

ADVISORY OPINION NO. 94-20

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 6, 1994

GOVERNMENTAL BODY SEEKING OPINION

A City Housing Authority

OPINION SOUGHT

Is it a violation of the Ethics Act for a member of a City Housing Authority Board to receive a discount on rent in exchange for providing caretaker services at an Authority building?

FACTS RELIED UPON BY THE COMMISSION

An individual has resided in an elderly/disabled housing complex operated by the City Housing Authority since 1987. In 1991 this person applied for and was awarded the position of caretaker for the facility. The position of caretaker involves residing in an apartment in the building which is equipped with an emergency panel. All 105 apartments in the building have an emergency cord which, if pulled, rings into the caretaker's apartment. The caretaker then checks on the nature of the emergency and takes appropriate action. The caretaker is also responsible for locking and unlocking doors to the building, delivery of notices from the office and other various tasks. In exchange for these services, caretakers receive a 75% discount on rent.

In 1992 this caretaker was appointed to the Board of Commissioners of the Housing Authority by the acting City Manager. The City Housing Authority is governed by a five-member Board of Commissioners who are appointed by the City Manager to staggered five year terms.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...local governments have many part-time public officials serving in... appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official...from the responsibility of voting or deciding a matter; however, 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.

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...may 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 §6B-2-5(d)(1) states in pertinent part that...no appointed public official...may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which he...may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, that nothing herein shall be construed to...prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code §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...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.

ADVISORY OPINION

In considering this request the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which per se prohibits the Caretaker from serving simultaneously on the Housing Authority's Board of Commissioners.

Public Contracts

WV Code §6B-2-5(d)(1) prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which the public official may have direct authority or control. Although the agreement between the Housing Authority and a caretaker may be considered a public contract, this section further provides that nothing contained within it would prohibit the employment of any person with any governmental body.

Further, this section provides that nothing contained within the Ethics Act should be construed to prevent a part-time appointed public officials from entering into a contract over which they may have influence or control provided they have been recused from deciding, evaluating or voting on the contract and has fully disclosed the extent of their personal interests.

Members of the Housing Authority serve as part-time appointed public officials. Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for a member of the Housing Authority to serve as the caretaker in a building owned and operated by the Housing Authority provided she does not deliberate, vote, or take any official action regarding her status as a caretaker for a building operated by the City Housing Authority.

Voting

Pursuant to WV Code §6B-1-2(c), a public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal" to him. The Commission previously defined "personal" as situations where the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may affect his vote, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

If the Housing Authority Board member is called upon to consider employment matters or other issues which would directly affect her position as caretaker, she should refrain from voting or taking other action regarding these matters since failure to do so would give the appearance of impropriety.

Private Gain

West Virginia Code §6B-2-5(b)(1) provides that a public official may not use his office or the resulting prestige for his own private gain or for the private gain of another. Consequently, the Authority member may not use her status or influence as a member of the Housing Authority to obtain, increase or promote her private interests as the caretaker of an Authority project. As previously noted, recusal from any participation in the decision making process would insulate the Authority member from appearing to violate the Ethics Act's prohibition against the use of her public office for her own private gain. The Commission notes that the Housing Authority Board member was awarded the position of caretaker prior to her appointment to the Authority's Board of Commissioners.

Employment

Pursuant to WV Code §6B-2-5(h) full-time public servants who exercise policymaking, regulatory or nonministerial authority may not seek or accept employment with any person who is or may be regulated by their governmental agency.

Although a position on the Authority's Board of Commissioners is part-time, the position of caretaker could be considered full-time employment. However, the elderly/disabled complex is component of the City Housing Authority, not a separate entity that is regulated by the Authority.

Therefore, it would not be a violation of WV Code §6B-2-5(h) for the caretaker of the elderly/disabled complex to continue to serve on the City Housing Authority's Board of Commissioners.


Chairman