



STATE OF WEST VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
CHARLESTON 25305

CHARLIE BROWN  
ATTORNEY GENERAL

July 7, 1987

The Honorable Thomas McNeel  
State Superintendent of Schools  
Department of Education  
Building No. 6, Room 358  
Charleston, West Virginia 25305

Dear Dr. McNeel:

The Attorney General of the State of West Virginia hereby acknowledges receipt of your request, dated March 31, 1987, for an opinion of the Attorney General. Please consider this opinion to be the response of the Attorney General as required by Chapter 5, Article 3, Section 1, of the Code of West Virginia of 1931, as amended (hereinafter Code). Your request for an opinion raises the question of whether or not a dentist who provides services for employees and dependents of the Board of Education for the County of Harrison may be selected through a bid process to provide claims administration, actuarial, and data processing services to the Board of Education for the County of Harrison, for those services which the dentist provides to the Board of Education for the County of Harrison.

The Board of Education for the County of Harrison provides its employees and their dependents with a health insurance program. As a part of the health insurance program furnished to employees and their dependents, the Board of Education for the County of Harrison provides for reimbursement of diagnostic and preventive dental services, basic dentistry, major dentistry, and orthodontics. All eligible employees or eligible dependents may select the services of any licensed dentist and receive benefits for reasonable and customary charges. The treating dentist selected by the eligible employee or eligible dependent must submit a treatment plan and itemized charges to the plan administrator.

The Board of Education for the County of Harrison let out to bid a contract to provide claims administrative services as well as actuarial and data processing services for the dental benefit program. The pertinent requirements are set out below:

"Provide a monthly claims check register listing all benefit payments.

"Prepare a monthly claims detail report showing benefit payments issued by line of benefit for employees and dependents.

"Prepare and present an Annual Operations Report detailing costs of the benefits being provided by the plan, analyzing claim trends and suggesting proper action to maintain the plan on a sound financial basis."

A dentist who provides services to eligible employees and their eligible dependents was the low bidder for provision of the services.

W. Va. Code § 61-10-15 provides in pertinent part as follows:

"It shall be unlawful for any member of a county commission, overseer of the poor, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools, or any member of any other county or district board, or for any county or district officer 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, officer, secretary, supervisor, superintendent, principal, or teacher, he may have any voice, influence or control \* \* \*."

Four facts have to be established in order for Code 61-10-15 to be applicable to the situation described hereinabove. A direct or an indirect pecuniary interest must exist. The interest must be in the proceeds of a contract or service or in furnishing any supplies in a contract. The person having the interest must be a member of a county commission, overseer of the poor, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools, a member of any other county or district board, or a county or district officer. Finally, such a person must have a voice, influence, or control over the awarding or letting of such contract. All four facts must be established in order for Code 61-10-15 to apply.

Code 61-10-15 is a clear statement of the public policy of the State of West Virginia. Its provisions are free from ambiguity. The statute is remedial in nature and is designed to protect public funds. The effect of the statute is to remove from public office any and all motivation to use public office for personal gain. Alexander v. Ritchie, 132 W. Va. 865, 53 S.E.2d 735 (1949); Jordan v. McCourt, 135 W. Va. 79, 62 S.E.2d 555 (1950); Cimino v. Board of Ed. of County of Marion, \_\_\_ W. Va. \_\_\_, 210 S.E.2d 485 (1974); Serge v. Matney, \_\_\_ W. Va. \_\_\_, 273 S.E.2d 818 (1980).

Code 61-10-15 is a remedial statute. There is no exception to Code 61-10-15. The statute should and will be rigidly enforced. Jordan v. McCourt, supra. However, the statute is a penal statute and must be strictly construed. State ex rel. Anderson v. Bd. of Ed. of Mingo Cty., \_\_\_ W. Va. \_\_\_, 233 S.E.2d 703 (1977). Further, a violation of this statute constitutes misconduct in office subjecting a violator to removal from office under Code 6-6-7. Kesling v. Moore, 102 W. Va. 251, 135 S.E. 246 (1926).

The first issue to be resolved is a factual issue regarding the existence of a pecuniary interest. It is not necessary to show an intent to violate the statute. It is only necessary to show a pecuniary interest in a contract by a listed person. Hunt v. Allen, 131 W. Va. 627, 53 S.E.2d 509 (1948); Alexander v. Ritchie, supra. The interest may be direct or indirect. Hunt v. Allen; Jordan v. McCourt, supra. There is a clear pecuniary interest in the claims administration services section of the program. Further, the interest is in the proceeds of a contract or services. However, the dentist is not a member of any class of individuals named in Code 61-10-15. Finally, the dentist did not have any voice, influence, or control over the awarding or letting of the contract. Although the facts described above meet two of the criteria for the application of Code 61-10-15, they do not meet all of the necessary criteria. Therefore, Code 61-10-15 does not apply to the situation described.

