

**ADVISORY OPINION NO. 93-49**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON JANUARY 6, 1994**

**GOVERNMENTAL BODY SEEKING OPINION**

A Superintendent of a County School System

**OPINION SOUGHT**

Is it a violation of the Ethics Act for individual members of a county board of education, their spouses, or the spouse of the superintendent, to bid on surplus property of the county board of education?

**FACTS RELIED UPON BY THE COMMISSION**

A County Board of Education will be conducting a public auction of old school furnishings that have been declared "surplus property". Items such as student desks, lockers, kitchen equipment, etc. will be sold by a licensed auctioneer to the highest bidder. Proceeds from the auction will be placed in the "General Fund" to be earmarked for specific school projects.

The superintendent of the school system participated, with the board members, in the decision to hold a public sale. As the chief executive officer, the superintendent was also responsible for overseeing the selection of the materials which will be sold as surplus property at the auction. The individual members of this county board of education, their spouses and the spouse of the superintendent would like to bid on these items.

**PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...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 or appointed 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 or employee may have direct authority to enter into, or over which he or she may have control...

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for a superintendent or any member of a county or district board...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), no public official or member of his or her immediate family may have more than a limited interest in the profits or benefits of a public contract over which they have authority or control. The Commission previously determined that this prohibition applies to sales and purchases as well as public contracts.

Clearly, county board of education members have direct authority and control over all county board of education contracts. Further, the county superintendent participated in the decision to hold a public sale and, as chief executive officer, the superintendent was responsible for overseeing the selection of the materials which will be sold as surplus property at the auction.

Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the individual members of a County Board of Education, their spouses or the spouse of the superintendent of the school system to bid on surplus County Board of Education property.

WV Code §6B-2-5(d)(3) provides that where the provisions of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a county school board, the affected governmental agency may make a written application to the Ethics Commission for an exemption. The school board has not made a request for an exemption. Furthermore, the Commission notes that such exemption would be academic in light of the prohibition against all pecuniary interests in public contracts established in WV Code §61-10-15 and discussed below.

#### **West Virginia 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 county board of education members have authority and control over all contracts let by the county board of education. Further, the county superintendent participated in the decision to hold a public sale and, as the chief executive officer for the board, the superintendent was responsible for overseeing the selection of the materials which will be sold as surplus property at the auction. Consequently, the requestors' positions gives them the degree of voice, influence and control contemplated by WV Code §61-10-15.

The Commission realizes that the requestors' interests in these particular contracts may be minimal, however, in Jordan v. McCourt, 62 S.E. 2d. 555 at 562 (1950), the West Virginia Supreme Court of Appeals held that even a minuscule interest in a public contract involved "a disregard of an imperative statute, and that no deviation therefrom is or should be permitted."

Therefore, it would be a violation of WV Code §61-10-15 for the individual members of a county board of education, their spouses or the spouse of the superintendent to bid on surplus county board of education property.

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

  
Chairman