

ADVISORY OPINION #91-92

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON FEBRUARY 21, 1992

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a City Council

OPINION SOUGHT

Is it a violation of the Ethics Act for a City to select a Company to establish and administer a deferred compensation plan for City employees when the independent sales agent for the Company is a City Council member's spouse?

FACTS RELIED UPON BY THE COMMISSION

The City is currently considering proposals for a deferred compensation plan to be administered by a private company. The City Council has approved a resolution of general intent and is now considering several proposals for the administration of the plan. The City will select the Company which will administer the deferred compensation plan based on cost, investment return, and Company security.

A service contract will exist between the City and the selected Company. Pursuant to this contract the role of the City is merely to approve payroll deductions for such plans, collect the funds and transfer such monies to the Company. According to the terms of the contract there will be no cost to the City, other than the usual overhead labor costs.

Employee participation in the plan is strictly voluntary. All contracts for participation in the deferred compensation plan will be private in nature since such contracts will be between each interested individual public employee and the private Company.

The spouse of a City Council member is an independent sales agent for a Company which administers deferred compensation plans and has provided a proposal for that Company to handle the City's account.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no elected...public official...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...may have direct authority to enter into, or over which he or she may have control...

ADVISORY OPINION

Pursuant to WV Code §6B-2-5(d)(1), a public official or a member of his or her immediate family may not have more than a limited interest in the profits or benefits of a public contract over which the public official has direct authority or control.

In this case, although a service contract will exist between the City and the selected Company, the Council member's spouse will not be a party to such public contract. The contract will be signed by the Mayor for the City and a corporate officer of the Company. As an independent contractor for the insurance Company, the Council member's spouse will merely act as an intermediary to process and maintain the compensation plans. The Council member's spouse would receive commissions from the contract agreements for participation in the deferred compensation plans which exist between the **private** company and **private** individual employees. The Commission notes, however, that the Board member's spouse would not be a party to those contracts either since those contracts will be between each individual participating employee and the Corporation.

Therefore, the selection of the Company that uses the Council member's spouse as an independent agent would not violate WV §6B-2-5(d)(1). First, neither the City Council member nor the spouse would have a direct interest in any benefit under the actual **public** contract between the City and the Company. Second, the interest in the benefits of any private contracts that may result from the public contract is limited in nature since the spouse will only receive sales commissions from the Company as its agent.

This decision follows the result reached in **Advisory Opinion #90-125**. In that Opinion the Commission concluded that an Ambulance Authority could contract for an employee IRA program with an insurance company that used as its agent a member of the Ambulance Authority's Board of Directors because the agent/Board member had only a limited interest in the contract between the Authority and the Company (i.e. sales commission).

However, the City Council will select and enter into a contract with the Company chosen to administer the private deferred compensation plan. WV Code §6B-1-2(c) provides that 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".

The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence the official's 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 or she must physically remove himself or herself from the room during the discussion and decision making process.

If the matter comes before the City Council for a vote or for deliberation, the Council member whose spouse is the independent sales agent for the Company should refrain from voting or taking any other action regarding the selection of that Company to administer deferred compensation plan since an indirect pecuniary interest is involved.

Pursuant to WV Code §2-5(b)(1), public officials may not use their office or the resulting prestige for their own private gain or for the private gain of another. Therefore, the Council member may not use the official status or influence which is inherent to City Council members to obtain, increase or promote business for that member's spouse.

Further, the City Council member should also be mindful of WV Code §6B-2-5(e) which prohibits a public official from using confidential information acquired during the course of performing official duties to further personal interests or the interests of another. Therefore, the public official may not use any confidential information acquired as a City Council member to assist the spouse in securing a payroll deduction program with the City through a competitive bid process or otherwise.


Chairman