

ADVISORY OPINION NO. 99-10

Issued On March 4, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A City asks whether it is entitled to an exemption from the Ethics Act's prohibition against private interests in public contracts.

FACTS RELIED UPON BY THE COMMISSION

The City seeks an exemption from a provision of the Ethics Act which prevents the City from purchasing supplies and materials from a business owned by the City's Mayor.

The Mayor owns a "combination hardware (primarily plumbing and carpentry supply) and auto parts store" in the City. There is only one other hardware store located in the City. The City has no other auto parts store.

In regard to the City's auto parts needs, the City Manager states that the City can not afford the cost of traveling to the nearest community, ten miles away, to buy the parts it needs to maintain City vehicles. He explains that the vehicles are not repaired by trained mechanics, but by City personnel using the "replace it and see if it works" approach, an approach he explains "entails many extra trips to the store."

In regard to the City's hardware needs, the City Manager explains that the Mayor's store will open at night to provide materials necessary to make emergency repairs to water and sewer lines. It is not clear whether the City Manager has sought to establish a similar emergency response plan with the other hardware store.

He is also concerned about materials which the other hardware store may not have in stock. As with auto parts, if he is unable to buy from the Mayor's store, the nearest other source of hardware is a ten mile drive away.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(d)(1) provides 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)(3) provides in pertinent part that... Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

The Ethics Act prohibits public servants from having a personal financial interest in a public contract, purchase or sale which their public position gives them the authority to award or control. The prohibition extends to the spouses of public servants and any business in which they or their spouse have an ownership interest of more than ten per cent.

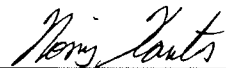
This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Act permits the Ethics Commission to grant an exemption from this prohibition to any agency which demonstrates that adherence to the prohibition will result in "excessive cost, undue hardship, or other substantial interference with the operation of" the agency.

If an agency is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm. It must show that real and significant hardship will result, hardship which outweighs the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.

The Commission finds that the City has failed to demonstrate the degree of "excessive cost, undue hardship, or other substantial interference" required to justify an exemption. An exemption is not granted.

The Commission notes that the prohibition does not bar purchases from the Mayor's business, when it is the only reasonable source in an emergency situation - a situation where prompt response time is crucial to the welfare or safety of City residents or the public generally. This would apply, in an emergency situation, to purchases of hardware or auto parts.


Chairman