ADVISORY OPINION NO. 2010-08

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Attorney** for a City Council asks whether it would violate the Ethics Act for Members of its governing body to vote to approve a change in the City Charter which would extend the current term of office for the City's elected public officials by one year.

FACTS RELIED UPON BY THE COMMISSION

A City currently holds its elections every four years on odd numbered years. The City Council and Mayor ("City Officials") propose that the charter be amended to change the election cycle to even numbered years in order to coincide with the primary election in which the offices of the President of the United States and Governor of West Virginia are on the ballot.

In addition to changing the election year, the City Officials propose holding non-partisan elections to eliminate the need for a primary and general election every four years. The result would be a single election for all City Officials.

The current terms of the elected City Officials expires in 2011. At present, based upon the existing charter, the next primary is scheduled for March 2011, and the next general election in May 2011.

In order to amend the municipal election calendar, the City Officials propose having City Council vote to approve a change to the City Charter. The proposed charter change would then be presented to the City voters at a Special Election to be held in the Fall of 2010. The proposed charter change to be considered by the citizens would contain the following:

(1) That one non-partisan election be held on even-numbered years and that the first election under the new charter be held in May 2012; and,

(2) That the terms of the existing City officials be extended from a four year term ending in 2011, to a five year term to end in 2012. Thereafter, all elected City Officials would continue to have a four year term.

The Requester seeks guidance in regard to whether the City Officials may, under the circumstances presented, vote to extend their term by one year; provided, that, the City

voters ratify this charter change and term extension at a special election to be held this year.

The City states that it wants to move its election to even-numbered years to increase voter turnout and to reduce costs by allowing it to share costs of the election with the County.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain.

ADVISORY OPINION

The issue presented in this opinion is unique and calls upon the Commission to render an opinion on election matters typically left to the province of other State Officials, notably the Secretary of State and the Attorney General. While the Commission is hesitant to intrude upon either's jurisdiction, the question presented by the Requester falls within the Ethics Act, and thus requires the Commission's analysis. Therefore, recognizing its statutory limits, the Commission shall address the limited question pertaining to the Ethics Act, and will defer the propriety of election procedures to the appropriate State Official and agency.

Proposed Charter Change

The City wants to change its election cycle from odd numbered years to even number years. The challenge presented is that the current term of office for the current governing body will end in 2011. The next even year general election for Governor and President is 2012. Therefore, there is a potential one-year gap between the existing terms and the next general election in an even year.

Although the Requester doesn't identify them in his request, there are two potential means of resolving this dilemma: (1) propose that the term of the current governing body be extended one year for the equivalent of a five year term; or (2) propose that the term of the governing body elected in 2011 be for a five year term.

Presently, it is the intent of the City Officials to pursue option one, and extend their current four-year term for an extra year. The City does not provide any reasoning or analysis in regard to why it is electing to go with option one, over option two. One possibility is that for option two, the City would be required to administer the election on its own as 2011, an odd-numbered year; hence, it could not share costs with the

County. However, the Requester provides no information or discussion on cost savings. The Requester also does not propose or suggest that the option two is being considered by the City Officials. Rather, the Requester only seeks an opinion with respect to the propriety of extending the current City Officials terms by one year.

Private Gain

The West Virginia Ethics Act prohibits public officials from using their public office or the prestige of their office for their own private gain. W.Va. Code § 6B-2-5(b).

According to the Requester, the City Officials seek to extend their current office terms an additional year in order to align future voting in even numbered years. The proposal would extend the established terms of office for the Mayor and all City Council from June 30, 2011 to June 30, 2012. The extension of their terms would also provide an extra year of compensation for the current Mayor and City Council members.

While the Commission typically defers questions as to the propriety of an election process to the Secretary of State's office, there are occasions when the handling of an election process could give rise to a violation of the Ethics Act. This is especially true when the proposed election procedure violates a law and results in a private gain to a public official.

Although the Ethics Commission is only empowered to interpret the Ethics Act, it may not do so in a vacuum. Thus, the Commission must take into consideration provisions of the Code and the Constitution that directly bear on this request. The requirements related to elected officials' terms of office and their compensation are established by constitutional and statutory provisions outside the Ethics Act. Specifically:

> **Terms of office not to be extended after election.** No law shall be passed after the election of any public officer, which shall operate to extend the term of his office.

W.Va. Constitution, Article VI, § 37

> **Salaries of officials cannot be increased during official terms.** No extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made; nor shall any Legislature authorize the payment of any claim or part thereof, hereafter created against the state, under any agreement or contract made, without express authority of law; and all such unauthorized agreements shall be null and void. Nor shall the salary of any public officer be increased or diminished during his term of office, nor shall any such officer, or his or their sureties be released from any debt or liability due to the state: Provided**,** the Legislature may make

> appropriations for expenditures hereafter incurred in suppressing insurrection, or repelling invasion.

W.Va. Constitution, Article VI, § 38

In addition, the Legislature has similarly imposed restrictions upon municipal officers:

> **Compensation of officers and employees.** Notwithstanding any charter provision to the contrary, the governing body of every municipality shall by ordinance fix or cause to be fixed the salary or compensation of every municipal officer and employee: *Provided,* **That the salary of any officer shall not be increased or diminished during his term.**

W.Va. Code § 8-5-12 (emphasis added).

In Advisory Opinion 2009-02, the Commission held that a County Commission may not provide additional benefits in the form of a wellness program for its elected members. In particular, the Commission noted that the West Virginia Constitution prohibits any increase in compensation for County officials unless expressly authorized by the Legislature. Since the Legislature did not authorize the expenditure of public monies on wellness programs for County elected officials, the Commission found that it would violate the Ethics Act's prohibition against use of office for private gain for the County Commission to do so.

Here, instead of amending the charter to apply to future elected officials (e.g. Option Two), the City Officials seek to extend their own terms by a year and thereby obtain an extra year of compensation. This would constitute use of public office for private gain.

Accordingly, the Commission hereby finds that a public official's vote to extend her or his own current term beyond that statutorily or constitutionally prescribed, and thereby obtain extra compensation, constitutes use of public office for private gain in violation of W.Va. Code § 6B-2-5(b).

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/ R. Kemp Morton, Chairman
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