ADVISORY OPINION NO. 2011-20

Issued On December 1, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected County Commissioner** asks whether he may purchase a tax lien at a Sheriff's sale or through the State Auditor's Office, or both.

FACTS RELIED UPON BY THE COMMISSION

In West Virginia, County Assessors are, on an annual basis, responsible for appraising the value of real and personal property situated in their county.[1] Once the annual assessment is complete, the Assessor submits the property books/assessments to the County Commission. The County Commission, acting in its statutory capacity as the board of equalization and review, must examine and review the property books and correct all errors in regard to the description and valuation of property. W.Va. Code § 11-3-24. Property owners may appear before the board of equalization and review to object to the valuation of their property. Id. The board of equalization and review, based upon the facts presented and applicable law, may grant or deny the property owner's request. The amount of property taxes owed is, in relevant part, based upon the assessed value of the property and its classification, e.g. residential, business or other.

Once the assessment process is complete, the County Sheriff is responsible for collecting property taxes. W.Va. Code § 11A-1-4. If a person fails to pay their property taxes, then the Sheriff may bring a civil action to recover the taxes or may sell the tax lien on the property. W.Va. Code §§ 11A-2-1, -2, and -10. The Code requires the Sheriff to sell tax liens at a public auction "to the highest bidder in the amount which shall not be less than the taxes, interest and charges which shall be due thereon..." W.Va. Code § 11A-3-2. Before the Sheriff's sale, the Sheriff must present a delinquent list to the County Commission for examination. If the County Commission finds the list to be correct, it directs the County Clerk to certify the list. W.Va. Code § 11A-2-14. This list is then published before the sale.

If tax lien is not sold at the auction, the Sheriff then certifies the property to the State Auditor for disposition. W.Va. Code § 11A-3-8. The State Auditor's office may then sell the tax lien. The State Auditor must first attempt to sell the lien at a public auction. If it is not sold at the auction, then the State Auditor may sell the lien directly to interested purchasers.

Regardless of what means is used to sell the tax lien, one a tax lien is sold, property owners are afforded various opportunities to redeem their property before the deed is conveyed to

[1] There are numerous laws governing the assessment of property and the sale of tax liens/property. Each required step is not outlined herein; only those steps deemed relevant to the question before the Ethics Commission.

the person who purchased the lien at the tax sale. Additionally, they may redeem their property at any point before the Sheriff's sale. W.Va. Code § 11A-3-4.

The law clearly prohibits the following public officials or employees from purchasing tax liens at Sheriffs' tax sales: sheriffs, clerks of the county commission or circuit court, assessors, State Auditor, or deputies or assistants of any of them. W.Va. Code § 11A-3-6. In regard to tax liens sold by the Auditor, there are similar prohibitions. Specifically, the following public servants may not purchase property sold by the Auditor: deputy commissioners, sheriffs, clerks of the county commission or circuit court, assessors, or deputies of any of them. W.Va. Code § 11A-3-49.

The Requester, an elected County Commissioner, seeks guidance on whether he may purchase delinquent property at a Sheriff's sale or from the State Auditor, or both.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads in relevant part:

> 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.

W. Va. Code § 6B-2-5(d)(1) provides in part that:

> [N]o elected or appointed public official ... or business with which he or she is associated may be a 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 § 61-10-15 states in part that:

> (a) It is unlawful for any member of a county commission ...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...

ADVISORY OPINION

The Ethics Act

Pursuant to W.Va. Code § 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control.

The primary responsibility for assessing property values and taxes lies with the County Assessor. The responsibility for collecting taxes, including the sale of tax liens, lies with the Sheriff. A County Commissioner has no direct control over the decision of a Sheriff to sell a tax lien at a public auction. Instead, the Sheriff may only sell the tax lien if the property owner fails to pay the taxes and is placed on notice that the tax lien will be sold at the Sheriff's sale unless the taxes are paid by a date certain. Moreover, at the tax sale, the Sheriff is statutorily required to sell the tax lien to the highest bidder in an amount which shall not be less than the taxes, interest and charges. If the tax lien is sold at the sale, still the property owner may redeem the property if he or she pays the purchaser of the tax lien the statutory fees and interest to which the purchaser is entitled. If the tax lien is not sold at the Sheriff's sale, then the State Auditor becomes responsible for disposing of the property/tax lien. If a tax lien is purchased from the State Auditor, the property owner still has the right to redeem the property.

