

ADVISORY OPINION NO. 2006-17

Issued On December 7, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A County School Teacher asks if he may sell an original song, musical arrangement and choreography to a boosters organization for use by the High School Show Choir he directs.

FACTS RELIED UPON BY THE COMMISSION

The requester is employed by a County Board of Education as a full-time music teacher. In addition to providing classroom instruction on such subjects as Dance, Introduction to Theater, Open Chorus and Show Choir, he also holds an extracurricular contract with the Board as the Show Choir Director at a county high school.

The Show Choir participates in national competition at various locations, performing a different program each year, lasting approximately twenty-five minutes and usually consisting of five to six song and dance numbers. Stock arrangements of show choir programs are ordinarily purchased from major music publishing companies at costs between \$900 and \$5,000. A professional song writer may charge up to \$650 per arrangement in a five to six arrangement program.

The Show Choir which the requester directs is supported by a Show Choir Boosters organization, a private entity which raises funds to pay for costumes, fees for students who are unable to pay, and other expenses not covered by the Board of Education. These funds are regulated by the County Board of Education as quasi-public funds pursuant to W. Va. Code § 18-5-13.

Outside his county school employment, the requester writes and develops programs for other show choirs, including choreography, songs and musical arrangements, on his own time using his own resources. The Show Choir Boosters is interested in purchasing a customized Show Choir program from the requester to be performed by the Show Choir he directs. The requester ordinarily charges \$750 to write an original song and up to \$500 for an arrangement of an existing song.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) provides in pertinent part that ... A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person

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 . . . county or district officer . . . to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract . . . [over] which as such . . . officer . . . he may have any voice, influence or control

W. Va. Code § 6B-2-5(h)(5) provides:

A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

ADVISORY OPINION

Both the Ethics Act and W. Va. Code § 61-10-15 contain prohibitions against public servants having private financial interests in public contracts, sales or purchases over which their public position gives them a degree of authority or control. W. Va. Code § 61-10-15 is a criminal misdemeanor statute which applies to certain county public servants, including teachers.

The requester proposes to sell his intellectual property, a customized show choir program, to the Show Choir Boosters organization at the school where he teaches. This transaction between a public servant and a private organization does not involve a public contract contemplated in § 6B-2-5(d) of the Ethics Act, or W. Va. Code § 61-10-15. Therefore, such a sale would not violate either of these particular prohibitions.

W. Va. Code § 6B-2-5(h)(5) prohibits public servants from receiving private compensation for providing services they are required to provide in the course of performing their public employment responsibilities. The requester's job responsibilities as a teacher providing instruction in Show Choir and as Show Choir Director do not extend to writing original music, arranging existing music, or creating original choreography. Accordingly, providing the proposed services to the Show Choir Boosters is not prohibited by this provision in the Ethics Act.

The Ethics Act also contains a general prohibition in § 6B-2-5(b)(1) against public employees using their public office, or the prestige of such office, for their own private gain. This prohibition is generally considered to serve as the cornerstone for the more specific restrictions that follow in the Act.

In Advisory Opinion 99-02, this Commission concluded that a vocational teacher who supervised students in the construction of a modular home could not purchase the completed home from his Vocational School at a public auction. In Advisory Opinion 96-13, this Commission determined that a music teacher could not provide private voice lessons to students who were in any of her music classes. These results were primarily based on the application of § 6B-2-5(d) [*public contracts*] and (h) [*private pay for public work*], respectively, and did not require application of § 6B-2-5(b)(1) [*use of office for private gain*].

Inevitably, during each competition season, the choice of the particular program to be performed by a high school show choir in national competition involves a critical determination. As the Show Choir Director, the requester has an indispensable role in influencing this decision. No one expects this decision to be based on the lowest competitive bid from a music publisher. However, when the requester's services for additional compensation are part of the equation, at least the appearance of bias or favoritism is inevitable.

For these reasons, this Commission concludes that selling a musical program to the Show Choir Boosters to be performed by the Show Choir the requester directs as a public employee of a County Board of Education would involve a prohibited use of office for private gain and the requester should not further pursue this initiative.

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