

ADVISORY OPINION NO. 90-26

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

A Superintendent of a County Board of Education

OPINION SOUGHT

- a. Whether an exemption should be granted to allow the County Board of Education to contract with a photography studio owned by a County Board of Education employee?
- b. Whether an exemption should be granted to allow the County Board of Education to contract with a photography studio owned by a Board of Education employee's spouse?

OTHER FACTS RELIED UPON BY THE COMMISSION

The County is located in a rural area with a limited number of local businesses. The County Board of Education is the largest employer in the area with 300 employees. A majority of the purchases made by the County Board of Education are made on a competitive bid basis and currently, as in the past, school pictures are procured through this procedure.

There are only two photography studios in the County and they are consistently among the low bidders on many of the individual school projects. One photography studio in the County is owned by a teacher who is not involved in the purchasing process of the various schools. The other photography studio in the County is owned by a County Board of Education bus driver's spouse.

Local schools are having trouble obtaining photography services for isolated events such as homecomings, proms, athletic contests and pictures for the yearbooks because many of the out-of-county companies do not bid on many of the schools events because of the small amount of work and funds involved.

Therefore, the County Board of Education has submitted a written application for an exemption allowing them to continue to contract with the local County photography studios, citing undue hardship, excessive cost, and substantial interference.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) states in pertinent part that... no 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...with which he or she is employed.

West Virginia Code 6B-2-5(d)(2) states in pertinent part that... a 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.

West Virginia Code 6B-2-5(d)(3) states in pertinent part that... where the provisions of subdivision (1) and (2) of this subsection would result in...undue hardship, or other substantial interference with the operation of a...county school board or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption.

ADVISORY OPINION

1. An analysis of the facts presented and the pertinent statutory provisions of subsections (d)(1) and (2) follows:

a. The owner of the photography studio is a public employee, since he or she is employed as a teacher by the County Board of Education.

b. The public employee has more than a limited interest in the profits or benefits of a public contact with the governmental agency with which she is employed.

c. For the purpose of this section "limited interest" is defined as an interest not exceeding ten percent of the outstanding shares of stock issued by a corporation or thirty thousand dollars, whichever is the lesser.

d. Therefore, it is a violation of subsection 6B-2-5(d)(1) for the County Board of Education to contract with a company which is owned by a County Board of Education employee.

e. However, the affected governmental body has submitted a written application to the Ethics Commission requesting an exemption to allow them to continue to contract with the photography studio, citing excessive cost, undue hardship and substantial interference.

f. The Commission finds that undue hardship and substantial interference would result if the provisions of this section were to be enforced. Therefore, the Commission hereby grants the requested exemption.

2. An analysis of the facts presented and the pertinent statutory provisions of subsections (d)(1) and (2) follows:

a. The bus driver is a public employee, since he is employed by the County Board of Education.

b. An immediate family member is associated with a business that has a public contract with the governmental agency which employs the bus driver.

c. For the purpose of this section "immediate family" is defined as a spouse residing in the individual's household.

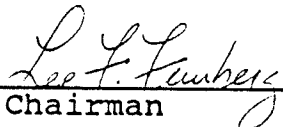
d. Furthermore, the immediate family member has more than a limited interest in the public contract since he has an ownership interest in the photography studio.

e. For the purpose of this section "limited interest" is defined as an interest not exceeding ten percent of the outstanding shares of stock issued by a corporation or thirty thousand dollars, whichever is the lesser.

f. Therefore, it is a violation of subsection (d)(1) of the Act for a County Board of Education to contract for services with a County Board of Education employee's spouse, when the spouse has more than a limited interest in the company.

g. However, the affected governmental body has submitted a written application to the Ethics Commission for an exemption, allowing them to continue to contract for services with the photography studio, citing excessive cost, undue hardship and substantial interference.

h. The Commission finds that undue hardship and substantial interference would result from the enforcement of the provisions of this subsection. Therefore, the Commission hereby grants the requested exemption.


Chairman