

ADVISORY OPINION NO. 96-39

Issued on August 8, 1996 By The

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

A County Airport Authority

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for a person who conducts business of a noncommercial nature with the County Airport Authority to serve as a member of that Authority's Board?

FACTS RELIED UPON BY THE COMMISSION

A County Airport Authority is considering a specific individual for appointment to serve as a member of that Airport Authority Board. This individual is a pilot who owns a general aviation aircraft for personal use. He rents tie down space for his aircraft and buys aviation fuel from this Airport Authority.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) provides in pertinent part that...no...appointed public official...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 61-10-15 states in pertinent part that...It shall be unlawful for any member of...any other county board...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

The Ethics Act prohibits public servants from being a party to, or having more than a limited interest in, a public contract over which their public position gives them authority or control. WV Code 6B-2-5(d). Clearly, members of an Airport Authority Board have direct authority and control over all Authority contracts. Consequently, if board members purchase fuel or ground rental from the authority it would be a violation, unless they followed the recusal procedure established by the Ethics Act for **part-time appointed** public officials.

The recusal provision permits part-time appointed public officials to avoid the public contact prohibition, provided they (1) fully disclose the extent of their interest in such a contract, (2) recuse themselves from consideration of the matter and (3) are excused from voting on it. The recusal proviso is available only to part-time appointed public officials. The Ethics Commission has ruled that for the recusal to be effective, the public official must be physically absent from the room during the discussion and decision making process.

Therefore, it would not be a violation of the Ethics Act for an individual who rents tie down space and buys fuel from an Airport Authority to serve on the Authority's Board, if the Board member has been recused from official consideration of rental or sales matters as described above.

WV Code 61-10-15

WV Code 61-10-15 applies a similar, but stricter, prohibition against private interests in public contracts. It prohibits certain county personnel, including those who serve as part-time appointed officials on county boards, commissions and agencies, from having a personal financial interest in a public contract, sale or lease over which their public position gives them "voice, influence or control".

WV Code 61-10-15 contains no recusal provision which would permit a person to avoid the prohibition by taking no action in considering or deciding a matter in which they have an interest. The WV Supreme Court of Appeals in, *Fisher v. Jackson*, 107 W.Va. 138, 147 S.E. 541 (1929), held that whether or not they choose to exercise it, the board of education members have voice, influence or control over board contracts by virtue of their public position.

However, the Commission finds that the legislation which governs County Airport Authorities has created an exemption from WV Code 61-10-15 which permits a person to purchase fuel, lease hanger space or contract for Authority goods and services, while serving on its Board. WV Code 8-29A-2 provides in regard to Airport Authorities "...That nothing herein shall be construed to prevent or make unlawful under this chapter **or any other chapter of the code of West Virginia** the appointment to the board of any person whose only interest in any property under the control of the board is that the person in a noncommercial manner leases hangar space, purchases fuel or contracts for any other goods or services provided by said airport authority subject to the control and management of the board."

The Commission's ruling here follows that of a similar issue decided by the WV Supreme Court of Appeals in *Summers County Citizens League, Inc. v. Tassos*, 367 S.E.2d 209 (WV 1988). There the Court held that WV Code 19-9-6 carved out a narrow exemption to WV Code 61-10-15 which allows school board members to have an interest in a bank selected to be the depository of county board of education funds. The language of that particular code section provided that a county board of education may open a bank account in a county bank in which a board member has a financial interest, provided that the member does not participate in the board's decision on the matter.

Even though the language in *Tassos* did not specifically seek to create an exception from WV Code 61-10-15, the Court held that an exemption nonetheless was created. The language regarding Airport Authority Board members appears even more clearly to create a limited exemption. Therefore, the Commission finds that it is not a violation of WV Code 61-10-15 for a person who conducts business of a noncommercial nature with the County Airport Authority to serve as a member of that Authority's Board.


Chairman