

June 1968

Conflict of Interest

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Recommended Citation

Edward P. Johnson, *Conflict of Interest*, 70 W. Va. L. Rev. (1968).
Available at: <https://researchrepository.wvu.edu/wvlr/vol70/iss3/13>

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Conflict of Interest

On February 8, 1968, the West Virginia Legislature passed a bill dealing with conflicts of interest of various classes of state officials and employees.¹ Upon examination, it can be seen that the statute actually deals with only one area of conflicts of interest: the disclosure, by state officials and employees, of business holdings which may be conflicting with their governmental role.

To discuss the ramifications of this new Act, it is first necessary to understand what is meant by the term "conflict of interest." In addition, the various common law, constitutional and statutory provisions in West Virginia should be examined.

In describing a "conflict of interest," one is faced with a very difficult task. Much like "sin," few can define a conflict of interest, yet all are against it. Very early in the common law, a body of law arose to cope with blatant abuses of a public position by an officer. It was recognized that the public official, being in a position of public trust, has "the obligation of acting solely in the interests of the cestui que trust, the public."² Through this reasoning, such crimes as bribery, embezzlement, and extortion were restricted.³ While these prohibitions proved to be quite beneficial, no provision was made for many minor abuses, such as those that arise when a public official is in a position to award a public contract to his own firm.

While everyone in this country is said to have the right to become an officeholder, one must at times subordinate this right to the public good. An officer whose private interests would prevent him from exercising impartial judgment in matters of public concern should not be allowed to serve. Accordingly, the common law came to recognize this fact, and, by expanding upon it, attempted to prevent situations where there existed even a *possibility* of divided loyalty.⁴ These offenses usually fell under the broad heading of "misconduct in office," although some more specific prohibitions did develop. The usual common law punishment for this misconduct offense was imprisonment or fine, to which may be added, disqualification from holding office or removal from office.⁵ The problem in enforcing

¹ Ch. 35, Acts of the West Virginia Legislature, Reg. Sess. 1968.

² Note, *Conflict of Interests: State Government Employees*, 47 VA. L. REV. 1034 (1961).

³ *Id.*

⁴ *Id.*

⁵ R. PERKINS, CRIMINAL LAW 410 (1957).

these common law prohibitions is obvious—where should the line between misconduct and acceptable activity be drawn? It is, of course, impossible to eliminate all potential conflicts of interest. Even if such a complete prohibition were effected, the number of civil servants willing to take employment under such circumstances would indeed be small. Thus somewhere in the gray area between the extremes of total prohibition and no restriction at all lies an optimum level of regulation. In such a system, the public weal would be protected, while reasonable activities of public officials would be permitted.

The various jurisdictions in the United States have approached this problem in a variegated and often haphazard fashion. Consequently, there are widely varying conceptions of what is and what is not acceptable practice in this country.

In West Virginia, certain alterations and additions have been made to the common law. For the most part, however, West Virginia has not developed a coherent and comprehensive approach to the problem.

The most basic conflict of interest provision in this state is found in the West Virginia Constitution. Article four, section six provides for the removal of all officers, elected or appointed, for official misconduct, incompetence, neglect of duty, or gross immorality.⁶ The West Virginia Supreme Court of Appeals has held that misconduct in office is any unlawful behavior by a public officer in relation to the duties of his office, wilful in character. This does not necessarily imply corruption or criminal intent.⁷ It appears that this constitutional provision is a “catch-all” to which the state can turn in the instance of an evident conflict of interest. Unfortunately, a major problem exists in applying the statute to specific situations, on account of its lack of positive, concrete guidelines. The vagueness of this section renders it nearly unenforceable today. The courts, therefore, need sensible guidelines as to the limits of public policy in the conflict of interest area.

It should be noted that West Virginia does have several provisions which treat specific offenses by designated classes of officers. One such area is that of *incompatible offices*. A person holding two offices is said to violate his public trust, not by his physical

⁶ W. VA. CONST. art 4, § 6.

