

ADVISORY OPINION NO. 2012-04

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Attorney for a Municipal Water Board asks if the Ethics Act permits the Board to employ the Board's Chairperson as its Supervisor

FACTS RELIED UPON BY THE COMMISSION

City Council appoints the Members of the Water Board. There are five Members. The Board Members select the Chairperson from the Members of the Board. The Supervisor oversees the day-to-day operations of the Water Board, and is effectively the Executive Director. Among other duties, the Supervisor oversees the office, billing, all aspects of the financial operation, operation, maintenance, all expenditures, overtime and scheduling. Additionally, the Supervisor supervises employees.

The Requester states that the Board has advertised the position in the local paper as a part time position that requires the employee to be available as needed, around the clock, with no additional compensation. Further, the Supervisor must reside in the area of the municipality. The pay rate will not exceed \$20 per hour. Finally, the Supervisor is prohibited from being employed elsewhere during normal business hours.

Only the Board's Chairperson and a current full-time Board employee applied for the position. According to the Requester, the Board employee stated that he had not seen the advertisement before applying and signed a written statement withdrawing his application upon learning that he could not also retain his full-time position with the Board. Thereupon, the Board hired its Chairperson as its paid Supervisor. The Board has put in place a procedure whereby the Board will supervise the Supervisor.

The Requester asks whether the Ethics Act permits its Chairperson to continue as both Chairperson of the Board and its paid part-time Supervisor.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) reads, in relevant part:

A public official or public employee may not knowingly or 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... The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code § 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service[.]" W. Va. Code § 6B-1-2(c).

The Ethics Act's prohibition against use of office for private gain was designed to steer public servants away from inherently questionable situations. This prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Many years ago, in Advisory Opinion 91-16, the Commission was presented with multiple questions concerning the employment of the Solid Waste Authority's Chairperson as its part-time Executive Director. After addressing the other issues at length, the Commission concluded, without further analysis, "The Commission would note that the public employee may not serve as the Chairman [sic] of the Solid Waste Authority and the Executive Director of the Solid Waste Authority simultaneously."

Thereafter, in A.O. 91-50, relying on A.O. 91-16, the Commission affirmed its conclusion and stated, "Consequently, the Solid Waste Authority Chairman [sic] must resign his position as an appointed member of the Authority before accepting the paid position as Director of the Solid Waste Authority."

The Commission recognizes that the Ethics Act has a provision that expressly allows the employment of persons with a government body.¹ For example, in AO 2012-01 issued on this date, citing earlier advisory opinions authorizing such, the Commission reaffirmed that a City Council Member may be employed by the City where s/he serves as an elected Council Member. The Commission noted, however, that other rules may limit such dual employment/service.

As it relates to the employment of the Chairperson of a Board, a different rule of law applies. This situation is more analogous to the employment of a Mayor by a municipality. In fact, the Commission has frequently interpreted Ethics Act in the context of the employment of a Mayor by the municipality. For example, in A.O. 2006-05, the Commission ruled that a Mayor in a Strong-Mayor form of government could not

¹ "... [N]o elected or appointed public official or public employee . . . may be a party to or have an interest in the profits or benefits of a contract which the 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....**" (Emphasis added). W. Va. Code § 6B-2-5(d)(1).

be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees.

The Commission summarized the basis for this prohibition as follows:

Although both positions are part-time and the Mayor would be able to fulfill both job responsibilities during the course of a work week, an inescapable conflict exists as the Mayor must supervise the City's employees. The conflict could not be avoided by the Mayor recusing himself on relevant votes or even delegating management responsibilities over his other positions. While the Mayor may be able to balance these job responsibilities and perform his positions in an impartial manner, as a matter of public policy and due to the conflicting nature of the duties and responsibilities, the Ethics Commission finds that the Ethics Act prohibits the Mayor from also being regularly employed by the City.

Advisory Opinion 2006-05; See *also* Contract Exemption 2009-01.²

Here, the Board has proposed to supervise the Supervisor, removing a direct conflict similar to that presented in the Strong Mayor opinions. The Supervisor retains, however, the remaining administrative powers. Yet, even in a municipality where the Mayor and Council members share the administrative powers, the Commission found that the Mayor is prohibited under the Ethics Act from being regularly employed by the municipality. In Contract Exemption 2010-03, the Commission held:

The Commission hereby finds that because the Mayor and Council members share the administrative powers of the Village, the Mayor is in a position similar to that of a Mayor in a Strong-Mayor form of government. Hence, the analysis and prior precedents of a Strong-Mayor form of government are applicable to the Mayor in a Mayor-Council form of government. Accordingly, the Commission finds that the Mayor is prohibited under the Ethics Act from being regularly employed by the Village.

