

ADVISORY OPINION NO 89-60

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 7, 1989

GOVERNMENTAL BODY SEEKING OPINION

Commissioner of Culture and History of the Department of Education and the Arts

OPINION SOUGHT

1. What should the Commissioner do regarding a contract between a business he owns and the United States Army and National Guard Unit?
2. Would the assets of a successor Corporation placed in a qualified blind trust be able to do business with state government entities?
3. The Commissioner is on the Board of a Country Club that is in the process of applying for a liquor license. Is there any conflict in the Commissioner's continued service on this Board?

OTHER PERTINENT FACTS RELIED UPON BY THE COMMISSION

The Commissioner was appointed by the Governor in June, 1989. Since then he has extricated himself from all former business relationships except one. He is a sole proprietor of an audio-visual business.

The Commissioner has not been an active participant in the business since assuming the responsibilities of Commissioner. He has hired an employee to oversee the daily operations of the business. The Commissioner's recent attempt to sell the equipment and lease the space has failed.

If he is unable to sell the business or equipment by the end of the year, he intends to set up a corporation, transfer all assets of the business into that corporation and turn those shares (issued by the corporation) over to a trustee during his term of office.

The Commissioner's business has had a contract with the U.S. Army and National Guard unit for several years. The Commissioner states that no work has been performed under that contract since July 1, 1989.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no appointed public official 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.

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that where the provisions of subdivision (1) 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) of this subsection.

West Virginia Code Section 6B-2-8(a) states that any person regulated by the provisions of this article need not report the holdings of or the source of income from any of the holdings of any qualified blind trust.

West Virginia Code Section 6B-2-8(b) states the provisions of subsection (d), section five of this article shall not apply to holdings which are assets within the trusts referred to in subsection (a) of this section.

West Virginia Code Section 6B-2-8(c) states in pertinent part. .. that the term "qualified blind trust" includes a trust in which a regulated person or immediate family has a beneficial interest in the principal or income, and which meets the following requirements:

(1) The trustee of the trust is a financial institution, an attorney, a certified public accountant, a broker, or an investment adviser, who (in the case of a financial institution or investment company, any officer or employee involved in the management or control of the trust)--

(A) is independent of and unassociated with any interested party so that the trustee cannot be controlled or influenced in the administration of the trust by an interested party;

(B) is not or has not been an employee of any interested party, or any organization affiliated with any interested party and is not a partner of, or involved in any joint venture or other investment with, any interested party, and

(C) is not a relative of any interested party.

(2) Any asset transferred to the trust by an interested party is free of any restriction with respect to its transfer or sale unless such restriction is expressly approved by the ethics commission;

(3) The trust instrument which establishes the trust provides that-

(A) except to the extent provided in paragraph (F) of this subdivision the trustee in the exercise of his authority and discretion to manage and control the assets of the trust shall not consult or notify any interested party;

(B) the trust shall not contain any asset the holding of which by an interested party is prohibited by any law or regulation;

(C) the trustee shall promptly notify the regulated person and the ethics commission when the holdings of any particular asset transferred to the trust by any interested party are disposed of;

(D) the trust tax return shall be prepared by the trustee or his designee, and such return and any information relating thereto (other than the trust income summarized in appropriate categories necessary to complete an interested party's tax return), shall not be disclosed to any interested party;

(E) an interested party shall not receive any report on the holdings and sources of income of the trust, except a report at the end of each calendar quarter with respect to the total cash value of the interest of the interested party in the trust or the net income or loss of the trust or any reports necessary to enable the interested party to complete an individual tax return required by law, but such report shall not identify any asset or holding;

(F) except for communications which solely consist of requests for distribution of cash or other unspecified assets of the trust, there shall be no direct or indirect communication between the trustee and an interested party with respect to the trust unless such communication is in writing and unless it relates only (i) to the general financial interest and needs of the interested party (including, but not limited to, an interest in maximizing income or long-term capital gain), (ii) to the notification of the trustee of a law or regulation subsequently applicable to the reporting individual which prohibits the interested party from holding an asset, which notification directs that the asset not be held by the trust, or (iii) to directions to the trustee to sell all of an asset initially placed in the trust by an interested party which in the determination of the reporting individual creates a conflict of interest or the appearance thereof due to the subsequent assumption of duties by the reporting individual (but nothing herein shall require any such direction); and

(G) The interested parties shall make no effort to obtain information with respect to the holdings of the trust, including obtaining a copy of any trust tax return filed or any information relating thereto except as otherwise provided in this subsection.

ADVISORY OPINION

1. Subsection (d)(1) of the Act prohibits a public official or a business with which he is associated from being a party to or having an interest in the benefits or profits of a contract with a governmental body over which he has direct authority or is employed.

In this case it is assumed that the Commissioner does not have direct authority over nor is he employed by the United States Army and National Guard Unit. Therefore it is not a violation of subsection (d)(1) for the Commissioner's business to contract with the U. S. Army and National Guard Unit.

2. Provided the trust described is a qualified blind trust established (pursuant to 6B-2-8(c)) a regulated person does not need to report his holdings or the source of income from any of the holdings of such qualified blind trust. (See, 6B-2-8(a))

The facts presented do not indicate whether the Commissioner intends to use a blind trust when transferring his assets. If he does not use a blind trust then this does not dispense with a possible 5(d)(1) conflict of interest. That provision prohibits a public official or a business with which he has more than a limited interest in from being a party to a contract with a governmental body over which he has direct authority or is employed.

However, if the Commissioner uses a blind trust then subsection 6B-2-8(b) states that the 5(d)(1) provision does not apply to holdings which are assets within the qualified blind trust.

3. Based on the facts set forth it does not appear to be a violation of the Act for a Commissioner to remain on the Board of a Country Club that is applying for a liquor license since he is not employed by, nor has any direct authority over the Liquor Commission.


Chairman