

ADVISORY OPINION NO. 96-03

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON FEBRUARY 1, 1996

PUBLIC SERVANT SEEKING OPINION

Member of a State Licensing Board

OPINION SOUGHT

Is it a violation of the Ethics Act for a member of a State Licensing Board to sublet office space to the Board for its official business?

FACTS RELIED UPON BY THE COMMISSION

A member of a small State Licensing Board resigned an officer's position with that Board. This action required the Board to find new office space to handle its official business. The requester volunteered to serve in the officer's position and find new office space. Suitable space was found but the landlord wanted \$250. per month rent if he leased directly to the State. The landlord was willing to privately lease the same space to the requester for \$150 per month and let the requester pursue a sublease with the Board.

Members of the Board are part-time public officials. The requester recused herself from the vote when the Board agreed to enter into a sublease for the space at \$175. per month. The Board was paying \$250. per month in its prior location.

The \$25. difference in rents was suggested by the Board member who resigned the officer's position based upon his past experience with delays receiving payments from the State and the need to perform routine housekeeping services at the Board office.

Additional reasons for the discrepancy is the desire of the other Board members to compensate the requester for temporarily providing an air conditioner and desk for the office until the Board could make its own purchases of those items and to compensate the requester for being out of pocket approximately \$1,000 in rent that she paid prior to the approval of the sub-lease. When the sub-lease is approved, the requester will receive the rent which she has paid, retroactive to the original date of the lease.

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(d)(3) provides in pertinent part that... Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

West Virginia Code 6B-2-5(d) prohibits a public servant from being a party to or having an interest in any public contract over which he has direct authority or control. As a member of the State Licensing Board, the requester has authority and control over any contracts entered into by the Board including a lease or sub-lease agreement.

A proviso to WV Code 6B-2-5(d) allows a part-time appointed public official to avoid the prohibitions of this section **only** if he has fully disclosed the extent of his interest in the contract, he is recused from deciding or evaluating the matter and excused from voting on the contract.

Members of this State Licensing Board are part-time appointed public officials. In this case the interest of the requester in the sub-lease was disclosed to the two remaining members of the Board and she did recuse herself from voting on the sub-lease agreement during the Board meetings. However, it is clear from the facts presented that because of the size of the Board, the requester continued to play a central role in seeking the new office space and the proposed lease/sub-lease agreement.

Therefore, it would be a violation of WV Code 6B-2-5(d) for the requester to enter into a sub-lease agreement with the Board as it is described in this request.

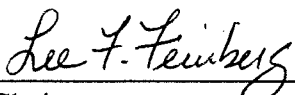
However, the Commission, based upon earlier correspondence with the requester, hereby grants an exemption to the Board pursuant to WV Code 6B-2-5(d)(3) since the facts presented by the Board demonstrate that the Board would be required to pay excessive costs if an exemption were not granted.

West Virginia Code 6B-2-5(b)(1) provides that a public official may not use his office or its resulting prestige for his own private gain or for the private gain of another. In this instance there would be private gain to the Board member if she is allowed to enter into the sub-lease agreement with the Board. The original lease agreement for the property requires \$150 per month rent and was entered into by the individual Board member and the property owner. The requester would now like to sub-lease the office space to the Board at a cost of \$175 per month. Clearly, the Board member would receive personal pecuniary benefit from this arrangement.

Further, the enabling legislation of the Board provides that Board members may receive a per diem of \$50 for each day spent conducting Board business and shall be **reimbursed** for all reasonable and necessary expenses **actually incurred** in the performance of their duties. This would not include generating additional money for a Board member through a Board contract or sub-lease agreement.

Therefore, it would be a violation of WV Code 6B-2-5(b)(1) for the requester to enter into a sub-lease agreement with the Board as it is described in this request.

However, the Commission notes that it would not be a violation of the Ethics Act for the Board to sub-lease the office space from the requester, provided she derives no pecuniary benefit from the agreement. Thus, the Board may sub-lease the office space from the requester for the sum of \$150 per month, which is the amount of her lease agreement with the owner of the property.


Chairman