Based upon the statutory procedures governing the assessment of property and the sale of tax liens, the Commission finds that elected County Commissioners do not exercise direct authority or control over tax liens sold at the Sheriff's tax sale or by the State Auditor so long as the County Commissioner was not involved in decisions which directly impacted the assessment or sale of the particular piece of property being sold. For example, a County Commissioner may not purchase a tax lien if the lien is on property for which the owner requested an adjustment of the assessed value or other relief from the County Commission directly, or in its capacity as the board of equalization and review.[2] In contrast, if the County Commission's only involvement in assessing the property was certifying the assessment through its duty to review the property books to correct errors and equalize assessments, then the Ethics Commission finds that this action does not constitute direct control over the sale of a tax lien, either at the Sheriff's tax sale or by the State Auditor. Hence, under these circumstances, the purchase of a tax lien by a County Commission would be permissible and would not be in violation of the Ethics Act's prohibition against having an interest in a public contract over which the public official exercises control.

West Virginia Code § 61-10-15

W.Va. Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against any "member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer" who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which the public official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. *See generally* Alexander v. Ritchie, 53 S.E.2d 735 (W.Va. 1949).

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[2] W.Va. Code § 6B-2-5(h) prohibits full—time public employees and officials from purchasing property from persons they regulate. As the position of elected County Commissioner is not a full-time position, this code provision does not apply to them.

In the present case, for the reasons outlined in the preceding section, the Ethics Commission finds that there is an insufficient nexus between the statutory duties of the County Commissioners and the statutory duties of the Sheriff to find that County Commissioners exercise voice, influence or control over the sale of tax liens at the Sheriff's tax sale or by the State Auditor. *See* A.O. 2011-02 wherein the Commission ruled that a County Commission may contract with a Conservation District under certain limited circumstances. While the exercise of "voice, influence or control" is broader than the exercise of "direct control", the Commission finds that an elected County Commissioner does not have voice or influence over which tax liens are offered for sale at the Sheriff's tax sale. While the County Commission must certify the delinquent list, this power is essentially ministerial in nature.

As such, the Commission finds that W.Va. Code § 61-10-15 does not prohibit County Commissioners from purchasing tax liens so long as they had no direct involvement in the assessment of the property. The analysis of what constitutes direct versus indirect involvement is discussed above and is equally applicable for purposes of complying with the limitations in W.Va. Code § 61-10-15. Specifically, a County Commissioner may not purchase a tax lien if the lien is on property for which the owner requested an adjustment of the assessed value or other relief from the County Commission directly, or in its capacity as the board of equalization and review. In contrast, if the County Commission's only involvement in assessing the property was certifying the assessment through its duty to review the property books to correct errors and equalize assessments, then the Ethics Commission finds that this action does not constitute direct control over the sale of a tax lien, either at the Sheriff's tax sale or by the State Auditor. Hence, under these circumstances, the purchase of a tax lien by a County Commission would be permissible.

The holding in this opinion should not be construed as authorizing County Commissioners to engage in other financial transactions with the Sheriff's Department or other County agencies. It only authorizes the purchase of tax liens at the Sheriff's sale or from the State Auditor.

In rendering this opinion, the Commission has considered the plain language in W.Va. Code § 61-10-15. It has also considered that the Legislature has expressly prohibited certain county officials from purchasing tax liens. These officials include: sheriffs, clerks of the county commission or circuit court, assessors, State Auditor, or deputies or assistants of any of them. W.Va. Code § 11A-3-6 and W.Va. Code § 11A-3-49. Additionally, W.Va. Code § 11A-3-6 was amended and/or reenacted in 1994 and again in 2010; however, on neither occasion was this code section amended to include County Commissioners. While the language in these code sections is not controlling in regard to the application of the Ethics Act and W.Va. Code § 61-10-15, nevertheless, the Commission has given it weight. Whether this list should be expanded to include County Commissioners is a policy decision which ultimately lies with the Legislature.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code § 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and

may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

R. Kemp Morton, III Chairperson