

ADVISORY OPINION NO. 89-67

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 4, 1990

GOVERNMENTAL BODY SEEKING OPINION

Chairman of the Board of Trustees University of West Virginia System

OPINION SOUGHT

1. Whether members of the faculty and staff of the University of West Virginia System may be granted a limited exemption from the blanket prohibition contained in West Virginia Code Section 6B-2-5(d)(1) when they are not in a position to influence a decision to award a public contract for goods or services?

2. Whether members of the faculty and staff of the University of West Virginia System may be granted a limited exemption from the blanket prohibition contained in West Virginia Code 6B-2-5(d)(1) when they are in a position to influence the award of a public contract for the purchase of goods or services and have a direct pecuniary interest in such contract so long as the affected employee recuses himself?

3. Whether the members of the Board of Trustees of the University of West Virginia System may be granted a limited exemption from the blanket prohibition contained in West Virginia Code Section 6B-2-5(d)(1) in instances where individual Board members recuse themselves from voting on specific Board actions involving a conflict of interest?

OTHER FACTS RELIED UPON BY THE COMMISSION

(Faculty and Staff)

The University of West Virginia Board of Trustees (hereafter referred to as Board of Trustees) governs a number of institutions having over 2,200 faculty and 3,100 support staff members serving the needs of 32,000 students. Some of these institutions, such as West Virginia University, Marshall University and West Virginia School for Osteopathic Medicine are the largest employers in their respective communities. Although it is not the major employer, the College of Graduate Studies relies heavily on part-time and adjunct faculty from the business community for its unique educational delivery system.

To provide the best education for students the Board of Trustees recruits and employs a broad variety of academicians, scientists, professionals and skilled technicians. Hundreds of administrative,

clerical and support staff enhance these professionals' work. The low salary often compels full-time faculty, staff and their spouses to take second jobs.

The University of West Virginia system has a three-fold mission of teaching, research and service to the citizens. To fulfill their educational mission the Board of Trustees is required to utilize the services of adjunct faculty members and other professionals who engage in private business.

Further, the Board of Trustees encourages the full-time faculty members to fulfill its mission of service to the state through private consulting agreements and service contracts with public and private entities.

Their research mission requires them to pursue public and private research funds in a continuing effort to improve the health, welfare or prosperity of the citizens of the state. In order to maximize their ability to obtain funds, the Board of Trustees cooperates with affiliated corporations which can rapidly respond to funding opportunities and when necessary, employ on a part-time basis members of the faculty and staff.

There are hundreds of instances where spouses of employees or immediate family members are "associated with businesses" doing business with the institutions of the University of West Virginia System. In most instances, the employees are not in a position to influence the institutions' decisions to contract for goods or services supplied by a local business.

The Board of Trustees requests a limited exemption to apply to faculty and staff when they are not in a position to influence a decision to award a public contract for goods or services to:

- (1) an immediate family member, or
- (2) to a business in which the faculty or staff member has an ownership interest, or
- (3) to a business in which an immediate family member will receive a portion of the profits from such contract.

In instances where faculty and staff are in a position to influence the award of a public contract for the purchase of goods or services and have a direct pecuniary interest in such contract an exemption is requested for faculty and staff so long as the affected employee recuses himself from the decision-making process and disinterested officials are available to make a decision on the award of such contract.

(Board of Trustees Members)

The members of the Board of Trustees are appointed by the Governor and approved by the State Senate. These individuals are citizen volunteers who are active in every sphere of public and private life in West Virginia. The Board members maintain in their private lives a high level involvement in the economic life in the State. The board of Trustees is responsible for the expenditure of nearly \$290,000,000 in fees, state appropriations, grants and contracts, private gifts, sales service and investment income in the 1989-90 fiscal year.

In light of the magnitude of the Board of Trustees' responsibilities and the scope of the activities undertaken by the institutions in the University of West Virginia System, conflicts may arise for individual members in the decision-making process for the Board.

Therefore, members of the Board of Trustees have requested a limited exemption from the conflict of interest provisions (6B-2-5(d)(1) in instances where individual Board members recuse themselves from voting on specific Board actions involving a conflict of interest.

PERTINENT 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 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...

West Virginia Code Section 6B-2-5(d)(2) states that in the absence of bribery or a purpose to defraud, an...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 that 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.

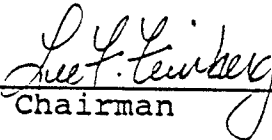
#### ADVISORY OPINION

An exemption, pursuant to West Virginia Code Section 6B-2-5(d)(3) is requested based upon the substantial interference on the operations of the Board of Trustees. The number of individuals governed by the Board, the tremendous burden created by the monitoring of potential conflicts (and excessive costs and undue hardship placed upon the Board associated with the monitoring of potential conflicts as well as the cost incurred in seeking individual requests for opinions and exemptions), the interference created in seeking to obtain and retain highly qualified, experienced professionals in the faculty of the colleges and universities in order to meet the goals established by the legislature and the Board substantiate the Board's conclusion that without an exemption available for the faculty and staff as well as the Board members would create substantial interference with the Higher Educational system.

1. The Commission hereby grants a limited blanket exemption pursuant to subsection (d)(3) of the Act, which will apply to the members of the faculty and staff of the University of West Virginia System when they are not in the position to influence a decision to award a public contract for goods or services. The blanket exemption will be in effect until July 1, 1990, and is based on the grounds of substantial interference and undue hardship to the affected governmental body.

2. The Commission hereby grants a limited blanket exemption pursuant to subsection (d)(3) of the Act, which will apply to the members of the faculty and staff of the University of West Virginia System when they are in a position to influence the award of a public contract for the purchase of goods or services and have a direct pecuniary interest in such a contract as long as the affected employee recuses himself from the decision making process and disinterested officials are available to make a decision on the award of such contract. The blanket exemption will be in effect until July 1, 1990, and is based on the grounds of substantial interference and undue hardship to the affected governmental body.

3. The Commission hereby grants a limited blanket exemption pursuant to subsection (d)(3) of the Act, which will apply to the Members of the Board of Trustees of the University of West Virginia System in instances where individual Board members recuse themselves from voting on specific Board actions involving a conflict of interest. The blanket exemption will be in effect until July 1, 1990, and is based on the grounds of substantial interference and undue hardship to the affected governmental body.

  
Chairman