

ADVISORY OPINION NO. 93-14

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 6, 1993

GOVERNMENTAL BODY SEEKING OPINION

A County Prosecuting Attorney and County Commission

OPINION SOUGHT

Is it a violation of the Ethics Act for the County Prosecuting Attorney to rent his personal office equipment to the County Commission for use in his public office?

FACTS RELIED UPON BY THE COMMISSION

The County Commission has acquired a fax machine and has chosen to locate it in the Circuit Clerk's office. The Clerk's office is open only from 8:30 a.m. to 4:00 p.m. Monday through Friday and is closed on weekends and all holidays.

The County Prosecuting Attorney's office is maintained in a separate private office building and is open from 8:00 a.m. until 5:00 p.m. Monday through Friday, until Noon on Saturdays, most holidays, and frequently at night. The Prosecutor needs a separate fax machine in his office because he often transmits warrants, court orders and police communications during hours when the circuit clerk's office is not open.

The County Prosecuting Attorney's private practice is located in the same building as his public office. In his private office, the requestor maintains his own fax machine. He would like to charge the Prosecuting Attorney's budget the shared expense on his private fax machine, consisting of one-third of the monthly rental, and the actual cost of transmissions made in connection with the Prosecutor's office.

The County Commission has agreed to this request and would like an opinion from the Commission on the propriety of this action. Further, if the Commission determines that this would be a violation of the Ethics Act, they have requested an exemption from the prohibition against having an interest in public contracts over which they have direct control. The County Commission cites excessive cost, undue hardship and substantial interference with the operation of the Prosecutor's office as justification for the exemption.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no elected...public official...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...

West Virginia Code §6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

- (i) not exceeding ten percent of the partnership or the outstanding shares of a corporation; and
- (ii) not exceeding thirty thousand dollars interest in the profits or benefits of the contract;

West Virginia Code §6B-2-5(d)(3) states in pertinent part that... where the provisions of subdivisions (1) and(2) of this subsection would result in...excessive cost, undue hardship, or other substantial interference with the operation of a...county...or other governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption...

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

Pursuant to WV Code §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.

The requestor states that any contract or agreement for the rental of a fax machine for use by the prosecuting attorney's office would be awarded and approved by the County Commission. However, the Commission determined in Advisory Opinion #92-03, and reaffirms in this opinion, that the requestor has control over the county's decision to enter into the contract due to his instigation of this contract, his close involvement with the ultimate decision as the attorney for the County Commission, and his inevitable role as supervisor or overseer of the contract which will be performed in his office. For these reasons it would be a violation of WV Code

§6B-2-5(d)(1) for the requestor to rent his private office equipment to the county for use in his office as prosecuting attorney.

However, the County Commission has submitted a written request for an exemption from this prohibition citing excessive costs and substantial interference with the operation of the county prosecuting attorney's office.

The County Prosecutor requires the use of a fax machine to transmit warrants, court orders and police communications during hours the Circuit Clerk's office is not open. The Prosecutor could rent a separate fax machine for his public office but instead has offered the County Commission use of his personal equipment. The shared expense on this machine would cost the County one-third of the monthly rental and the actual costs of transmissions made in connection with the prosecutor's office. This arrangement would clearly save the County Commission money since the shared expense would be less than the cost of providing another fax machine.

The Commission finds that substantial interference with the operation of the County Prosecuting attorney's office would result if he is prohibited from obtaining a separate fax machine since the office requires the use of the machine to transmit warrants, court orders and police communications during hours the courthouse is not open. Further, the Commission finds that the County would incur excessive costs if they are required to lease a fax machine specifically for use in the Prosecuting Attorney's office. The requestor has offered to share his private fax machine with the public office and divide the costs. This agreement would cost the County only one-third of the monthly rental expense.

Therefore, pursuant to WV Code §6B-2-5(d)(3) the Commission hereby grants the requested exemption. However, the Commission notes that such exemption is academic in light of the prohibition against all pecuniary interests in public contracts established in WV Code §61-10-15 and discussed below.

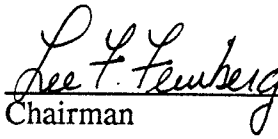
WV Code §61-10-15

West Virginia Code §61-10-15 provides that it is a criminal violation 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.

As previously noted the requestor has influence over the county's decision to enter into the agreement to use his private fax machine due to his instigation of this contract, his close involvement with the ultimate decision as the attorney for the County Commission, and his inevitable role as supervisor or overseer of the contract which will be performed in his office. Consequently, the requestor's position does give him the degree of voice, influence or control contemplated by WV Code §61-10-15.

Therefore, it would be a violation of WV Code §61-10-15 for the County Prosecuting Attorney to rent his personal office equipment to the County Commission for use in his public office.

The Commission notes that it is without authority to grant exemptions to WV Code §61-10-15.


Chairman