

ADVISORY OPINION NO. 2005-01

Issued On February 3, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it may continue to contract with a radio station which is owned by a holding company in which a newly elected County Commissioner is a minority shareholder.

FACTS RELIED UPON BY THE COMMISSION

Approximately fifteen years ago, the County Commission entered into an informal agreement with a local radio station to place radio repeaters on the station's towers. The repeaters are used to transport radio signals for communications by law enforcement personnel, fire departments and other emergency service workers.

A newly elected County Commissioner is a minority shareholder in a holding company which owns the radio station. The radio station charges the County Commission one hundred dollars (\$ 100.00) per month for this service. The County Commission makes a lump sum payment once a year. It paid the yearly usage fee for 2005 prior to the newly elected County Commissioner taking office. The County Commissioner does not receive any direct remuneration as a result of the agreement.

There are no other local radio towers where the repeaters may be placed. The construction of a new tower would cost the County an estimated twenty thousand dollars (\$ 20,000.00) or more.

CODE PROVISIONS RELIED UPON BY COMMISSION

W.Va. Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or 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 ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control ...

W.Va. Code § 6B-2-5(d)(3) provides that: Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a ...municipality...the affected government body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

W.Va. Code § 61-10-15 states in 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 ... [over] which as such member he may have any voice, influence or control ...

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Both the Ethics Act and W.Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in a public contract, purchase or sale over which their public position gives them control. The Ethics Commission has the power to grant a County an exemption from the Ethics Act where it appears that the prohibitions of W.Va. Code 6B-2-5(d) would result in excessive cost to the public body or undue hardship. As there are no other radio towers in the county, and as the construction of a new radio tower would result in significant costs to the County, the Commission finds that prohibiting the County Commission from contracting with the radio station would result in excessive cost and undue hardship. Based upon these facts the Commission grants the County Commission an exemption under the Ethics Act.

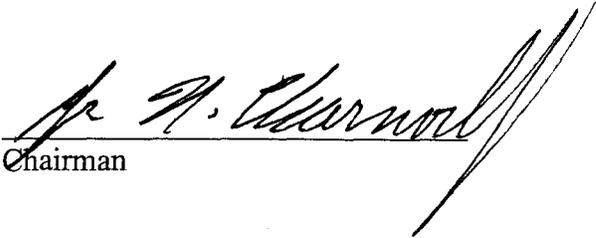
It is also necessary to analyze whether the contract is in violation of W.Va. Code § 61-10-15. The public contract prohibition in W.Va. Code § 61-10-15 is more comprehensive, prohibiting covered persons, such as a County Commissioner, from having a personal financial interest, directly or indirectly, in public contracts, purchases and sales over which their public position gives them "voice, influence or control."

In most situations, it would be a violation for a County Commission to contract with a business which is owned by a holding group of which a County Commissioner is a minority shareholder. However, as the radio tower is the only available tower in the County, the contract is permissible.

The WV Supreme Court of Appeals dealt with a similar situation in *Dials v. Blair*, 111 S.E.2d 17 (W.Va. 1959). In that case, a county school system purchased water from a company in which a board member had an ownership interest. The Court ruled that it was not a violation of W.Va. Code § 61-10-15 for a county board of education to purchase water from the company where water service could not be obtained from any source other than water companies in which a member of the board had an ownership interest.

Given this particular factual situation, the Commission rules that it would not be a violation of W.Va. Code § 61-10-15 for the County Commission to continue to contract with the radio station for the placement of the repeaters on the towers. The County Commissioner who is a limited shareholder in the holding company which owns the radio station, should not participate in the review of the contract or payments, and should recuse himself from any official action in regard to the contract in question.

The Commission notes that this decision is limited to the facts and circumstances of this particular case, and the decision may not be relied upon by others without having first consulted with and received written confirmation from the Ethics Commission.


Chairman