

ADVISORY OPINION NO. 96-41

Issued on September 5, 1996 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

Director of Purchasing for a County Board of Education

OPINION SOUGHT

Is it a violation of West Virginia Code 61-10-15 for the County Board of Education to pay for merchandise ordered from a company which now employs the spouse of the Board's Treasurer/Business Manager?

FACTS RELIED UPON BY THE COMMISSION

The Treasurer/Business Manager of a County Board of Education is responsible for all business affairs of the school system, including the supervision of the purchasing director. He exercises no control or influence on purchasing decisions, but does control, in concert with the Board of Education, the procedures and practices which the purchasing department must follow.

In Advisory Opinion #95-54, the Ethics Commission determined that the power of the Treasurer/Business Manager to oversee the business affairs of the school system, including the supervision of the purchasing director and the procedures and practices which the purchasing department must follow, is sufficient to give him voice and influence, if not actual control, over the purchasing decision of that Board. The Commission held that it would be a violation of West Virginia Code 61-10-15 for the County Board of Education to purchase school supplies from a company which employs the Treasurer/Business Manager's spouse.

The County Board of Education followed the Commission's ruling and did not purchase materials from this company. Recently, the Treasurer/Business Manager's spouse changed jobs. She is now employed with a different company which conducts business with the School Board. The Board understands that they may no longer purchase items from this company, however, prior to the spouse's employment, the County Board of Education did order supplies from the company. The Board requests a ruling as to whether it would be a violation of WV Code 61-10-15 for the Board to pay for items which were ordered prior to the Treasurer/Business Manager's spouse's employment with such company.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

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West Virginia Code 61-10-15 provides that it is a criminal violation for any county officer to have a direct or indirect financial interest in the proceeds of any public contract if he has voice, influence or control over such contract. As previously noted, the Commission held that it would be a violation of West Virginia Code 61-10-15 for the County Board of Education to purchase school supplies from a company which employs the Treasurer/Business Manager's spouse. However, in this instance the purchases were made from the company prior to the employment of the Treasurer/Business Manager's spouse with such company. Consequently, the Manager did not have a pecuniary interest in the contract at the time it was entered into.

A similar situation existed in Advisory Opinion #91-66. In that case, an employee/stockholder of a company which conducted business with a County Commission was elected to serve on that County Commission. The Ethics Commission held that although the newly elected County Commission member did have voice, influence or control over the payment aspects of a contract, the Commission does not consider the approval of payment under a contract which was entered into prior to the County Commission member's election to be the type of voice, influence or control over the awarding or letting of a contract covered by WV Code 61-10-15.

Further, the West Virginia Supreme Court of Appeals held, in *Fisher v. Jackson*, 107 W.Va. 138. 147 S.E. 541 (1929), that payment for an item furnished before a public officials's term began would not be a violation under the statute. The Court upheld this decision in *Jordan v. McCourt*, 62 S.E. 2d 555 (1950), which involved a County Board of Education's purchase of items from a local motor company which was owned by a newly elected member of the Board. The Court held that payment for transactions which occurred prior to the time when the newly elected Board member took office does not amount to a violation of WV Code 61-10-15.

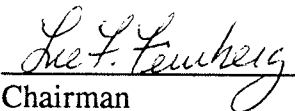
The three cases presented deal with payment for merchandise which was purchased prior to the election of the public official. These officials did not have voice, influence or control over such contracts since they had not yet been elected to office.

The situation currently before the Commission differs slightly because the Treasurer/Business Manager did have voice and influence, if not actual control, over the contract, but did not have a pecuniary interest in such contract at the time it was awarded. However, the Commissions believes that such differences are inconsequential and should not affect the outcome of this opinion.

Therefore, based on the previous advisory opinion of the Commission and the precedent established by the West Virginia Supreme Court of Appeals, the Commission finds that it would not be a violation for the County Board of Education to pay for merchandise ordered from a company which now employs the spouse of the Board's Treasurer provided such transactions occurred prior to the spouse's employment with such company.

The Commission would remind the requester that the County Board of Education may not continue to conduct business with this company as long as the spouse of the Treasurer/Business Manager of the County Board of Education is employed by that company.

Finally, pursuant to WV Code 6B-2-3, any person acting in good 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.


Chairman