

**ADVISORY OPINION NO. 96-51**

**Issued on November 7, 1996 by the**

**WEST VIRGINIA ETHICS COMMISSION**

**PUBLIC SERVANT SEEKING OPINION**

State Board Member

**OPINION SOUGHT**

Is it a violation of the Ethics Act for a State Board to pay attorney fees to the firm of one of its members?

**FACTS RELIED UPON BY THE COMMISSION**

The requester is part-time appointed member of a State Board. An employee of that Board was named in a complaint regarding the handling of an official matter of the Board. The Board, including the requester, voted to authorize the payment of legal fees incurred by the employee in connection with that complaint. At the time the vote was taken there was no indication as to the identity of legal counsel who would be selected by the Board employee.

The employee subsequently retained the requester's law partner. The requester was not involved in that decision or in establishing the terms of representation by the partner.

The complaint was summarily dismissed and the request for payment of the fees incurred is now pending. The requester is concerned to establish whether payment pursuant to the earlier decision to pay the employee's attorney fees would violate the Ethics Act now that the identity of the attorney is known to the requester.

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

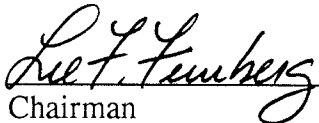
West Virginia Code 6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which such 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... 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.

**ADVISORY OPINION**

The Ethics Act, at WV Code 6B-2-5(d), prohibits public servants from being a party to, or having a financial interest in, a public contract over which they may have authority or control. Under the facts as represented, however, the requester had no authority or control over a critical element of the contract, i.e. the selection of the actual provider of services. Furthermore, at the time he voted to approve payment of fees that might be incurred, he had no knowledge that his partner would be selected.

For the foregoing reasons the Commission finds that the requester did not have authority or control over the contract as that phrase is used in WV Code 6B-2-5(d). Therefore it would not be a violation of the Ethics Act for the State to approve payment of the attorney fees.

The Commission notes that part-time appointed officials such as the requester may be parties to or have financial interests in contracts provided they recuse themselves from evaluating and voting on such contracts. Now that the identity of the provider is known to him, the requester has authority or control over any subsequent acts regarding the contract. Therefore he must recuse himself from any further discussion or vote regarding the employee's fee agreement.

  
Chairman