

ADVISORY OPINION NO. 95-45

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1995

GOVERNMENTAL BODY SEEKING OPINION

A County Development Authority

OPINION SOUGHT

Is it a violation of the Ethics Act for the attorney for the County Development Authority to serve as legal counsel for an Association in a law suit against the County Commission?

FACTS RELIED UPON BY THE COMMISSION

The members of a County Development Authority are all appointed by the County Commission. However, the County Commission does not exercise supervisory power over the decisions of the Development Authority.

The Authority works closely with a non-profit corporation that is also interested in promoting economic development in the area. The Director of the Authority is also the President of the non-profit corporation. Authority members select four of their own directors to serve on the 24-member board of the corporation.

The County Development Authority has retained as its own legal counsel a partner in a local law firm. The position of legal counsel to the Authority is part-time. Recently the Authority's legal counsel and his firm have agreed to represent an Association of certain county employees in a lawsuit against the County Commission for back pay. The clients in the lawsuit are **not** employees of the Development Authority. The Director of the Authority inquires whether this representation of county employees is prohibited by the Ethics Act.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(f) states in pertinent part that [n]o present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a ... particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. A staff attorney, accountant, or other

professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the governmental agency, without the consent of the governmental agency...

West Virginia Code 6B-2-5(g)(1) provides, in pertinent part, that (1) No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations appear, in a representative capacity before the governmental entity in which he or she serves or served or is or was employed

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...or any member of any other county or district board, or for any county or district 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

In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which would prohibit an attorney for a County Development Authority from simultaneously representing county employees from another agency in a lawsuit against the County Commission.

The prohibition against representing private parties at WV Code 6B-2-5(f) is inapplicable to this case since the legal counsel never represented the county in the back pay dispute.

The prohibition against appearing before a governmental employer on behalf of a private client is not applicable because it applies only to public officials and **full-time** staff attorneys and accountants. The legal counsel does not fit any of these categories. Even if he did, an appearance before the County Commission or the Circuit Court in a wage dispute would not be an appearance before his governmental employer which is the Development Authority.

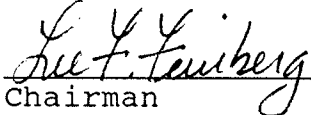
West Virginia Code 61-10-15

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. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office. The Ethics Commission is without authority to grant exemptions from this provision.

The Commission finds that the legal counsel's position with the Development Authority does not give him voice, influence or control over the employment contracts between the County Commission and the county employees suing for back wages. Therefore it would not be a violation of WV Code 61-10-15 for the Development Authority's legal counsel to represent other county employees in a lawsuit against the County Commission for back pay.

Pursuant to WV Code 6B-2-3, any person acting in good faith reliance on an advisory opinion 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.

This opinion may not be relied upon as either approval or disapproval of this conduct under the Code of Professional Responsibilities governing attorneys.


Chairman