

ADVISORY OPINION NO. #91-53

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 13, 1991

GOVERNMENTAL BODY SEEKING OPINION

A potential Candidate for a County Commission

OPINION SOUGHT

- a. Whether it is a violation of the Ethics Act for a County Commission member to have a partnership interest in a law firm which represents agencies affiliated with the County Commission?
- b. Whether it is a violation of W.Va. Code §61-10-15 for a County Commission member to have a partnership interest in a law firm which represents agencies affiliated with the County Commission?

FACTS RELIED UPON BY THE COMMISSION

The requestor is currently in the process of deciding whether to seek a position on a County Commission during the 1992 election. His final decision will be influenced by the ruling of the Ethics Commission regarding possible violations of the Ethics Act and WV Code §61-10-15.

The requestor has been a partner in a law firm since 1987. His current interest in the partnership is approximately 2% and it is projected that his partnership interest will not exceed 3.5% by the end of his term on the County Commission.

The requestor's law firm represents three agencies which are affiliated with the County Commission. The County Commission appoints all of the members of one such agency and provides 40% of its operating revenue.

The County Commission appoints some of the members of the two other agencies. It also sets the levy rate and allocation of levy proceeds for those agencies. However, the requestor has stated that, as a County Commission member, he would not have direct authority or control over the letting of public contracts between his private law firm and those agencies affiliated with the County Commission.

The law firm occasionally serves as bond counsel for both the County Commission and the County Building Commission. The law firm's appointment as bond counsel for the County Commission is usually the result of a request for such appointment by the entity seeking bond financing. Likewise, the appointment of the law firm as bond counsel for the Building Commission occurs when the law firm is representing the entity seeking bond financing. However, the County Commission gives the final approval of the law firm chosen to be bond counsel. The requestor, however, is assigned to a different department of the law firm and does not participate in bond matters.

Finally, various attorneys for the law firm occasionally appear before the County Commission when it is sitting as a board of review and equalization to resolve property tax appeals. This work is not assigned to the requestor's department within the law firm.

The requestor states that he does not receive over \$30,000 from the law firm as a result of the firm's representation of agencies affiliated with the County Commission or the firm's representation of clients before the County Commission sitting as a Board of Review and Equalization.

Further, the requestor has stated that he is willing to abstain on the resolution of any tax disputes where the law firm is involved.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code §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 West Virginia Code §61-10-15 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 the 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.

W.Va. Code §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 and public employees serving in elected positions...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.

W.Va. Code §6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain or that of another person.

W.Va. Code §6B-2-5(d)(1) states in pertinent part that...no elected...public official...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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body...

W.Va. Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service...which as such member he may have any voice, influence or control.

ADVISORY OPINION

The Ethics Act

Pursuant to subsection 6B-2-5(d)(1) of the Ethics Act a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct control.

For the purpose of this section, "limited interest" as an owner is defined as an interest, not exceeding ten percent, of a partner or shareholder in a partnership or corporation which is the contractor on a public contract which will not result in a profit of more than thirty thousand dollars. A person's interest in a public contract can be a "limited interest" only if he or she owns ten percent or less of the business. If the requestor's interest in the firm exceeds ten percent at some point in the future, then he would no longer have a "limited interest" under the Ethics Act.

The requestor stated that his current interest in the law firm is approximately 2% and will not exceed 3.5% by the end of his term on the County Commission. Also, he does not receive over \$30,000 from the law firm as a result of the firm's representation of agencies affiliated with the County Commission or the firm's representation of clients before the County Commission sitting as a Board of Review and Equalization. Consequently, the requestor would have a limited interest in the profits or benefits of any public contract between the law firm and such agencies.

Therefore, it would not be a violation of subsection 6B-2-5(d)(1) of the Ethics Act for a County Commission member to have a partnership interest in a law firm which represents agencies affiliated with the County Commission as long as he maintains a limited interest in such firm. Further, the requestor has stated that, as a County Commission member, he would not have direct authority or control over the letting of public contracts between his private law firm and those agencies affiliated with the County Commission.

Pursuant to subsection 6B-1-2(c) of the Ethics Act certain conflicts of interest are inherent in part-time public service and 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 requestor also asks the Ethics Commission to define other restrictions or limitations which would apply if he is elected to the County Commission. The Ethics Commission cannot anticipate every potential factual situation which might raise a question of a potential violation of the Ethics Act. This opinion cannot be considered an exhaustive discussion of all potential Ethics Act issues that the requestor may face if elected to the County Commission. However, the Commission would remind the requestor that pursuant to subsection 6B-2-5(b)(1) of the Ethics Act a public official may not use his office or resulting prestige for his own private gain or for the private gain of another. Simply, he may not use his status as a County Commission member to obtain, influence, increase or promote business for his private law firm.

The requestor should also be mindful of subsection 6B-2-5(e) of the Ethics Act which prohibits a public official from knowingly and intentionally disclosing confidential information acquired by him during the course of his public service for his own private gain or for that of another person. This would include using such information to benefit a client of his private law firm.

W.Va. Code §61-10-15

W.Va. 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.

A County officer has a pecuniary interest when he is an employee of a private entity which is the other party to the contract with the County, whether or not the County officer is also a shareholder, director or officer of such private entity. Therefore, the requestor may not insulate himself from the sanctions of W.Va. Code §61-10-15 by resigning from his partnership with the firm and remaining as a salaried employee.

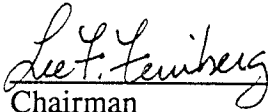
The statute forbids a County officer from engaging in business transactions on behalf of the public, if by virtue of his private interests, he may benefit financially, directly or indirectly, from the outcome of those transactions.

The requestor has stated that, as a County Commission member, he would not have direct authority or control over the letting of public contracts between his private law firm and those agencies affiliated with the County Commission. Therefore, it would not be a violation of W.Va. Code §61-10-15 when a County Commissioner's private law firm contracts with agencies which are merely affiliated with the County Commission since he would not have direct authority or control over the letting of such contracts.

However, on occasion the requestor's private law firm either contracts directly with the County Commission as its bond counsel or applies to the County Commission for its approval to act as bond counsel for other clients. In such cases, he would have a direct interest in the profits or benefits of a public contract over which he has authority and control since his private law firm would be employed by the County Commission and paid with County funds.

Therefore, the County Commission member would be in violation of W.Va. Code §61-10-15 if his private law firm acts as bond counsel for the County Commission, since he would have an interest in the profits or benefits of a public contract over which he has direct authority and control.

The Commission notes that W.Va. Code §61-10-15 sanctions the mere existence of a pecuniary interest, thus the requestor may not insulate himself from the provisions of the statute by abstaining from voting on such issues.


Chairman