

ADVISORY OPINION NO. 99-31

Issued On October 7, 1999 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The Chairman of a County Board of Health asks if the Board may consider another Board member for the position of administrator of the local health department.

FACTS RELIED UPON BY THE COMMISSION

The County Board of Health has the responsibility for hiring the administrator of the local health department. The Board advertised the position in newspapers, and a Board member who possesses the necessary qualifications applied. The Board reviewed the applications at two special meetings, and the member/applicant recused herself on both occasions.

The Chairman represents that the member/applicant is the most qualified for the position, and the Board seeks guidance on whether it may hire the applicant.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) provides in pertinent part that... A public official or public 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 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.

WV Code § 61-10-15 provides in pertinent part that..."It shall be unlawful for...any member of any other county or district board...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service, or in furnishing any supplies in the contract for, or the awarding or letting of, which, as a member, he may have any voice, influence or control ..."

ADVISORY OPINION

Only one section of the Governmental Ethics Act is pertinent to this inquiry.¹ Subsection 6B-2-

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Subsection 6B-2-5(h) limits full-time public officials who exercise regulatory authority from seeking employment with any person who is or may be regulated by the governmental agency which

5(b)(1) prohibits the intentional use of public office for private gain.

The Commission has previously ruled, in Advisory Opinion 91-50, that it would not be a violation of the Governmental Ethics Act for the Chairman of a Solid Waste Authority to apply for the position of Director of the same Solid Waste Authority.

As that opinion explained, a board member may be considered for employment by her own board if (a) the Board provides an adequate and meaningful public notice to all possible applicants; (b) the Board member removes herself from the decision making process and independent, impartial decision-makers are substituted; and (c) the Board member possess the necessary qualifications. Once hired, the Board member would need to resign from the Board. *See* Advisory Opinion 91-16.

Therefore, the Commission concludes that the County Board of Health may consider a Board member for the position of Administrator as long as the above-listed conditions are met. The requester has represented that the Board member is the most qualified applicant and has provided the Commission with documentation that the Board provided meaningful public notice and the Board member recused herself from Board discussions concerning the position.

Because the requester is a member of a county board, the broader prohibitions of West Virginia Code § 61-10-15 must also be considered. This criminal statute makes it unlawful for any county board member “to be or become pecuniarily interested” in the proceeds of any contract over which the member may have “any voice, influence or control.” Contracts under the statute include employment contracts, and a board member with a pecuniary interest may not recuse herself to avoid the problem. Moreover, a Board member who votes to approve a contract, knowing that another member has a pecuniary interest, may also be subject to removal from office. *Cimino v. Board of Education*, 158 W. Va. 267, 210 S.E.2d 485 (1974).

It is the opinion of the Commission that the County Board of Public Health cannot consider one of its Board members for employment be the Board unless the member/applicant resigns her position

they serve. In this instance, the member is not a full-time public official, and the restriction does not apply to employment with another governmental entity. Subsection 6B-2-5(d) prohibits part time appointed officials from having an interest in a public contract over which they have authority to enter into or control unless their interest is publicly disclosed and they recuse themselves from deliberations and decision making. This section does not apply to employment contracts.

before the Board makes its hiring decision. Although the Governmental Ethics Act permits the member to resign after being hired, § 61-10-15 does not. The Board cannot hire an individual who is still a Board member at the time of its vote without violating the statute.



Chairman