

CONTRACT EXEMPTION NO. 2009-07

Issued On December 3, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Cabell County Board of Education** seeks an exemption to permit it to contract with a business owned by a high school assistant principal to provide an after-school driver's education program to students in the county school system.

FACTS RELIED UPON BY THE COMMISSION

Pursuant to the mandates of W.Va. Code § 18-6-1 *et seq.*, the Cabell County school system offers elective driver's education classes to its students at Huntington and Cabell-Midland High Schools. Until this most recent school year, the driver's education classes were conducted during regular school hours and were taught by a paid certified employee of the school system. Students taking the class were not charged a fee, and those successfully passing the program were given course credit towards graduation.

The classes, however, are limited in size and availability. For example, Huntington High School offers a driver's education class with a maximum enrollment of about twenty (20) students per year.

Therefore, in an effort to expand the availability of driver's education to students in the school system, the Cabell County Board of Education (CCBOE) decided this school year to offer driver education classes as part of the evening school program.¹ The evening class program includes both classroom and behind the wheel instruction. Additionally, the CCBOE decided to utilize a third-party entity to teach the driver's course.

Accordingly, in January 2009, the CCBOE posted and solicited bids for entities to provide the after-school driver's education program in the two county high schools. In response, the CCBOE received bid proposals from (1) AAA Auto Club Driving School and (2) A1 Drive Right Driver Training School.

¹ According to the Requester, Cabell County School System offers both the traditional day program of classes and courses, as well as an evening school. The evening school program has a separate administrator and principal than the day program. Therefore, while the same facilities and buildings are used for course instruction, the administration and teachers of the evening program are contracted separately from the administration and teachers of the day school. Thus, a teacher working in both the day and evening classes would be subject to two separate contracts with the CCBOE.

Although both entities proposed offering at least thirty (30) hours of classroom training and six (6) hours of behind the wheel training, the two proposals differed on price and certification requirements for instructors.

The AAA Auto Club Driving School ("AAA") of Portsmouth, Ohio, proposed using certified driving instructors with at least 40 hours of training. The cost to participants would be \$350.00. If a parent or student is an AAA member, the cost of the program would be reduced to \$330.00.

A1 Drive Right Driver Training School ("A1") of Huntington, West Virginia, proposed using three instructors (1 classroom, 2 driving) at each high school. A1 stated that each instructor would have at least a B.A. degree in safety education from an accredited university. A1 further stated in its proposal that some of its instructors are already employed in the school system. The proposed cost to participants would be \$285.00.

Based upon the two proposals, the CCBOE determined that A1 was the preferred bidder based upon two main criteria. The first was the difference in cost to the students. The A1 price (\$285.00) was \$65.00 cheaper than the AAA price. The second criterion was that the A1 instructors were more qualified than the AAA instructors. In particular, the CCBOE focused on the aspect of the A1 proposal that all instructors would have at least a B.A. degree in safety education. It is noteworthy, however, that the bid requirement posted by the CCBOE did not include such a criteria, and that the AAA instructors met the posted bid requirements.

Notwithstanding, the CCBOE selected A1 as the third party entity to administer and teach driver's education classes as an evening school program. Students are currently enrolled in this after-hours program and pay a cost of \$285 directly to A1. The CCBOE allows the use of the class space at the two county high schools, but it is not otherwise involved in the administration and teaching of the classes. Participants in the classes pay the fee directly to A1 which is responsible for maintaining all equipment, cars, and insurance coverage for the after-school program. A1 employs its own instructors for the classes, and utilizes its own resources and equipment.

The business owner of A1 Drive Right Driver Training School is Lloyd McGuffin, an assistant principal at Huntington High School. Huntington High School is one of the locations where the evening driver's program is provided, and students at the school may enroll in the course. Additionally, the A1 instructors working for Mr. McGuffin, and teaching the driver's classes, are also school employees and teachers in the Cabell County school system.

Despite the perceived inter-relationship of the CCBOE and Mr. McGuffin, the Requester distinguishes and draws distinction to the fact that Mr. McGuffin is the assistant principal over the day program. According to the Requester, Mr. McGuffin does not have any role in administering the evening program through which A1 provides its service. Rather, the evening program has its own principal.

The matter is further complicated by subsequent activity of the CCBOE. After awarding the contract to A1 to provide the after-hour driver's program, the CCBOE desired to additionally provide course credit to the program. However, according to the Requester, a "facilitator" needed to be hired to oversee the evening hour course to be able to provide course credit towards graduation.

Therefore, between August 24, 2009 and August 31, 2009, the CCBOE posted a position for an employee to serve as a "facilitator" of the driver's program. In keeping with the day/evening separation, the selected applicant would be given an "extracurricular contract" with the WVBOE to provide this service at the posted rate of \$20 an hour.

According to the Requester, only one applicant, Lloyd McGuffin, applied for this facilitator position. Hence, on September 29, 2009, the CCBOE awarded the "extracurricular contract" to Mr. McGuffin to serve as "facilitator" of the driver's program being taught by his business.

Currently, Mr. McGuffin has the following financial relationships with the Cabell County Board of Education: (1) Employment contract to serve as assistant principal at Huntington High School; (2) Employment contract to serve as the after-hours "facilitator" of the driver's education program; and, (3) Contract to provide after-hours driver's education program through his business A1. The CCBOE now seeks an exemption to allow it to contract with A1 Drive Right Driver Training School and Mr. McGuffin to provide the evening class driver's education program.

