

ADVISORY OPINION NO. #91-50

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 11, 1991

GOVERNMENTAL BODY SEEKING OPINION

Chairman of a County Solid Waste Authority

OPINION SOUGHT

Whether it is a violation of the Ethics Act for an individual to serve as the Chairman of the Solid Waste Authority and the Director of the Solid Waste Authority simultaneously?

FACTS RELIED UPON BY THE COMMISSION

The requestor is the Chairman of a County Solid Waste Authority and for 2 1/2 years has served without compensation as the Director of the Authority. Over a period of time, his duties as such have expanded to include the preparation and submission of plans and reports, employee supervision and general accounting. Further, as the acting Director of the Authority the requestor is required to attend meetings, seminars and legislative hearings.

Because of the time required to perform these functions, the requestor can no longer serve as the Authority's Director without compensation and is asking for a subsistence stipend of approximately \$6,000 per annum.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a public official...not knowingly and intentionally use his ...office or the prestige of his...office for his...own private gain or that of another person.

West Virginia Code Section 6B-2-5(h)(1) states that no full-time public official...who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself...to be employed by any person who is or may be regulated by the governmental body which he or she serves while he...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...whether rendered as an employee or as an independent contractor.

West Virginia Code Section 20-9-3(b) states that...the Authority Board of Directors shall be comprised of five members who shall be appointed...The members of the Board shall receive no compensation for their service thereon but shall be reimbursed for their actual expenses incurred in the discharge of their duties...

ADVISORY OPINION

Solid Waste Chairman

The question contained in the request letter relates to the propriety of the Chairman of the Solid Waste Authority seeking the position of Director of the Solid Waste Authority.

Subsection 6B-2-5(h) of the Ethics Act only limits a full-time public official who exercises policymaking, nonministerial or regulatory authority from seeking employment with, or allowing himself to be employed by any person **who is or may be regulated** by the governmental agency which he serves while he serves in such governmental agency.

In this instance Subsection 6B-2-5(h) would not apply since the individual while acting as the Solid Waste Authority Chairman would not be considered a "full-time" public official. Furthermore, although in his capacity as a County Solid Waste Authority member he would exercise regulatory or non-ministerial responsibilities, he would not be seeking employment with a person regulated by the Authority.

Therefore, it would not be a violation of subsection 6B-2-5(h)(1) of the Ethics Act for a member of the Solid Waste Authority to apply for the position of Director of the Solid Waste Authority.

Favoritism

However, subsection 6B-2-5(b)(1) of the Ethics Act states that a public official may not knowingly and intentionally use his office for his own private gain or for that of another person. A prohibition against nepotism is included within this subsection. Nepotism has been defined by the Commission as favoritism shown or patronage granted by persons in high office to relatives or close friends in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. Under the facts of this matter the Commission believes that its nepotism regulations would apply.

The Commission has established certain guidelines to follow in order to aid public officials in avoiding the appearance of nepotism when they are considering hiring a relative or close friend for a public position:

- a. Provide an adequate and meaningful public notice to all possible applicants.
- b. Remove himself from the decision making process and substitute independent, impartial decision-makers.
- c. Insure that the relative or close friend possesses the qualifications necessary for the position.

If the County Solid Waste Authority and the Chairman have followed the steps outlined above it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Chairman to be considered along with the other applicants for the position.

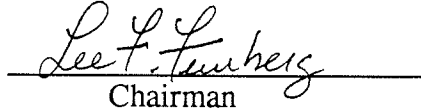
However, the Commission would note that Advisory Opinion #91-16 established that an individual may not serve as the Chairman of the Solid Waste Authority and the executive Director of the Solid Waste Authority simultaneously. Consequently, the Solid Waste Authority Chairman must resign his position as an appointed member of the Authority before accepting the paid position as Director of the Solid Waste Authority.

Voting

Subsection 6B-1-2(c) of the Ethics Act provides that in part-time public service certain conflicts of interest are inherent and when such conflict becomes personal to a particular public official, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

Therefore, a public official is not permitted to vote on or decide a matter that has become "personal" to that individual. The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, is affected in a manner which may influence his vote or would give the appearance of impropriety.

Obviously, the matter of considering who to hire when a Board Member is a candidate for a position would be personal and requires the recusal of that member. For a public official's recusal to be effective, it is necessary for the official to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period.


Chairman