

ADVISORY OPINION NO. 94-02
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON FEBRUARY 3, 1994

GOVERNMENTAL BODY SEEKING OPINION

A Member of an Airport Authority

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a member of an Airport Authority to act as a realtor in the sale of property to the Authority?

FACTS RELIED UPON BY THE COMMISSION

The requestor is a licensed realtor and has served for a number of years as a member of a County Airport Authority. Members of the Authority are part-time appointed public officials.

The Authority has recently become interested in a piece of property which is listed for sale with a local real estate firm of which the requestor is President. The requestor would like to become involved as a co-realtor in the sale. As such he would be entitled to a co-broker's one-half share of the real estate sales commission paid by the seller out of the sale proceeds. The requestor's motivation is to save the Authority his portion of the broker's fee by having it deducted from the sale price.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no appointed public official...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 may have control...Provided, however, 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 §61-10-15 states in pertinent part that...It shall be unlawful for any member of any 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), a public official may not be a party to, or 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 contains an exemption which specifically provides that a part-time appointed public official may have a pecuniary interest in the profits or benefits of a public contract over which he may have direct authority or control provided the part-time public official is recused from deciding or evaluating, is excused from voting on such contract, and fully discloses the extent of the interest in the contract.

Therefore, it would not be a violation of the Ethics Act for a part-time member of an Airport Authority to act as a realtor in the sale of property to the Authority provided he fully discloses his interest and abstains from any discussion or vote on the purchase of the property.

West Virginia Code §61-10-15

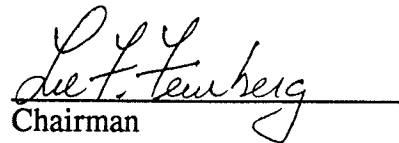
West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. The West Virginia Supreme 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.

Clearly, the purpose of this section is to protect public funds and to recognize the fact that a person cannot properly represent the public in transacting business with himself. The section is designed to remove from public office any temptation for personal advantage. However, in this instance the requestor has stated that he would forego a sales commission and have the sale price reduced by the amount of his portion of the commission. This arrangement would save the Authority approximately \$4,000. Such action would remove any direct or indirect interest in the contract since the requestor would receive no pecuniary benefit from acting as the realtor in the sale of property to the Authority.

Therefore, it would not be a violation of WV Code §61-10-15 for a member of an Airport Authority to act as a realtor in the sale of property to the Authority, **provided** he, his agency or members of his real estate agency do not receive any part of the sales commission or any other benefit arising from his participation as a co-broker on the contract to purchase the property.

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 WV Code §61-10-15, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.

The Commission notes that this opinion is limited to an analysis of the facts presented by the requestor.


Chairman