

**ADVISORY OPINION NO. 96-29**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON AUGUST 8, 1996**

**PUBLIC SERVANT SEEKING OPINION**

An Attorney on behalf of a County Board of Education

**OPINION SOUGHT**

Is it a violation of the Ethics Act or West Virginia Code 61-10-15 for a member of a County Board of Education to provide services to a multicounty vocational Center which receives funding from that County Board of Education?

**FACTS RELIED UPON BY THE COMMISSION**

A multicounty vocational technical Center serves a two county region. The Center is operated by a five member Board of Directors which is comprised of the Superintendent and one School Board member from each of the two participating counties and a representative of the State Superintendent of Schools.

The funding for the multicounty vocational technical Center comes from a variety of sources, including the state school aid formula, the vocational bureau, tuition, and payments from the County Boards of Education it serves.

For the past several years the multicounty vocational technical Center has conducted business with an individual who owns a radiator sales and repair service. It purchases approximately four or five radiators each year for use in the vehicles repaired at the vocational Center.

In the May primary election, this individual business owner was elected to serve as a member of the County Board of Education which is served by the vocational Center.

**PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

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...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**

**The Ethics Act**

A member of a County Board of Education would like to provide services to a multicounty vocational center which receives funding from that County Board of Education.

The Ethics Act prohibits public servants from being a party to or having an interest in a public contract which they have the direct authority to award or over which they have control. It would be a violation of the Ethics Act for a business owned and operated by a School Board member to sell radiators to that County's schools since the member's position on the Board gives him **direct** control over County School contracts.

However, in this instance, the vocational school is operated and controlled by a five member Board of Directors, which is comprised of the Superintendent and one School Board member from each of the two counties and a representative of the State Superintendent of Schools. The newly elected County Board of Education member does not serve on the vocational school's Board and consequently does not have direct authority to award or control its contracts. Therefore, it would not be a violation of the Ethics Act for his personal business to supply radiators to the vocational school.

**However, such business activity is, as discussed below, a violation of WV Code § 61-10-15.**

**WV Code 61-10-15**

WV Code 61-10-15 applies a similar, but stricter, standard to the degree of official involvement a public servant may have in a public contract in which he has a direct or indirect personal financial interest. WV Code 61-10-15 prohibits certain county personnel, including school board members, from having a personal financial interest in a public contract over which their public position gives them "voice, influence or control".

The WV Supreme Court held, in *State v. Neary*, 365 S.E.2d 395 (1987), that the powers which the County Commission have over the PSD, including the authority to appoint and remove members of the PSD, establish the direct control that the County Commission exercises over the PSD and the voice and influence they wield over PSD public contracts. The Court further held that the law does not require the showing of an actual exercise of influence, and that a violation of the conflict of interest statute can be proven by a showing that the public official became or remained interested in the proceeds of a contract, in which, by virtue of his office, he may have voice, influence or control.

Previously, when interpreting this statute, the Ethics Commission has held that the authority of a County Commission to appoint two of the five members of a County Solid Waste Authority and to provide some funding to that Authority, was sufficient to give these Commission members the degree of voice, influence and control over Solid Waste Authority contracts contemplated by WV Code 61-10-15. (See Advisory Opinion #94-08) In addition, in Advisory Opinion #94-22, the Commission determined that since the County Board of Education appoints two of the seven members of a Technical School Board, the County Board of Education member has voice, influence or control over the Technical School's public contracts.

Parallel facts exist in Advisory Opinion #94-30 and as recently as #96-11. In both instances the Commission held that the substantial influence the County Commission exerts over the activities of an Economic Development Authority through the appointment of members and funding, is sufficient to give the County Commission some level of voice, influence or control over the Development Authority's public contracts.

Similarly, the Commission finds that the power of the County Board of Education to appoint two of the five members of the vocational school's Board of Directors and to share in funding its operation is sufficient to give individual School Board members "voice and influence" over the vocational Center's public contracts.

Therefore, it would be a violation of WV Code 61-10-15 for a member of a County Board of Education to provide services to the multicounty vocational center.

The Commission notes that although this may seem harsh, the WV Supreme Court has consistently recognized the broad purpose of the conflict of interest statute as is reflected in the following language of *Jordan v. McCourt*, 62 S.E. 2d 555 (1950):

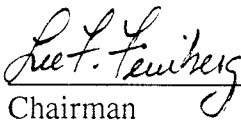
"The public policy of this State, is not directed against actual fraud or collusion, but is for the purpose of preventing those acts and eliminating any opportunity therefore..."

In *Alexander v. Ritchie*, 53 S.E.2d 735 (1949) the WV Supreme Court held that:

"The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage..."

In another example of the strict construction of WV Code 61-10-15, the West Virginia Supreme Court held, in *Fisher v. Jackson*, 107 W.Va. 138. 147 S.E. 541 (1929), that whether or not they choose to exercise it, board of education members have voice, influence or control over board contracts by virtue of their public position. Simply, the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest is not sufficient to immunize that official from the sanctions contained in WV Code 61-10-15.

The Ethics Commission, when applying this statute in Advisory Opinion #95-38, held that "Considering the intent of the legislature as reflected by the broad language of the statute and the WV Supreme Court's precedents interpreting it, the Commission finds that it would be a violation of WV Code 61-10-15 for the Board of Education to conduct business with a company in which the spouse of a Board member has an ownership interest, regardless of whether the member actually votes **against** such contract."

  
Chairman