

ADVISORY OPINION NO. 99-29

Issued On October 7, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County School Board Member** asks whether a business owned by the Member and her spouse may contract with a Training Center for physically or mentally disabled adults which has some interaction with the School Board.

FACTS RELIED UPON BY THE COMMISSION

The School Board Member and her spouse own a general contracting company which would like to bid on construction projects proposed by the Training Center. The Center's bylaws provide that three of the ten members of its board are the superintendents of three county school systems in the region, including the Requester's county. Two employees of the Center, an instructor and the Center's director are considered employees of the Requester's School Board, although subject to the direction of the Training Center's own Board. The School Board provides \$15,000 to the Center annually from the County's special education levy and approximately \$55,000 in salaries and other benefits. The attendees of the Training Center ride County school buses.

The School Board exercises no control over the operation of the Training Center. The Center's Director would be involved in any construction project.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code § 6B-2-5(d)(1) provides in pertinent part that... In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, 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 § 61-10-15 states in pertinent part that...It shall be unlawful for any member...of any county or district board...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

Both the Ethics Act and WV § 61-10-15 prohibit public servants from having a personal financial interest in public contracts over which their public position gives them control. The language used by the Ethics Act prohibits private interests in public contracts which the public servant can award or control. WV § 61-10-15 prohibits interests in contracts over which the public servant has voice, influence or control.

Ethics Act. The Ethics Act's prohibition does not prevent the School Board Member's construction company from contracting with the Training Center, because her position on the School Board gives her no authority to award or to control Training Center contracts. It would not be a violation of the Ethics Act for the construction company to contract with the Training Center.

WV Code § 61-10-15. This prohibition is more comprehensive and extends to contracts over which a public servant may exercise voice, influence or control. The fact that one of ten members of the Training Center's Board and its Director are School Board's employees and its contribution, through the special levy, to its operating budget must be weighed to see if it allows School Board members to influence, if not control, the actions of the Training Center.

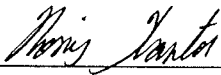
Earlier opinions of the Ethics Commission have held that a public official's authority to appoint some or all of the member of another agency's board, when coupled with other factors, may give the official voice, influence or control over the other agency's contracts. Other factors which have been taken into account are (1) the degree of supervision or oversight the public official's own agency is authorized to exercise over the other agency's activities and (2) the extent to which the public official's agency provides financial support to the other agency.

The decision of the WV Supreme Court of Appeals in *State v. Neary*, 365 S.E.2d 395 (W. Va. 1987) illustrates this concept. There the Court ruled that the broad powers which a county commission exercises over a public service district, including the authority to appoint **and remove** all of its members, gave commission members voice, influence or control over the contracts of its public service districts.

Weighing these factors, the Commission finds this to be a close question. The Commission previously advised the Requester that her construction company could contract with the Parks and Recreation Commission under the specific facts she provided. [A.O. #99-26]. The current scenario, however, presents somewhat different facts.

The School Board's monetary contribution to the Training Center from its special levy is relatively insignificant. Although the School Board does not have the ability to control the Training Center's award of a construction contract, one of the Center's Board members, the Superintendent, answers to the School Board and has an ongoing working relationship with Requester. In addition, the Center's Director is also a School Board employee potentially subject to termination by the Board even though supervised by the Center's Board. Under the more stringent standards of West Virginia

Code § 61-10-15, the Commission finds that the Requester, as a member of the School Board, has a sufficient amount of influence over the contracts of the Training Center that it would be a violation of WV Code 61-10-15 for the construction company she and her spouse own to contract with the Training Center.



Chairman