

ADVISORY OPINION NO. 92-05

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 5, 1992

GOVERNMENTAL BODY SEEKING OPINION

Executive Director of a County Redevelopment Authority for an Authority Board Member

OPINION SOUGHT

Is it a violation of the Ethics Act for a part-time appointed public official to have a pecuniary interest in the profits or benefits of a public contract over which he may have direct authority or control?

FACTS RELIED UPON BY THE COMMISSION

The County Redevelopment Authority was established to assist in the creation of economic development within the County. The Board members of the Authority are considered part-time appointed public officials.

A County Redevelopment Authority member owns approximately 13,000 acres of land, part of which is wooded, and would like to deed five to ten acres of that land, at no cost, to the Authority so the Authority can establish a pallet assembly shop on the property. It is estimated that this shop would create 50 to 75 jobs for citizens in the surrounding area.

This project will be financed with public funds. A contract for the construction of the pallet assembly shop will be awarded first followed by a second contract for the operation and management of the completed shop by a private party. Both contracts will be awarded by the Redevelopment Authority through a competitive bid procedure. The Authority member is a partner in a sawmill operations company which would like to submit bids on both contracts relating to the pallet assembly shop project. Once the shop is operational, the private party with the contract to manage the shop will be responsible for the purchase of the lumber required for the actual construction of the pallets. This decision will be at the sole discretion of the shop manager but the funds to purchase the lumber will be provided by the Redevelopment Authority.

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...may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain or that of another person. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected or appointed 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 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...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(e) states in pertinent part that...No present or former public official...may knowingly and improperly disclose any confidential information acquired by him...in the course of his...official duties nor use such information to further his...personal interests or the interests of another person.

West Virginia Code Section 61-10-15 states in pertinent part that...It shall be unlawful for any county officer...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

ADVISORY OPINION

The Ethics Act

Pursuant to WV §6B-2-5(d)(1) 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 authority or control. However, this section specifically states that a part-time appointed public official is exempt from this prohibition provided he seeks to be recused from deciding or evaluating the contract, is excused from voting on the contract, and has fully disclosed the extent of such interest in the contract. 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.

Since the Board members of the County Redevelopment Authority are part-time appointed public officials, it would not be a violation of WV Code §6B-2-5(d)(1) for a Board member of the Authority to have a pecuniary interest in the profits or benefits of public contracts over which he may have direct authority or control provided he recuses himself, as outlined above, from the decisions to award such contracts.

The Commission would remind the Board members that WV Code §6B-2-5(b)(1) prohibits public officials from using their public office or the resulting prestige of their office for their own private gain or the personal gain of another. Specifically, an Authority Board member may not use his official position to obtain, increase, influence or promote business for his private company.

Further, the Redevelopment Authority Board members should also be aware of WV Code §6B-2-5(e) which prohibits public officials from using confidential information acquired during the course of performing official duties to further personal interests or the interests of another. Therefore, Board members may not use any confidential information acquired as an Authority member to assist any private company, through a competitive bid process or otherwise, in securing a public contract with the County Redevelopment Authority.

WV Code §61-10-15

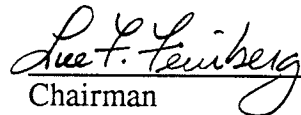
West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer or member of a County board to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract when he may have voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office.

The Authority Board member who is the partner in the sawmill operations would have a direct pecuniary interest in the proceeds of the public contracts for the construction and management of the pallet assembly shop if either of those contracts are awarded to his sawmill company. Further, if his company is successful in acquiring the contract for the management of the shop, the Authority member may also have an indirect interest in the public contract since he is the owner of approximately 13,000 acres of partially wooded property adjacent to the shop site. Although the management of the shop will be responsible for the decisions to purchase the lumber required for construction of the pallets, the funds to purchase such lumber will be provided by the Redevelopment Authority.

The Commission has determined above that if the part-time appointed Board member recuses himself from deliberations and voting on the public contract, he would be exempt from the prohibitions established in WV Code §6B-2-5(d)(1) and therefore would not violate the Ethics Act. However, WV Code §61-10-15 requires only that a county official exercise voice or influence over the contract. The West Virginia Supreme Court, interpreting WV Code §61-10-15, has held that a public official has voice, influence or control over a public contract simply by virtue of his public position.

Further, the Court, in Fisher v. Jackson, 107 W.Va. 138, 147 S.E. 541 (1929) held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15.

Therefore, it would appear to be a violation of WV Code §61-10-15 for the part-time appointed Board member to have a pecuniary interest in the profits or benefits of the public contracts over which he has direct authority or control.


Chairman