Authority, from investing in a private company which receives financial assistance from the Development Authority.

West Virginia Code 6B-2-5(d)(1) prohibits a public official from having a financial interest in a public contract over which he has direct authority or control. However, in Advisory Opinion #94-30, the Commission determined that a County Commissioner does not have direct authority or control over the public contracts entered into by the County Development Authority.

The requester also serves in the part-time appointed position of member of the County Development Authority. In this position he would have direct control over all contracts or business transactions entered into by that Authority. However, WV Code 6B-2-5(d)(1) contains a provision which allows a **part-time appointed public official** to have such a financial interest in his Agency's contracts provided he fully discloses the extent of his interest in the contract, seeks to be recused from deciding or evaluating the matter and requests to be excused from voting on the contract.

The requester's interest in the public contract would also be subject to other applicable restrictions contained in the Ethics Act regardless of which governmental position he holds. For example, West Virginia Code 6B-2-5(b)(1) provides that a public official may not use his office or its resulting prestige for personal private gain or for the private gain of another. The requester may not use his position as a member of the County Commission or the Economic Development Authority to improperly influence, obtain, increase or promote the interests of the private company in which he owns stock.

Further, the requester should be mindful of WV Code 6B-2-5(e) which prohibits a public official from either disclosing confidential information acquired by him in the course of his official public duties or using such information to further his personal interests or the interests of another person.

In light of the foregoing, the Commission finds that the requester would not be in violation of the Ethics Act if he privately invests in a private company which receives financial assistance from the Development Authority provided he follows the guidelines set forth above.

However, this is academic in light of the prohibition against all pecuniary interest in public contracts established in WV Code 61-10-15 and discussed below.

West Virginia Code 61-10-15

As previously noted, the requester is a County Commissioner and a member of the County Economic Development Authority. He is interested in purchasing stock in a corporation which receives financial assistance from the Authority.

West Virginia Code 61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have 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. The Commission is without authority to grant exemptions from this provision.

The requester, as an Authority Board member, would have voice, influence or control over any business transaction the Authority may enter into with the private company. The purchase of stock in the private company by the requester as a personal investment would create a financial interest in the contracts of the private company. Further, the Court, in *Fisher v. Jackson*, 107 W.Va. 138. 147 S.E. 541 (1929) held that recusal of a public official from voting on a particular matter in which he has a direct or indirect interest was not sufficient to immunize that official from the sanctions now contained in WV Code 61-10-15.

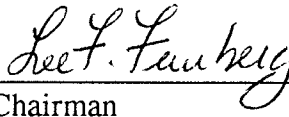
Therefore, it would be a violation of WV Code 61-10-15 for the Economic Development Authority Board member to purchase stock in a private company which receives financial assistance from the Development Authority. Such a purchase would give the requester a direct personal financial interest in the contract between the Authority and the private company.

West Virginia Code 61-10-15 applies a different, stricter standard to the degree of control a public official is permitted to have over a public contract in which he also has a private financial interest. As a County Commissioner, the requester does not exercise **direct** authority and control over the County Development Authority, however, WV Code 61-10-15 requires only that a county official exercise voice, influence or control over the contract. In Advisory Opinion #94-30, the Ethics Commission found that a County Commission's power to appoint the members of the County Development Authority, along with its ability to make contributions to the Authority from general funds and its capability to transfer and convey property to the Authority was sufficient to give the County Commissioner some level of voice, influence or control over the County Development Authority's public contracts.

The Commission finds that these same facts exist here. Because of the substantial influence the County Commission exerts over the activities of the Economic Development Authority, through the appointment of members and funding, this financial interest would remain for the requester as a County Commissioner even if he resigned his position as a member of the Economic Development Authority. Therefore, it would be a violation of WV Code 61-10-15 if a County Commissioner purchased stock as a private investment in a private company which receives financial assistance from the Development Authority.

The Commission notes that the enabling legislation of the County Economic Development Authorities, at WV Code 7-12-4, carves out an exemption from WV Code 61-10-15 which allows certain individuals to have an interest in a contract over which they have direct authority and control. However, this exemption is specifically limited to persons with an interest in a banking institution or a public utility.

This opinion is strictly limited to the precise facts and circumstances provided to the Commission by the requester in the original request letter.


Chairman