

ADVISORY OPINION NO. 94-22

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 1, 1994

GOVERNMENTAL BODY SEEKING OPINION

Member of a County School Board and Regional Educational Service Agency Board

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for a County School Board and Regional Educational Service Agency (RESA) Board member to contract to perform private work for that County's RESA or regional vocational school or to act as a subcontractor on a contract with that County Board of Education?

FACTS RELIED UPON BY THE COMMISSION

The requester, a member of a County Board of Education, has a 49% ownership interest in a construction company and her spouse owns the remaining 51%. Part of her school board duties require her to serve on the Board of Directors of the local Regional Educational Service Agency (RESA) which serves that County's school system.

This RESA covers an eight county region. The Board of Directors of the RESA is comprised of the Superintendent and one Board member from each of the eight county school systems within the RESA's area and a representative of the State School Superintendent. The RESA's funding comes from a variety of sources including the state school aid formula, payments from the county school boards it serves for services rendered to them, and grant monies received from the state and federal government. Services typically provided to the school boards by the RESA include computer repairs, cooperative purchasing, and diagnostics related to special education.

The Requester's school system is also served by a regional vocational/technical school covering a three county region. This Vocational School's Board is comprised of the Superintendent and one school board member from each of the three counties along with a representative of the State Superintendent of Schools. Each county school board pays the Vocational School monies representing tuition for the educational services provided to students from each county.

The Requester's school board also serves as the fiscal agent for the RESA and the Vocational school. Consequently the RESA's and Vocational School's funds flow through that school board's bank account.

The School Board member inquires whether her Company can contract to perform services for either the RESA or for the Regional Vocational School that serve her county school system. Additionally, a contractor has approached the requester's Company to see if it would serve as a subcontractor on a building project pursuant to a contract with the requester's school system.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(d)(1) states that no elected...public official...or business with which he...is associated may be a party to or have an interest in the profits or benefits of a contract with the governmental body over which he...has direct authority or with which he...is employed...

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county board of education...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

COUNTY BOARD OF EDUCATION AND RESA

Public Contracts

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 or she may have direct authority or control. For the purposes of this section, a limited interest is defined as an interest not exceeding ten percent of the partnership or the outstanding shares of a corporation.

In this instance, the amount of ownership interest that the requester holds in the construction company is 49%. This company may contract either directly with the governmental entities or act indirectly as a subcontractor. As a member of the County Board of Education and the RESA Board of Directors the requester would have direct authority and control over any construction contract awarded by the Board of Education and RESA.

Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the requester's private company to enter into a public contract directly with RESA or indirectly as a subcontractor to perform private work for that County Board of Education.

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 a member of the County Board of Education and the RESA Board of Directors the requester would have direct authority and control over any contract awarded by such governmental entities.

Therefore, it would be a violation of WV Code §61-10-15 for the requester's private company to contract directly or to act as a subcontractor to perform private work for the County Board of Education or RESA.

VOCATIONAL SCHOOL

Public Contracts

As previously noted, WV Code §6B-2-5(d)(1) prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which he or she may have direct authority or control.

As one of five members of the County Board of Education the requester has the authority to participate in the appointment of two of the seven members of the regional Vocational school serving her area. However such authority does not give the requester **direct** authority or control over contracts let by the Vocational school.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for the requester's private company to contract or act as a subcontractor to perform private work for Vocational school provided she is not appointed to serve on the board which governs the Vocational school.

West Virginia Code §61-10-15

WV 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. 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 office from the sanctions contained in the statute.

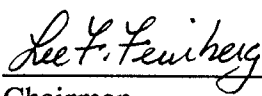
In this instance the contract between the requester's private company and the regional Vocational school is one in which she has a direct pecuniary interest. As a member of the County Board of Education the requester has the authority to participate in the appointment of two of the seven members of the board which governs this school.

The Commission finds that WV Code §61-10-15 applies a different, stricter standard to the degree of control a public official is permitted to have over a public contract and still have a private financial interest in the contract. The power of the County Board of Education to appoint two of the seven members of the board which governs the technical school is sufficient to give the requester voice, influence or control over contracts let by the school. Consequently, the requester's position as a County Board of Education member does give her the degree of control contemplated by WV Code §61-10-15.

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. State v. Neary, 365 S.E.2d, 395 (1988). 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.

Therefore, it would be a violation of WV Code §61-10-15 for the County Board of Education member's private company to contract to perform private work for the regional Vocational school serving her County Board of Education.

The Commission notes that WV Const. art. XII, §9 provides that "no person connected with the free school system of the State...shall be interested in the sale, proceeds or profits of any book or other thing used, or to be used therein, under such penalties as may be prescribed by law." The Commission is without authority to interpret this provision but would suggest that the requester seek clarification from the appropriate authority to determine what applicability it may also have to potential liability arising from the questions posed.


Chairman