

ADVISORY OPINION NO. 90-76

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 6, 1990

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf on a State Superintendent

OPINION SOUGHT

Whether a blanket exemption under subsection 6B-2-5(d)(3) should be given to members and employees of the State Board of Education; and members and employees of all County Boards of Education?

OTHER FACTS RELIED UPON BY THE COMMISSION

The requestor states that the same conflict of interest in public contract issues addressed in the Commission's earlier advisory opinion No. 89-67 applies to the members and employees of the State Department of Education, and County Boards of Education members and employees. Therefore, the requestor asks that the Commission extend the blanket exemption issued to the Higher Education faculty and staff members, to also include the employees and Board of Education members identified above.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...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 which such official or employee may have direct authority to enter into, or over which he or she may have control. Provided, however, that nothing herein shall be construed...to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code Section 6B-2-5(d)(2) states in pertinent part that...an elected...public official or 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 of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

(i) not exceeding ten percent of the partnership or the outstanding shares of a corporation; or

(ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

West Virginia Code Section 6B-2-5(d)(3) states in pertinent part that...where the provisions of subdivisions (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 a written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

Subsection 6B-2-5(d)(1) of the Act prohibits public officials and public employees who have more than a limited interest in the benefits or profits from being a party to a public contract with the governmental body with which they are employed when they have direct authority or control over the letting of public contracts.

In an earlier advisory opinion (No. 89-67) the Commission granted faculty and staff members of higher education institutions an exemption to subsection 6B-2-5(d)(1) that would allow those individuals or businesses in which they have more than a limited interest to contract with the governmental agency that employs them. The Commission based that opinion on the structure and specific characteristics that attach to institutions of higher education.

The Commission observes a substantial difference in the responsibilities and duties of faculty and staff members at higher education institutions and State education employees. Faculty and staff members at higher education institutions are often required by their employment contract to or at the very least expected to conduct research, provide consulting services and participate in publication activities in their field of expertise and contract with public or private entities. This practice is encouraged by their department supervisor or the Institution president.

However, unlike their higher education counterparts participation in such activities is not required for the requesting employees in their employment contract with the State Department of Education or the County Boards of Education. Any degree of participation in such activities (research, consulting or publishing) would depend strictly upon the prerogative and initiative of such employee.

The Legislature recently made certain Amendments to the Ethics Act which will go into effect June 9, 1990 and change certain conflict of interest in public contracts provisions.

Public Employees

Under the Act as amended, a public employee who does not have **authority or control over** the letting of a public contract does not need to seek an exemption since he or she will no longer be covered in the prohibition provisions of the interest in public contracts. It is the Commission's opinion that this change in subsection 6B-2-5(d)(1) will address and relieve many of the requesting public employees' concerns.

However, public employees with **contracting authority or control over** the letting of a contract would still be in violation of Subsection 6B-2-5(d)(1) of the Act and would need to apply to the Commission for an exemption pursuant to subsection 6B-2-5(d)(3) on an individual basis.

Public Officials

As previously noted, the Act as amended by the Legislature during the 1990 Legislative session, also provides that **part-time appointed public officials** (such as State Board of Education members) may enter into a contract with the governmental body over which he or she has direct authority when the appointed part-time public official takes the following three steps: 1) recuses himself from deciding, 2) excuses himself from voting on such contract and 3) fully discloses the extent of his interest in the matter.

However, the amendment to the Act will not change the rule that an **elected part-time public official** (such as a County Board of Education Member) may not contract with the County Board of Education without receiving an exemption from the Ethics Commission pursuant to subsection 6B-2-5(d)(3).

Therefore, it would be a violation of subsection 6B-2-5(d)(1) of the Act for County Board members who have more than a limited interest in the benefits or profits to contract with the governmental entity over which they have direct authority.

However, subsection 6B-2-5(d)(3) allows an elected part-time public official on an individual basis to make a written application to the Commission for an exemption to the prohibitions outlined in subsection (d)(1) of the Act. In order for the Commission to grant such an exemption the requestor must show that the enforcement of the provisions would result in excessive cost, undue hardship or other substantial interference with the operation of a state or county school board or other governmental agency.



CHAIRMAN