The Chairperson of a municipal board has an inherent, over-riding interest in every aspect of each employee's employment with the board. Simply removing the oversight of his own employment is insufficient to negate the conflict of interest inherent in being one's own boss. Therefore, the Commission hereby generally finds that the Ethics Act prohibits a Chairperson (or Board President) from being employed by the Board simultaneously. Thus, under most circumstances, if a Board believed that its

² In Contract Exemption 2009-01, the Commission found that it would violate W. Va. Code § 6B-2-5(d)(1) for the Mayor of the Town of Mabscott to continue to be employed as Police Chief; Head of the Street Department; and/or Assistant Fire Chief during his service as the Town's Mayor. The Commission's ruling relied upon prior precedent and prohibition of employment of the Mayor in a Strong-Mayor form of government.

Chairperson (or Board President) is the best candidate to be employed by the Board, then the Chairperson (or Board President) must resign his position as Chairperson (or Board President) of the Board, but may remain a member of the Board.³ Additionally, in such circumstances, the employee/Board Member may not be a member of the Board Personnel Committee.

In this particular instance, however, the Commission finds the facts to be so unique that it cannot permit the Board to hire its Chairperson even if he resigns his position as Chairperson. The Commission finds that it appears that the Board may have tailored the job description in such a way that only the Board's Chairperson meets the qualifications. For example, the Supervisor position requires 15 years managerial experience in municipal potable water, which the Chairperson has from his years on the Board. The position does not require the Supervisor to have any professional license or certification. Further, the Commission takes administrative notice that few, if any, jobs require a part-time position to be available around the clock and not have other employment during normal business hours.

In Advisory Opinion 92-20, a Mayor and City Council sought permission to hire the Mayor's spouse without giving public notice of the position and by transferring the Mayor's salary to the spouse. The Commission noted that the position was created specifically for the Mayor's spouse and was not available to other qualified and interested individuals. Denying the request, the Commission ruled that while W. Va. Code § 6B-2-5(b)(1) does not presumptively prohibit the employment of a Mayor's spouse, here the Mayor and City Council failed to follow the Commission's nepotism guidelines, e.g. advertising the position, considering all qualified applicants, and removing the Mayor from the process.

Here, although the Board advertised the position and the Chairperson was removed from the process, it does not appear that any other person had a meaningful opportunity to be considered for the position because the job was so narrowly tailored. Even before the position was advertised, when the Board learned that the previous Supervisor was retiring, in discussions among the Members they concluded that their Chairperson was the best candidate, without having advertised the position. In Advisory Opinion 91-16, the Commission reviewed the proposed employment of the Chairperson of a County Solid Waste Authority by the Authority, and stated:

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. The Commission assumes that the Authority Chairman [sic] would be considered a "close friend" of the other Solid Waste Authority Members.

³ This opinion clarifies AOs 91-16 and 91-50 which could be interpreted to require the Chairperson to resign as a member of the board before accepting employment with the board.

This opinion should not be interpreted to require all municipal and county governing bodies to publicly advertise every employment opportunity, especially if it is a short-term, temporary position or an emergency situation. Instead, when the public body knows in advance that one of its preferred candidates is a relative, close friend, or fellow member of the public body, in order to avoid violating W. Va. Code § 6B-2-5(b) (1), then the public body must follow the Commission's nepotism guidelines more fully set forth at W.V.C.S.R. § 158-6-3.

Thus, the Ethics Commission concludes that the Requester may not employ its Chairperson as its Supervisor. If the Requester is unable to find a qualified candidate after a meaningful search using relevant, less unnecessarily restrictive requirements, then it may return to the Commission to seek a Contract Exemption to hire the Board's Chairperson; to do so requires the Board to prove that hiring anyone else would result in undue hardship, excessive cost, or substantial interference with government operations.

The Board shall, within thirty (30) days, notify the Ethics Commission how it will comply with this opinion. Further, the Board is hereby granted a transition period of ninety (90) days from the date of this opinion to comply with this opinion.

During this time, the Commission encourages the Board to examine its job description carefully to determine whether the restrictions noted herein are necessary for the Supervisor to be effective. Further, the Board, if it elects to re-advertise the position, shall widely advertise the position throughout the area, not just in the local paper, and shall allow sufficient time for the advertisement to run, but not less than one week.

The Commission appreciates the Board's cooperation in seeking advice, and is confident that the Board will follow the guidance set forth herein.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.*, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

_____s/s R. Kemp Morton_____
R. Kemp Morton, Chairperson