Article III, Section 2, of the West Virginia Constitution provides in full as follows:

"All power is vested in, and consequently derived from, the people. Magistrates are their trustees and servants, and at all times amenable to them."

Article III, Section 2, of the West Virginia Constitution applies to all officers and employees of the body politic of the

State of West Virginia, including officers and employees of county boards of education. Mason County Board of Education v. State Superintendent of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980).

"A public officer is in the position of a fiduciary and he is under an obligation to serve the public with highest fidelity and undivided loyalty." State ex rel. Preissler v. Dostert, 163 W. Va. 719, 730, 260 S.E.2d 279, 286 (1979). "The duty of a public officer to fulfill the obligations of his office should take precedence over all other matters." Kemp v. Boyd, \_\_\_ W. Va. \_\_\_, 275 S.E.2d 297, 302 (1981). A public officer may not act as the agent of a private person where the private agency might come into conflict with the efficient fulfillment of his official duties. Such an agency is contrary to public policy and prohibited by Article III, Section 2, of the West Virginia Constitution. Such a position is unlawful even if there is no actual loss or detriment to the public or fraudulent intent in entering into the position. Graf v. Frame, \_\_\_ W. Va. \_\_\_, 352 S.E.2d 31 (1986).

A person who accepts a public office assumes the burdens and obligations of the office. Nelson v. West Virginia Public Employees Insurance Board, \_\_\_ W. Va. \_\_\_, 300 S.E.2d 86 (1982). An obligation assumed on taking public office is that a person not occupy a position in which a private interest might conflict with a public duty. Graf v. Frame, supra.

In order for the prohibition of Article III, Section 2, of the West Virginia Constitution to apply, it is necessary that the behavior analyzed be performed by a public officer. Graf v. Frame, supra. Further, there must either be an actual conflict of interest or a potential conflict of interest. Graf v. Frame, supra. See Nelson v. West Virginia Public Employees Insurance Board, supra; Kemp v. Boyd, supra; State ex rel. Preissler v. Dostert, supra.

In the instant case, a potential for a conflict of interest exists at the very least. The plan administrator is required to supervise the basic funding portions of the plan. The dentist who bid on the position provides services supervised by the plan administrator. The potential for conflict is obvious. However, in order for the prohibition under Article III, Section 2, of the West Virginia Constitution to apply, the position must be that of a public officer.

There are several criteria that must be met in order to determine whether a person occupying a particular position is a

public officer or a mere employee. These criteria are as follows:

1. Is the position created by law;
2. Is the position designed by office;
3. Are the qualifications of the appointee prescribed;
4. Are the duties, tenure, salary, bond and oath either prescribed or required; and
5. Is the person occupying the position a representative of the state?

State ex rel. Carson v. Wood, 154 W. Va. 397, 175 S.E.2d 482 (1970); Graf v. Frame, supra.

Applying this criteria to the instant case, we find that the position is created by contract; the position is not designated as an office; the qualifications of the appointee are not prescribed, the duties are prescribed; tenure, salary, bond and oath are not prescribed or required; and the person occupying the position is performing ministerial acts as an agent of the Board. It is clear therefore that the position of plan administrator is not a public office. Accordingly, Article III, Section 2, of the West Virginia Constitution does not prohibit a person from occupying both positions.

Article XII, Section 9, of the West Virginia Constitution provides in full as follows:

"No person connected with the free school system of the State, or with any educational institution of any name or grade under state control, shall be interested in the sale, proceeds or profits of any book or other thing used, or to be used therein, under such penalties as may be prescribed by law: Provided, that nothing herein shall be construed to apply to any work written, or thing invented, by such person."

Before Article XII, Section 9, of the West Virginia Constitution applies, one must establish that a person is connected with the free school system and that the person is interested in the sale, proceeds, or profits of any book or other thing used in the free school systems.

The test for connection is much less rigorous than that for public office. The county boards of education are a part of the free school system. A person acting as the agent through a formal contract with the Board of Education for the County of Harrison is connected with the free school system. A dentist providing services to the Harrison County Board of Education is required to provide services, as well as space maintainers, inlays and crowns, removable bridges, partials, dentures, and orthodontics. All of the listed items are things. The dentist is interested in the sale, proceeds, or profits of such things by reason of the fact that he or she is compensated for them. Accordingly, Article XII, Section 9, of the West Virginia Constitution prohibits a dentist who furnishes services to a county board of education from also serving as the plan administrator of a dental plan under which said dentist furnishes services.

Very truly yours,

CHARLES G. BROWN  
Attorney General

By

 Deputy  
STEPHEN D. HERNDON

CGB/SDH/mlk