

ADVISORY OPINION NO. 89-132

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON FEBRUARY 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

President of a State University

OPINION SOUGHT

Whether it is a violation of the Act for a State University President to be a Board of Director for a telephone company that does business with the University?

OTHER FACTS RELIED UPON BY THE COMMISSION

The University President was appointed to the Board of Directors of the Telephone Company in January 1989. This appointment was approved by the Board of Regents President.

There are ten members on the Telephone Company's Board. Seven are required not to be company employees. The Directors are customarily re-elected each year.

The Telephone Company selects Board members partly on the basis of their geographical location and business or profession. The President was selected because of his unique personal prestige which is based on his intelligence, education, skills and abilities. He has a Ph.D. in Economics and Industrial Relations, and has been engaged in academic research and publication in the area of public sector bargaining.

In at least two other states the Telephone Company has college or University Presidents on their Board. Several state College Presidents and the Board of Regents Chancellor preceded this University President on the Board.

As Board of Director the University President receives an annual retainer of \$12,000 and a meeting fee of \$600. The Board meets six times per year. The University President does not receive bonuses or other compensation based upon the performance of the Company.

The Telephone Company Board ordinarily does not discuss its customers (including the University) at Board meetings. However, in the event that would occur the University President would abstain and remove himself from participating in any discussion that might conflict with the University's interests or with his role as President.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) states in pertinent part that... A public official may not intentionally use his...office or the prestige of his...office for his...own private gain or that of another person. The performance of usual and customary constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code 6B-2-5(b)(2) states in pertinent part that...the Legislature recognizes that there may be certain public officials...who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. Such persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by such persons may have its own inherent prestige, it would be unfair to such individuals and against the best interests of the citizens of this state to deny such persons the right to hold public office or be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them...Exemptions may be granted by the commission, on a case by case basis, when it is shown that: (1) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (2) the office held or the employment engaged in is such that it normally or specifically required a person who possesses personal prestige; and (3) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

West Virginia Code 6B-2-5(h)(1) states in pertinent part that...no full-time public official...who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official or public employee whether rendered as an employee or as an independent contractor.

## ADVISORY OPINION

An analysis of the facts presented and the pertinent statutory provision of subsection (b)(1) follows:

Subsection (b)(1) of the Act prohibits a public employee from intentionally using his office or prestige for his private gain.

However, subsection (b)(2) of the Act recognizes that there may be certain public employees who bring to their respective employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal traits.

In many cases these persons bring a personal prestige to their employment which inures to the benefit of the State and its citizens. Such persons may, in fact be sought by the State to serve in their employment because through their unusual traits, they bring stature and recognition to their employment and to the State itself.

It would be unfair to such individuals and against the best interests of the citizens of the State to deny such persons the right to be publicly employed on the grounds that they would, in addition to the emoluments of their employment be in a position to benefit financially from the personal prestige which otherwise inheres to them.

An individual may be granted an exemption from the application of the provisions of subsection (b)(1) when it is shown that:

(1) The public employment engaged in is not such that would ordinarily be available or offered to a substantial number of citizens of this State;

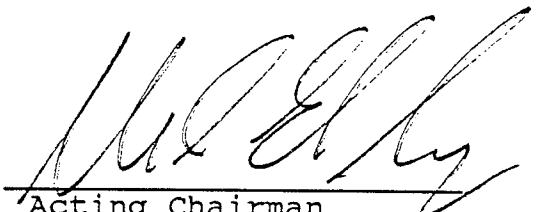
(2) The employment held is such that it normally requires a person who possesses personal prestige, and

(3) The person's employment contract provides or anticipates that the person will gain financially from activities which are not a part of his employment.

It is obvious that the University President meets all three criteria above and should be granted an exemption to the provision of subsection (b)(1) to be a Board of Director for the Telephone Company.

An analysis of the facts presented and the pertinent statutory provisions of West Virginia Code subsection 5(h)(1) follows:

1. The University President is a full-time employee who exercises policymaking, nonministerial and regulatory authority.
2. The second prong of subsection (h)(1) required to prohibit the full-time employee from being employed by the Telephone company is that either he or his agency may or does regulate the company employing him.
3. However, in this instance the University President does not regulate the Telephone Company.
4. Therefore, it is not a violation of subsection (h)(1) of the Act for the University President to be employed as a Board of Directors member for a Telephone Company.

  
Acting Chairman

MICHAEL EDWARD NAGY  
2-1-98