In support of its exemption request, the CCBOE maintains that AAA is more expensive than A1, thereby creating a hardship upon the students in the school system who elect to participate in this program. Additionally, the Requester maintains that the A1 instructors are more qualified than the AAA instructors and have undergone background checks since they are already school system employees.

Finally, the CCBOE asserts that the Assistant Principal and his staff do not conduct any of their private business work during work hours, and that the after-school program does not interfere with their primary work duties and responsibilities.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does

not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected or appointed public official or public employee ... or business with which he or she is associated may be party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control.

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, ...or other governmental agency, the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part: "It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control"

W. Va. Code § 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

The Ethics Act and West Virginia Code § 61-10-15

The Ethics Act prohibits public servants, including assistant high school principals, from having more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control, unless the governing body seeks, and receives, an exemption to contract with the public officials. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not

exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

In addition to the Ethics Act, county school officials and employees must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition under W.Va. Code § 61-10-15 has no monetary threshold.

In accordance with the Ethics Act and W.Va. Code § 61-10-15, the initial inquiry is whether Mr. McGuffin exercises voice, influence and control over the contract for the after-school program. In Advisory Opinion 2009-11, issued today, the Commission held that "an assistant principal has voice, influence and control over the administration of a public contract with a third party provider in whose courses the students at his school may enroll."

Accordingly, in order to proceed with the proposed contract with A1, the CCBOE must obtain an exemption.

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. Similarly, under W.Va. Code § 6B-2-5(d) of the Ethics Act, the Commission may grant an exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of the affected government body.

In consideration of this matter, the Commission must weigh the Requester's concerns of cost and instructor qualifications with the mandates of W.Va. Code § 61-10-15 and the Ethics Act which are aimed at eliminating conflicts of interest in public service. These considerations are intertwined with the Commission's role in determining whether it is in the best interest of the public to grant a contract exemption.

Here, the Requester states that to prohibit the contract would result in excessive costs to students in the school system. A1 charges **\$285.00**. AAA would have charged **\$350.00²**. Hence, there is a difference of **\$65.00**. The Requester states that the difference in the cost of enrollment would result in excessive costs to students in its county.

² The cost for AAA Members would be **\$330.00**. However, AAA members must pay a membership fee. Hence, the cost for AAA members will not be used for purposes of analyzing whether an exemption should be granted in this case.

Further, the CCBOE asserts that it would substantially interfere with the operations of the school system if they are required to offer more classes as part of the regular school curriculum and/or sponsor its own after-school program. According to the Requester, the CCBOE estimated that it would cost the county board approximately \$64,800 if the CCBOE administered its own evening driver's education classes for students.

While these financial constraints are legitimate concerns, the Commission is troubled by the appearance of impropriety and self-dealing, and declines to approve a business owned by an Assistant Principal to contract with the school system to provide educational classes to students in the school system where he serves.

The CCBOE's basis for granting the exemption is diminished by the availability of re-bidding with the desired enhanced instructor requirements or lower costs as well as pursuing a more cost-effective CCBOE administered driver's program.

If this question been presented prior to Requester's awarding of the contracts, the Commission would have denied the request for an exemption. However, the Requester has already awarded the contracts and the students have paid their money and are currently enrolled in the evening program.

Because it would be an undue hardship upon students currently participating in the evening driver's education classes if the program was immediately ceased, the Commission grants a limited exemption to the Cabell County Board of Education to continue the contract until the currently participating students finish their program; provided that the following conditions are met:

First, the Requester may **not** continue to allow A1's owner/school employee, Lloyd McGuffin, to continue to serve as the facilitator of the after-schools program through his extracurricular contract with the school system. To allow a school employee to contract with the school system to provide an after-hours driver's education program, and then to hire the same employee/business owner to serve as the students after-hours facilitator of the program in the opinion of the Commission creates a clear conflict. The purpose of the Ethics Act and § 61-10-15 is to eliminate not only actual conflicts, but situational conflicts which leave the door open for potential abuse.

Second, the Assistant Principal shall have no involvement with the granting of course credit for his after-school program classes;

Third, the Assistant Principal shall have no involvement or oversight of the contract from the CCBOE/ high school administration side, including the offer, bidding or granting;

Fourth, neither the Assistant Principal, nor any other school employee working for A1, shall use his/her name or title to advertise, endorse or otherwise personally promote student involvement in the after-school program; and

Fifth, neither the Assistant Principal, nor any other school employee working for A1, shall conduct their business during regular school hours unless they take authorized leave.

Due to the circumstances presented, the Ethics Commission hereby grants a limited exemption to allow the CCBOE to continue this contract until **February 1, 2010**, to allow the students currently participating in the classes an opportunity to complete their course. This exemption does **not** extend to those students enrolling in the driver's education classes for the Spring 2010 semester, which begins in late January 2010.

Last, the Commission notes that W.Va. Code § 18-6-2 reads:

In those counties where sufficient public secondary school driver education courses are not available to meet all requests for the course, county boards of education shall, as quickly as possible, make sufficient courses available to fill those requests

This code section further contains language which appears to limit the amount of tuition which a school board may charge for enrollment in such courses. *Id.* The Ethics Commission has no authority to interpret this statute. However, the Ethics Commission encourages the Requester to seek the advice of its attorney or the State Department of Education, or both, regarding (1) whether the enrollment fees are consistent with the statutory provisions; and (2) whether students are permitted to pay the third party directly, or whether the students should remit their money directly to the school system.

In conclusion, the Commission notes that exemptions may only be granted on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons. This exemption is effective from the date of issuance.



R. Kemp Morton, Chair