

ADVISORY OPINION NO. 94-12

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MAY 5, 1994

GOVERNMENTAL BODY SEEKING OPINION

A County Commission

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for the county prosecuting attorney to rent his personal office space and equipment to the county commission for use in his public office?

FACTS RELIED UPON BY THE COMMISSION

For many years the county commission has maintained a contract with the local prosecuting attorney which provides that in exchange for \$300 per month the prosecutor would supply his own office space including equipment, supplies, maintenance, utilities and insurance.

This arrangement has proven financially advantageous to the Commission since they currently have neither adequate space for the prosecuting attorney's office nor the funding required for a law library. Consequently, the county commission seeks an exemption from the provisions of WV Code §6B-2-5(d)(1) if the Ethics Commission finds the lease to be a violation of that provision of the Ethics Act.

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...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...

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...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 from subdivisions (1) and (2) of this subsection.

West Virginia Code §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 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.

Any contract or agreement for the rental of the prosecuting attorney's private office would be awarded and approved by the county commission. However, the Commission determined in Advisory Opinions #92-03 and #93-14, and reaffirms in this opinion, that the county prosecuting attorney has control over the county's decision to enter into the contract due to his close involvement with the ultimate decision as the attorney for the county commission, and his inevitable role as the supervisor or overseer of the contract which will be performed in his private office. For these reasons it would be a violation of WV Code §6B-2-5(d)(1) for the county prosecuting attorney to rent his private office and equipment to the county for use as his public office.

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 since they currently have neither adequate space for the prosecuting attorney's office nor the funding required to establish a law library. The Commission finds that the county commission would incur excessive costs and substantial interference with the operation of the county prosecuting attorney's office if they are prohibited from contracting with the county prosecuting attorney to utilize his private office to perform his official public responsibilities.

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.**

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. A County Prosecuting Attorney is covered by this statute.

As previously noted, the county prosecuting attorney has influence over the county commission's decision to enter into the agreement for the use of his private office and equipment in the performance of his public responsibilities due to his close involvement with the ultimate decision as the attorney for the county commission, and his inevitable role as the supervisor or overseer of the contract which will be performed in his private office. Consequently, the prosecuting attorney's position gives 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 and 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