

ADVISORY OPINION 89-10

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1989

GOVERNMENTAL BODY SEEKING OPINION

A City Attorney

OPINION SOUGHT

1. "Two city council members are members of the Board of Directors of different local banks. Is the city able to use these banks for any banking services, i.e. bank accounts, C.D.'s, bond financing, and other financial services? There are several other banks in the area. One council member has more than a limited interest in the bank.
2. "A full-time shift fireman owns and operates a business that does repair work on breathing apparatus on his own time. When the City Fire department needs repair work done to its breathing apparatus, they use this employee's business to do the repair work. He is the only certified repairman for our brand of breathing apparatus in the state. Can we use his business for this repair work? If not can we apply for waiver?"
3. "The Board of Public Works Director owns a strip of land adjacent to our fire station. For the city to have access to the station for parking in the back lot, we must cross this strip of land. This strip also provides for additional parking. Can the city lease this property? If not, can we obtain a waiver?"
4. "A city council member owns a rental and retail sales business which keeps in stock certain pieces of equipment and supplies. The city from time-to-time needs equipment and supplies in short notice or at night in an emergency-type situation for Public Works jobs. If this individual is the sole supplier, or has the lowest price, in the area, can the City purchase these supplies and equipment? If not, can we apply for waiver?"
5. "In the above scenarios, if you were to substitute the individuals in question with a member of the Board of Zoning, Appeals, Sanitary Board, Planning Commission, Design Standards Committee, Beautification Committee, Beckley Renaissance Board of Directors, or civil service commissions, would that change the ability of the city to do business with the individual? If so, what is the determining factor in deciding why or why not the activity would be unlawful?"

OTHER PERTINENT FACTS RELIED UPON BY THE COMMISSION

All facts are set forth above in the opinion sought section.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states...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 with the governmental body over which he or she has direct authority or with which he or she is employed: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body.

West Virginia Code Section 6B-2-5(d)(2) states...in the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this section is an interest not exceeding ten percent of the partnership or the outstanding shares of a corporation or thirty thousand dollars, whichever is the lesser, or an interest as a creditor not exceeding ten percent of the total indebtedness of a business or thirty thousand dollars, whichever is the lesser.

West Virginia Code Section 6B-2-5(d)(3) states...where the provisions of subdivision (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

1. Since both city council members are public officials within the meaning of the Act neither they nor businesses which they are associated with are permitted to have an interest in the profits or benefits of a contract with a governmental body over which they have direct authority.

One council member has more than a limited interest in the bank, therefore, the city must seek written exemption to continue to do business with the bank on whose board the council member serves by showing loss of quorum, excessive cost, undue hardship or substantial interference with the city.

2. The fireman is a public employee within the meaning of the Act and neither he, nor a business which he has more than a limited interest in may receive the benefits or profits of a contract with a governmental body with which he is employed.

However, the city has applied for a written exemption to permit the fireman to do repair work for the city's breathing apparatuses.

The Commission grants the city's exemption since the nearest certified breathing apparatus serviceman is located in North Carolina and would involve excessive cost and less time for repair.

3. The City Works director is a public employee within the meaning of the act who may not be a party to a contract with governmental body that employs him.

However, the city has applied for a written exemption to permit the public works director to lease property to the city to use for parking and unloading.

The Commission grants the city's exemption since it has shown without the lease it would cause undue hardship and substantial interference to the city.

4. A city council member is a public official within the meaning of the Act and neither he nor a business with which he is associated may receive the benefits or profits of a contract with the governmental body over which he has direct authority.

However, the city has applied for a written exemption to be permitted to rent and purchase building supplies from the council member's business.

The Commission grants an exemption to purchase or rent any item from the council member's business as long as it can be shown that the item can be obtained there at a lower cost to the city or that an inability to purchase would create undue hardship (such as being needed on an emergency basis).

5. This question is general and speculative in nature and the Commission is unable to answer it at this point without further information or facts. However, the Commission would refer you to subsections 6B-2-5(d)(1)(2) and (3).

Lee F. Leuberg  
Chairman