

ADVISORY OPINION NO. 96-34  
ISSUED BY THE  
WEST VIRGINIA ETHICS COMMISSION  
ON AUGUST 8, 1996

PUBLIC SERVANT SEEKING OPINION

A State Public Official

OPINION SOUGHT

Is it a violation of the Ethics Act for a State Public Official to have an interest in a lease with the agency by which he is employed?

FACTS RELIED UPON BY THE COMMISSION

The Official is an Assistant Secretary of a State Department - one of two for the Department. In late 1995 his father, as an estate planning decision, gave the Official, the Official's brother and sister a partial interest in an office building which he owned. At the time of the gift his father was negotiating with the State to lease office space in the building for use by a local office of one of the Divisions comprising the Department in which the Official serves.

Subsequently the Official, his father, brother and sister executed a lease of part of the property to the State. When several public questions were raised about the propriety of the Official's interest in the lease, he deeded his interest in the property back to his father. The lease has been amended to reflect the new ownership situation.

The Official is concerned to establish whether he has been correct in his belief that the Ethics Act did not bar his interest in the lease, because his official position gave him no authority or control over any of the Department's leases. Both the Division seeking the office space and agency personnel who are involved in selecting and securing agency leases report to the other Assistant Department Secretary. The Official asserts, and there is no suggestion to the contrary, that at no time did he have anything to do with the relocation of the local office to the building owned by his father, one of eleven considered by the agency before a lease was entered into.

Only the Secretary of the Department has the authority to commit the Department, or its constituent Divisions and agencies, to leases - only he can authorize the execution of a lease for any agency in the Department. Both the local office which sought to lease office space and the Compliance Division, the agency division responsible for the oversight of agency leases, are the responsibility of and answer to the other Assistant Department Secretary - not the Official. The Official has no responsibility or authority regarding the selection or maintenance of agency leases.

It appears from information provided by the agency that the lease of the office space provides the agency good value and will significantly enhance the accessibility and convenience of the agency to the public. The property leased was recommended by the Assistant Director of the Compliance Division from among seven he personally visited and evaluated. His recommendation was approved by the Director of the Compliance Division and the other Assistant Department Secretary. The Secretary of the Department confirmed the recommendation and authorized the execution of the lease without consulting the Official. The Department's Requisition for Space was submitted to and approved by the Secretary of the Department of Administration, as is the case with all State leases, and he signed the lease on behalf of the State.

#### **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, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body....

#### **ADVISORY OPINION**

The Ethics Act contains a provision which prohibits public servants from being a party to or having an interest in a public contract which they may have "direct authority to enter into", or over which they may have "control". WV Code 6B-2-5(d). The Official is covered by this provision and it would be a violation for him to be a party to or have an interest in a State lease, which his public position gave him the direct authority to enter into or over which he had control. While the Ethics Commission can grant an agency a hardship exemption from this prohibition, none was sought or granted in regard to this lease.

It appears clear that the Official has no authority to commit the agency to leases since he does not directly supervise the agency personnel responsible for arranging and maintaining its leases. Only the Department Secretary has the authority to enter into or authorize agency leases and none of his authority in this regard was delegated to the Official.

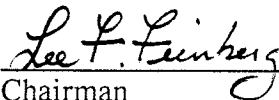
It is equally clear that the Official's position gives him no control over agency leases. He takes no part in the process by which the agency searches for, secures and maintains necessary office space for its field offices and supervises no one involved in that process.

Based on the facts contained in the request for this advisory opinion, made jointly by the Official and the Department Secretary, it would not be a violation of the Ethics Act for the Official to be a party to or have an interest in the State's lease of office space in his father's property.

In addition to the Ethics Act's prohibition against a private interest in a public contract, the Act contains a prohibition against the use of office for private gain. WV Code 6B-2-5(b). This private gain prohibition provides that public servants may not use their public positions, or the prestige of those positions, for their own private gain or the private gain of another. The Commission will consider whether the Official's interest in the lease was, or his father's and sister's continued interest in the lease is, consistent with the private gain prohibition.

The Commission has examined and considered the assertions of both the Official and the Department Secretary contained in this request for an advisory opinion. It finds nothing to suggest that the Official used his position with the agency to arrange an agency lease of office space in the property owned by his father or to secure unwarranted advantage in the terms of the lease. The mere fact that he is an agency official is not evidence of a use of office for private gain. The interest of the Official, his father and sister in the lease did not and do not constitute a violation of the prohibition against the use of office.

While no provision of the Ethics Act prohibits the Official's personal interest in the agency lease, the Commission approves of his decision to put the issue at rest by divesting himself of any interest in the lease.

  
Chairman