ADVISORY OPINION NO. 2011-03

Issued On April 7, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Hospital,** whose members are appointed by the County Commission, asks whether it may modify an existing contract with another hospital which employs a County Commissioner.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a County Hospital. The County Commission appoints its Board of Trustees. None of the County Commissioners serve on the Board of Trustees. The County Commission does not exercise control over the County Hospital's contracts nor does it fund the hospital through general appropriations. From time to time, the County does provide grants to the hospital. In the past three years the County has given the hospital approximately fifteen thousand dollars in grant money.

A County Commissioner is employed by a city-owned hospital as a pharmacist. The city which owns the hospital is located in a different county. The Requester's county exercises no control over the management of the city-owned hospital. For example, it does not appoint the city-owned hospital's board of trustees or provide funding to it. Indeed, as the city-owned hospital is located in another county, the Requester's county has no authority over the administration of the city-owned hospital.

The Requester has an existing contract with the city-owned hospital for consulting pharmacy services. The Requester seeks to modify its contract with the city-owned hospital wherein, in part, the city-owned hospital will operate a pharmacy at the County Hospital. The County Commissioner/city-owned hospital employee is not a party to the existing contract, nor does he receive a commission, bonus, or other direct compensation by virtue of the contract, or proposed contract modification. Further, the Requester has not been involved in the contract negotiations.

The County Hospital's contract with the city-owned hospital pre-dates the County Commissioner's election. At that time, the County Hospital sought and received Ethics Commission staff advice in regard to whether the County Hospital could continue to contract with city-owned hospital in light of the County Commissioner's employment by the hospital. Staff advised that, in accordance with A.O.s 2001-11 and 2001-12, the County Hospital could continue to contract with the hospital as the contract in question pre-dated the County Commissioner's election. The County Hospital was further advised that the contract could not be modified unless the five factor test/exception in W.Va. Code§ 61-10-15, as discussed

herein, was met. The Requester seeks this opinion to ensure that the five-part test is met so that it may, in turn, modify the contract.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-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 6B-2-5U) provides, in part, that... (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by the nonprofit.

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

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...

(e) The provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

(1) Is not a party to the contract;
(2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
(3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
(4) Does not participate in the deliberations or awarding of the contract; and
(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

ADVISORY OPINION

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, a County Commissioner is employed by a city-owned hospital located in another county. Neither he, the County Commission on which he serves, nor the Requester appoint the members of the city-owned hospital's board of trustees or appropriate money to the city-owned hospital. Indeed, the city-owned hospital is located in another county.

Based upon these facts, the Commission finds that for purposes of the Ethics Act, the County Commission does not have direct authority or control over the contract in question. As such, the Requester may continue to contract with the city-owned hospital, even if the terms of the contract are modified. *See* A.O. 2011-02.

Limitations do apply. The County Commissioner may not use his position to influence the award of the contract. Moreover, if a matter relating to the subject contract comes before the County Commission, then the County Commissioner/pharmacist should recuse himself from voting on such matter. 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.

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).

In 2002 the Legislature amended this provision to exempt public officials who are employees of a vendor or supplier if the public official:

(1) Is not a party to the contract;
(2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
(3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
(4) Does not participate in the deliberations or awarding of the contract; and
(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.

Based upon the facts presented, the Commission finds that the five part test is met. Hence, the County Hospital may continue to contract with the city-owned hospital so long as the County Commissioner/pharmacist continues to meet the five-part test and complies with the guidance provided in the preceding section. (If the city-owned hospital was in the same county as the Requester, and controlled or funded, in whole or part, by the Requester's county commission, then further analysis would be required and a different result may follow.)

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.

/s/R. Kemp Morton, Chairperson
West Virginia Ethics Commission