

ADVISORY OPINION NO. 2006-16

Issued On December 7, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County Board of Education asks if it may contract with the Superintendent's spouse to conduct training sessions for teachers.

FACTS RELIED UPON BY THE COMMISSION

The State Department of Education has trained a cadre of instructors to train teachers at the county level on the use of a reading assessment tool called Dynamic Indicators Basic Early Literacy Skills (DIBELS). Only 33 persons in West Virginia are certified to provide this training. In the requesting Board of Education's county, only two persons are certified. One is already employed by the Board as a full-time teacher and the other is a retired teacher who is also the spouse of their County Superintendent.

The Board contemplates hiring the Superintendent's spouse under a contract to provide such services as preparing facilities for training and testing, working with students conducting testing for instructional purposes, and face-to-face training with teachers who will be using DIBELS to assess reading skills.

CODE PROVISIONS RELIED UPON BY THE 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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

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: Provided, however, That nothing herein shall be construed to prevent or make unlawful the employment of the spouse of any such member, officer, secretary, supervisor, superintendent, principal or teacher as principal or teacher, auxiliary or service employee in the public schools of any county. . . .

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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 Act's prohibition against private interests in public contracts, W. Va. Code § 6B-2-5(d), applies to public servants, their spouses and businesses in which they or their spouses have an ownership interest of more than 10 per cent (10%). This prohibition contains a proviso which states that it is not intended to apply to "the employment of any person with any governmental body."

This Commission has not previously determined whether a service contract with the spouse of a public servant who has authority or control over a contract falls under this exemption authorizing employment by a governmental body, when the spouse is acting as an independent contractor. Because of the outcome of this request based upon application of W. Va. Code § 61-10-15, this Commission does not need to decide this question at this time.

W. Va. Code § 61-10-15 provides that it is a criminal violation for certain county personnel, including the County Superintendent, to have a direct or indirect personal financial interest in a public contract over which their public position gives them "voice, influence or control." While this general prohibition includes employment contracts, the statute specifically provides that it does not apply to the spouse of a Superintendent who is employed by the Board as "a principal, or teacher, auxiliary or service employee."

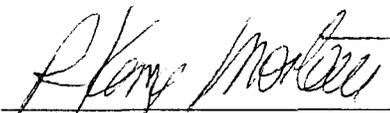
Accordingly, employment of the Superintendent's spouse as a DIBELS trainer would not violate W. Va. Code § 61-10-15, provided this employment falls within one of the exempt categories listed above. This position does not involve a service employee position (such as a bus operator, cook, or custodian) nor an auxiliary (such as a nurse or speech therapist) or school principal. Therefore, to be included, it would have to be as a "teacher."

W. Va. Code § 61-10-15 does not contain a definition of "teacher." W. Va. Code § 18A-1-1, defining various school personnel positions, defines a "classroom teacher" as "the professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity."

In Advisory Opinion 2000-14, this Commission concluded that a part-time football coaching position did not qualify for exemption as a "teacher" or any of the other authorized categories. Similarly, in Advisory Opinion 99-15, this Commission ruled that a position described as a "Work-Based Learning Coordinator" did not come within this specific exemption in W. Va. Code § 61-10-15.

Based upon the information provided by the County Board of Education, this Commission finds that employment of the Superintendent's spouse to provide DIBELS training is prohibited under W. Va. Code § 61-10-15, and the Board should seek another certified cadre member to provide any future training needed within the county school system.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1, *et seq.*, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of W. Va. Code § 61-10-15, and shall have an absolute defense to any criminal prosecution to actions taken in good faith reliance upon such opinion. Further, in accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked.


Chairman