⁷ Kesling v. Moore, 102 W.Va. 251, 135 S.E. 246 (1926).

inability to perform the duties of both offices, but from the fact that the inconsistent nature and relation of the offices renders the dual holding improper. Public policy considerations cannot tolerate such actions.⁸ Under the West Virginia Constitution (and the earlier common law) dual office holding is forbidden.⁹ It has been held in West Virginia that the acceptance of an incompatible office actually vacates any other office which the officer may hold.¹⁰

Another major area of public concern centers around commercial transactions. Few instances of conflict of interest can incite public rath and indignation as can the case where an official secures a lucrative public contract for his own benefit. As the West Virginia Supreme Court of Appeals has said, "common prudence dictates that men holding official positions must not deal with themselves in a private capacity, directly or indirectly."¹¹ Such action, which apparently was official misconduct at common law, has been further circumscribed in West Virginia. The West Virginia Constitution provides that no senator nor delegate can hold civil office for profit during his term, nor shall he "be interested, directly or indirectly in any contract with the State, or any county thereof, authorized by any law passed during the term for which he shall have been elected."¹²

By statute, interests in public contracts have been forbidden to many municipal, county, and school officials. The wording of the law is such that if any of these officers becomes "pecuniarily interested, directly or indirectly" in the proceeding of any contract or service, he is guilty of a misdemeanor and is automatically removed from office.¹³ Wilfullness is in no manner an element.

This statute, providing for mandatory removal, leads to very harsh results. Consequently, a school board member who provides the school system with goods and services from his firm is subject to immediate removal, even though the services were provided at or below cost.¹⁴ The court has said that the Code "implements the

⁸ *State ex rel. Thomas v. Wysong*, 125 W.Va. 369, 24 S.E.2d 463 (1943).

⁹ W. VA. CONST. art 7, § 4.

¹⁰ *Building & Loan Ass'n v. Sohn*, 54 W.Va. 101, 46 S.E. 222 (1903).

¹¹ *Alexander v. Ritchie*, 132 W.Va. 865, 53 S.E.2d 735 (1949).

¹² W. VA. CONST. art 6, § 15.

¹³ W. VA. CODE ch. 61, art 10, § 15 (Michie 1966).

¹⁴ *Jordan v. McCourt*, 135 W. Va. 79, 62 S.E.2d 555 (1950). *See also Alexander v. Ritchie*, 132 W. Va. 865, 53 S.E.2d 735 (1949); *Haislip v. White*, 124 W. Va. 633, 22 S.E.2d 361 (1942); *Arbogast v. Shields*, 123 W. Va. 167, 14 S.E.2d 4 (1941).

public policy of this State, and its provisions are clear and unambiguous. Although harsh, its objects and purposes are salutary."¹⁵ The court concluded that, "the statute is designed to remove from public officers any and all temptation for personal advantage."¹⁶ The severity of this statute has been upheld in case after case, affecting both the guilty and the unwary alike. It appears desirable to alter this provision so that a person with a going business concern is not effectively prevented from entering into such an office.

It also has been held that approval of a contract by a school board member who knows that another member has an interest in the contract is official misconduct, making the first member also subject to removal from office.¹⁷

Not only does the law affect the officials involved, but it also voids the contract, even preventing recovery for work already completed on a quantum meruit basis.¹⁸

Although there are statutes and provisions to deal with certain other instances of conflict of interest,¹⁹ it is evident that large areas of possible conflict remain unscathed. Common law remedies are no longer capable of handling the burgeoning problem. Although codes of ethics are one answer, it appears that statutory guidelines are the most practical answer.

This, then, brings us to the new act, which may be considered as a strong first step in the right direction. In any effective system of conflict of interest prevention, some means of disclosure must first be adopted. This Act adds a new chapter to the West Virginia Code entitled, "Legislators, Public Officers, Agents, Servants, Employees and Judges; Conflicts of Interest."²⁰ It requires state legislators, officers and employees of the executive branch, judges, and judicial branch employees to file an affidavit, under oath, each January. That affidavit is to contain the name of every firm, corporation, partnership, or other business association in which the

¹⁵ Alexander v. Ritchie, 132 W. Va. 865, 53 S.E.2d 735 (1949).

