ADVISORY OPINION NO. 2011-02

Issued On February 3, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Council Member** asks whether his business may contract with a Conservation District.

FACTS RELIED UPON BY THE COMMISSION

A newly elected County Council Member owns a construction business. He asks whether his company may bid on a contract being let by a Conservation District. The Conservation District consists of three counties, including the county where the Requester serves as an elected County Council Member.

Conservation Districts were created to conserve land from soil erosion. See W.Va. Code§ 19-21A-2. The Members of the Districts are elected. W.Va. Code§ 19-21A-6.

County Commissions/County Councils may provide funds to Conservation Districts; however, they are not statutorily mandated to do so. The relevant provisions of the West Virginia Code state:

> The governing body of any governmental division which may reasonably be expected to receive a benefit from the construction, improvement, operation or maintenance of any works of improvement may expend money for such construction, improvement, operation or maintenance if this expectation exists as to any part of the governmental division and even though such works of improvement are not located within the corporate limits of the governmental division or are not within this state: *Provided,* That if the expenditure is not made directly by the governmental division for such purpose, it shall be made only through a conservation district or watershed improvement district organized under the laws of this state, but it shall not be necessary that any part of the governmental division be within the limits of the district through which the expenditure is made. The governing bodies or governmental divisions may set up in their respective budgets funds to be spent for such purposes and municipalities and counties may levy and collect taxes for such purposes in the manner provided by law: *Provided, however,* That in case sufficient funds cannot be raised by ordinary levies, additional funds may be raised by municipalities and counties as provided by section sixteen, article eight, chapter eleven of this code.

W.Va. Code § 19-21A-11. Counties may also enter into agreements with Districts for the purpose of constructing flood control projects. This code section, W.Va. Code§ 19-21A-13, reads:

> The county commission of each county and the governing body of each municipality in the state are hereby authorized and empowered to enter into a contract or agreement with the conservation district or districts for the purpose of constructing flood control projects within their respective counties or municipalities or adjacent thereto and to use the projects as recreational areas or public parks. For the purpose of defraying the cost of any such project or projects, the county commission or the governing body of any municipality is hereby authorized to borrow from the federal government or from any federal agency having money to loan, a sum sufficient to cover the cost of such project or projects. For the purpose of retiring any indebtedness incurred under the provisions of this section, notwithstanding any other provisions of law, the county commission or the governing body of any municipality is hereby authorized to lay and impose a county or citywide levy as the case might be.

This fiscal year, the Requester's County Council has allocated $2,700.00 to the Conservation District. The District intends to submit another request for funding this fiscal year. The project on which the Requester seeks to bid is not being funded by county funds.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-2-5(d)(1) provides in part that ... no 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. C.S.R. § 158-8-4 states that... [P]ublic officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code§ 61-10-15(a) states in part that ... 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...

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Both the Ethics Act, W. Va. Code§ 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code§ 61-10-15, prohibit county officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

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. In this case, the County Council does not appoint the Members of the Conservation District; instead, the voters of the respective counties elect the Conservation District's Members. Further, the County Council does not approve the Conservation District's budget nor is it statutorily mandated to fund the District.

The County Council is authorized to appropriate money to the District and has done so in the past. However, the Commission has previously ruled that providing funding to a governing body, standing alone, does not constitute direct authority or control for purposes of the public contract prohibition in the Ethics Act, W.Va. Code§ 6B-2-5(d). Specifically, in A.O. 94-08, the Commission ruled that it would not violate the Ethics Act for a County Commissioner to contract with a County Solid Waste Authority although the County appointed two of its members and had the authority to determine the amount of funding for the Authority. *See also* A.O. 93-05 (Commission ruled that the Ethics Act did not prohibit a County Commissioner from contracting with a Public Service District). In these opinions, while the subject contracts did not violate the Ethics Act, the Commission found that they were prohibited by the stricter provisions in W.Va. Code § 61-10-15. As such, the Commission finds that the contract in question is permissible pursuant to the Ethics Act as the allocation of funds does not rise to direct authority or control; however, as the Requester is a member of a county council, it is necessary to examine the application of the stricter provisions in W.Va. Code§ 61-10-15.

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).

The Ethics Commission has held in the past that an elected county official's power to appoint constitutes "voice, influence or control" over public contracts administered by the board or authority over which the county official has appointment power. *See* A.O. 2004-10A and A.O. 2004-1OB. However, the relationship between conservation districts and county commissions is unique as: Conservation Members are elected, not appointed; the Districts may consist of one or more counties; County Commissions/County Councils are not statutorily required to fund these Districts; and county commissions exercise no control over their budgets.

In A.O. 99-26 the Commission ruled that a County School Board Member could contract with a County Parks and Recreation Commission although the County's special education levy provided about 6% of the Park Commission's operating budget. Similarly, the Commission ruled in A.O. 2010-14 that a School Board's financial support in the form of providing free office space to a teacher's credit union, a non-profit organization, did not constitute the requisite degree of control to trigger the limitations in W.Va. Code§ 61-10-15.

In A.O. 99-29, when asked to apply the limitations in§ 61-10-15 to the question of whether a County School Board Member's business could contract with a training center with which the School Board had a close relationship, the Commission stated that, in weighing various factors, "[T]he Commission finds this to be a close question." Similarly, here, the Commission finds it to be a close question. In the case presented, the financial support provided by the Requester's county to the District is limited. In contrast, there may be situations where a county provides significant funds to a District.

Weighing the various factors, the Commission finds that a County Council Members business may contract with a Conservation District under the following circumstances: (1) the contract is let via a sealed bid process; (2) the project is **not** funded by County money; (3) the project is **not** the subject of an agreement between the District and the County including any agreement for flood control as authorized by W.Va. Code§ 19-21A-13 ; and (4) the affected Member recuses himself from the District's appropriation request or any request for funding. *See* W.Va. Code§ 6B-2-5U).

For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. Further, he may vote on the County's overall budget, but must recuse himself if a line item affects the Conservation District and if a line item specifically addresses any such line item. *See* A.O. 2010-13.

This opinion should not be construed as allowing a County Commissioner to contract with Conservation District's for any other purpose than those outlined herein. Further, it

does not authorize the employment of County Commissioners or County Council Members, their spouses or dependents or by Conservation Districts in the County where they serve.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *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§ 68-2-3, 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.

JonathanETurak
Acting Chairperson