

ADVISORY OPINION NO. 91-38

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 2, 1991

GOVERNMENTAL BODY SEEKING OPINION

President of a County Commission

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a County Commission member to vote on a site approval for a solid waste disposal facility which contracts with a Company owned by the Commission member's brother?

OTHER FACTS RELIED UPON BY THE COMMISSION

The County Commission currently has pending before it a request by a solid waste disposal facility (hereinafter referred to as the Facility) for approval to establish, construct and operate a commercial Class A disposal facility within the County. This request was prompted by the issuance of a Certificate of Site Approval to the facility by the County Solid Waste Authority.

Pursuant to Section 20-9-12(c) of the West Virginia Code, after the Certificate of Site Approval is issued by the Solid Waste Authority, the facility is required to request approval of the County Commission to site the facility in the County. The Commission is required to grant or deny the approval within thirty days of receiving the request.

A member of the County Commission is connected with a company which provides a service to the Facility. This company transports leachate generated on the Facility's current solid waste facility disposal site to a sewage treatment plant. This service is a relatively insignificant part of the company's total business activity. However, this is the only company within the County that is available to transport leachate.

There is no written contract between this company and the Facility for the services provided. It is merely a private agreement between the two companies established during the normal course of business and requires no approval or permission of either the County Commission or the Solid Waste Authority.

The company is owned by the County Commission member's brother. The Commission member serves as the director of the company but does not have an ownership interest in it nor does he receive a salary. However, he does rent a building to the company.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials...serving in elected...and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official...such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code Section 6B-2-3 states in pertinent part that...A person subject to the provisions of this chapter may make application in writing to the ethics commission for an advisory opinion on whether an action or proposed action violates the provisions of this chapter or the provisions of section fifteen, article ten, chapter sixty-one of this code and would thereby expose the person to sanctions by the commission or criminal prosecution...A person subject to the provisions of this chapter may rely upon...an advisory opinion of the commission, and any person acting in good faith reliance on...any such opinion shall be immune from the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon any such opinion...in regard to the sanctions of this chapter and the sanctions of section fifteen, article ten, chapter sixty-one of this code.

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...In addition to the provisions of section fifteen, article ten, chapter sixty-one of the code, no elected or appointed public official or public employee or a member of his...immediate family or business with which he...is associated may be a party to or have an interest in the profits or benefits of a contract which such official may have direct authority to enter into, or over which he...may have control...

ADVISORY OPINION

The only matter before the County Commission is the request for approval by the Facility and the County Commission member has no interest in the Facility. Thus no violation of §6B-2-5(d)(1) would occur since the Commission member has no interest in the profits or benefits of a contract which such official may have direct authority to enter into, or over which he may have control.

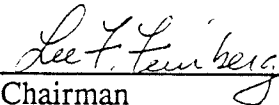
Additionally, the Commission has considered the facts described by the County Commissioner and, especially in light of the Legislature's failure in the past legislative session to adopt the Ethics Commission's recommendations regarding conflicts of interest, finds that no violation of the Act would occur if the County Commission member participated in discussion of or voting on the request for approval filed by the Facility which conducts business with a company owned by the Commission member's brother, which company rents a building from the Commissioner, and of which company the Commissioner is an unpaid director.

Although it would not be a direct violation of the Ethics Act for the Commission member to participate in such matters, pursuant to subsection 6B-1-2(c) a part-time elected official **should** seek to be excused from voting, recused from deciding or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter that has become "personal to him".

The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, is affected in a manner which may influence his vote or would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process. The Commission finds that this matter would be personal to this County Commissioner.

Further, the Commission would note that West Virginia Code §61-10-15 provides that it is unlawful for any member of a County Commission to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service over which as such member he may have any voice, influence or control.

Although any person covered by the Ethics Act acting in good faith reliance on any advisory opinion issued by the Commission shall be immune from the sanctions of section fifteen, article ten, chapter sixty-one of this code, this advisory opinion is strictly limited to the narrow finding that the Commissioner's actions would not constitute a violation of the Ethics Act and is not in any way intended to interpret §61-10-15 and therefore, does not intend to convey immunity from the sanctions contained therein.


Chairman