

ADVISORY OPINION NO. 92-53

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 7, 1993

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a County Commission Member

OPINION SOUGHT

Is it a violation of the Ethics Act for the spouse of a County Commission member to provide bookkeeping services to a Committee for an incompetent person when members of the Committee are appointed by the County Commission?

FACTS RELIED UPON BY THE COMMISSION

The requestor was recently elected to the position of County Commissioner. Prior to his election, the requestor was appointed by the County Commission to serve as one of three committee members for an incompetent person. As such, the requestor had a shared responsibility to manage the financial and personal affairs of this person subject to a periodic accounting to the County Commission.

The requestor has stated that prior to taking office in January 1993, he will resign as a member of the Committee for the incompetent person. Further, as a County Commissioner he will not participate in or vote on any matter involving this particular estate.

The requestor's spouse owns and operates a bookkeeping service. This bookkeeping business was previously selected by the Committee to handle the accounting affairs of the incompetent person. The requestor did not participate in this decision. The Committee would like to continue to retain this bookkeeping service after the requestor resigns his position with the Committee.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...local governments have many part-time public officials...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 §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...

West Virginia 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 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

In considering this request the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that no provision of the Ethics Act per se prohibits a spouse of a County Commission member from providing bookkeeping services to a Committee for an incompetent person when members of this Committee are appointed by the County Commission.

However, West Virginia Code §6B-1-2(c) provides that a part-time elected official should seek to be excused from voting, deciding or otherwise 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 his vote, or when voting 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 should recuse himself from voting, deliberating or taking any official action as a member of the County Commission regarding any action of the Committee relating to his prior service on such Committee.

Further, pursuant to WV Code §6B-2-5(b)(1), public officials may not use their office or its resulting prestige for their own private gain or for the private gain of another. Therefore, the requestor may not use his position as a County Commission member to influence, obtain, increase, or promote his spouse's personal financial interests in providing services to the Committee.

WV Code §61-10-15

West Virginia Code §61-10-15 provides that it is illegal for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of **any** contract or service 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 recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest is not sufficient to immunize that official from the sanctions contained in this statute.

The County Commission is responsible for the selection and appointment of members to Committees which manage the financial and personal affairs of incompetent persons. Prior to his election to the County Commission, the requestor was appointed by the County Commission to serve on one such Committee. Although he will resign this position when he takes office in January, his spouse would like to continue to provide bookkeeping services to the Committee.

The Ethics Commission finds that the power of the County Commission to appoint members to the Committee and to review its actions is insufficient to give the requestor voice, influence or control over the Committee's employment contracts. Consequently, the requestor's position as a County Commissioner does not give him the degree of control contemplated by WV Code §61-10-15.

Therefore, it would not be a violation of WV Code §61-10-15 for the requestor's spouse to provide bookkeeping services to the Committee for an incompetent person after the requestor takes office as a County Commission member.

Pursuant to WV Code §6B-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from 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 such opinion.


Chairman