¹⁶ *Id.*

¹⁷ Jordan v. McCourt, 135 W. Va. 79, 62 S.E. 2d 555 (1950).

¹⁸ *Id.*

¹⁹ See, e.g., W. VA. CODE ch. 6, art. 6, § 2 (Michie 1966), which gives the Senate or House of Delegates power to expel a member; W. VA. CODE ch. 6, art 6, § 3 (Michie 1966), which provides for impeachment or removal of any officer of the State or any judge for maladministration, corruption, immorality, or other good cause.

²⁰ Ch. 35, Acts of the West Virginia Legislature, Reg. Sess. 1968.

official or employee (or members of his immediate family) owned at least a ten per cent interest, and from which goods or services have been supplied to the state. Also, the person must list each corporation, firm, partnership, or other business association of which he is an "officer, director, agent, attorney, representative, employee, partner, or employer" and which is furnishing or has furnished goods to the state.²¹

In addition, the affected person should disclose "any other interest or relationship which might reasonably be expected to be particularly affected by legislative action or is in the public interest."²²

The majority of the provisions appear to be adequate and reasonable, although the ten percent interest rule might better be served by an additional provision requiring an indication of the total monetary value of the investment in the company or form. The family relationship requirement is also basically sound, although it might be extended to include more than just spouse and children as it does now. The last provision discussed above dealing with "other interests or relationships" appears to be mere surplussage. It is so vague as to be completely ineffective.

The Act further provides that if an intentionally false statement is filed, the person doing so is guilty of a misdemeanor and is subject to imprisonment for from six months to a year.²³ In the case of a failure to file, the person is automatically suspended without pay until he complies with the directive.²⁴

The new Act also requires that records of the disclosure shall be compiled, opened to public inspection, and kept for five years.²⁴ While this is a useful provision, it would serve its purpose more efficiently if some form of dissemination were effected. For example, the immediate employer should be given a list of the possible conflicts of interests of his employees.

To summarize, it can be seen that much remains to be done in the conflict of interest area in West Virginia. The present authority relies on a patchwork of common law, constitutional,

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

and statutory provisions. Accordingly, it is uneven in its approach, being too harsh in some instances, too lax in others.

Further progress may not be achieved by enacting a comprehensive statute, using the new disclosure Act as a point of departure. This would require weighty consideration, for many problems beyond the scope of this paper must be taken into account (*e.g.*, the question of the state legislator appearing before a state administrative board; receipt of gifts; disclosure of confidential materials, etc.). Certain other technical problems must also be considered, such as whether the over-all conflict of interest legislation should include municipal and county employees and officials. While the difficulties are many, certain other states have not found them insurmountable. It is hoped that the legislature will extend this basic conflict of interest law by taking far-reaching action in this vital area within the near future.

Edward Perry Johnson

Election Laws

Chapter 24 of the Acts of the West Virginia Legislature¹ makes changes in seven sections of the West Virginia Election Code.² The changes are confined to two areas: purging of the registration rolls and defining the powers and duties of the Secretary of State. The bill becomes effective 90 days from passage or approximately one week before the 1968 primary election on May 14. Therefore, its operation will probably not have any substantial effect, if any, until the general election in November 1968.

Four of the seven amended sections relate to purges of the registration rolls. Before the present amendment, the West Virginia Election Code stated that a voter's registration would be canceled by the clerk of the county court if the voter failed to vote in a period covering two primary and general elections.³ As amended by Chapter 24, this section places an affirmative duty on the

¹ Ch. 24, Acts of the West Virginia Legislature, Reg. Sess. 1968 amends W. VA. CODE ch. 3, art. 2, §§ 3, 9, 11, 16, 22 and 36 and ch. 3, art. 6, § 9 (Michie 1966).

² The 58th Legislature passed six other bills making minor changes in the election laws affecting W. VA. CODE ch. 3, art. 1, §§ 16, 19, 23, and 29; ch. 3, art. 2, § 30; and ch. 3, art. 4, § 20 (Michie 1966).

³ W. VA. CODE ch. 3, art. 2, § 3 (Michie 1966).