

ADVISORY OPINION NO. 97-11

Issued on April 3, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

Member of a Board of Education

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 if a public official votes to assume a private debt owed to his private employer?

FACTS RELIED UPON BY THE COMMISSION

The requester is a member of the County Board of Education and chief loan officer of a local Bank. He also owns a small portion of stock in the Bank. Prior to the requester's election to the Board of Education, his Bank made an unsecured loan of \$20,000 to several private citizens so they could purchase materials to construct an athletic building and rest room facility on property owned by the Board of Education. The labor to construct the building was donated.

The four individuals have now asked the Board of Education to pay the remaining balance on the loan.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated 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 or she may have control...

West Virginia Code 6B-2-5(d)(2) states in pertinent part that...an elected...public official...or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having an interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is the contractor on the public contract involved. A limited interest for the purposes of this subsection is:

(A) An interest:

(i) not exceeding ten percent of the partnership or the outstanding shares of a corporation

West Virginia Code 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...district school officer...supervisor or superintendent, principal or teacher of public schools, 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.

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The Ethics Act

The Ethics Act, at WV Code 6B-2-5(d), prohibits public servants from being a party to, or having more than a limited financial interest in, a public contract over which they may have authority or control. The contract in this case, however, is between the bank and several private individuals. Therefore the provisions of WV Code 6B-2-5(d) do not apply to the Board of Education's decision whether to pay off the individuals' debt to the Bank.

The Commission also notes that if the provisions of WV Code 6B-2-5(d) did apply, they would not prohibit the requester from taking part in the Board's decision since his ownership of less than ten per cent (10%) of the Bank's stock would give him only a limited financial interest in any contract.

However, WV Code 6B-1-2(c) provides that public servants should not vote or take official action with regard to matters in which they have a personal conflict of interest. In this case, the requester's employer has an interest in having the loan paid off promptly. This is an interest that would create the appearance of impropriety if the requester participates in any vote by the Board of Education to assume responsibility for the loan. Therefore the requester should recuse himself and not vote or take any other official action relating to the Board's decision whether to pay of the loan.

West Virginia Code 61-10-15

West Virginia Code 61-10-15 prohibits designated county personnel, including school board members, from having a personal financial interest, directly or indirectly, in a public contract, purchase or sale over which their public position gives them "voice, influence or control".

Earlier decisions of the Supreme Court of Appeals of West Virginia have established that the requester's employment by and ownership interest in the bank gives him an indirect financial interest in the bank's financial transactions. If the Board's action in paying off the loan is the type of transaction covered by WV Code 61-10-15, then the requester would have a prohibited personal financial interest and would be in violation of WV Code 61-10-15.

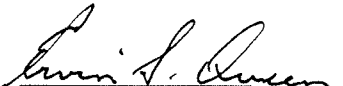
Whether the Board's action would be covered by WV Code 61-10-15 depends on a factual determination which has not been made and cannot be made by the Ethics Commission. The question turns on whether the Board currently owns the improvements financed by the construction loan sought to be repaid.

If the improvements are owned by the Board, then the payment of the loan would be in the nature of a gift and would not be the type of transaction covered by the prohibition in WV Code 61-10-15 against personal financial interests in public contracts, purchases and sales.

However, if the improvements are not owned by the Board, then the payment of the loan would constitute a purchase of those improvements and would be covered by the prohibition in WV Code 61-10-15. The Commission notes that in such a case the recusal of the requester from any vote would not protect him from liability under WV Code 61-10-15. See *Fisher v. Jackson*, 107 W.Va. 138, 147 S.E. 541 (1929). Further, under *Hunt v. Allen*, 53 S.E.2d 509 (1948) the WV Supreme Court held that county school board members who voted to pay for goods known to have been sold to the board by another board member in violation of WV Code §61-10-15, were guilty of official misconduct and subject to removal from office, even though they themselves had no personal financial interests in the purchases voted upon. A similar outcome is possible under this scenario.

The Commission's decision in this Advisory Opinion is limited to a consideration of the Ethics Act and WV Code 61-10-15. It should not be interpreted as an endorsement of any policy that may motivate the Board to assist those individuals who want to be free of their indebtedness to the Bank.

This opinion should also not be considered a finding that a decision by the Board to pay off the loan does not violate any other provision of law or the State Constitution.


Chairman