

ADVISORY OPINION NO. 95-15

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 6, 1995

PUBLIC SERVANTS SEEKING OPINION

City Employees

OPINION SOUGHT

Is it a violation of the Ethics Act for city employees to accept payment to perform work on a construction project which will be located in the city?

FACTS RELIED UPON BY THE COMMISSION

A private non-profit agency is interested in building a federally-funded housing project inside the City. In the initial phase of the project, an ad hoc steering committee was established to work on site acquisition and to engage community and trade union support. The steering committee consists of representatives of non-profit organizations such as the Salvation Army, the local domestic violence shelter, and a private architect.

The requesters are employed as the City Planning Director and the City Housing Director and were also actively involved, as part of their public employment responsibilities and while on city time, with this steering committee.

A feasibility study must now be prepared before the project can receive final approval from the Department of Housing and Urban Development. Although it has funds to conduct the study, the private agency does not have the time or manpower to complete the study itself. It has asked the requesters to prepare the feasibility study for a fee of approximately \$2,000.00.

The work required for the feasibility study involves examining the demographic characteristics of the area to insure that there is a need for this type of project, determining an appropriate site, exploring other possible sources of funding, and documenting community support for the project. These activities are outside the scope of the requesters' official job responsibilities as city employees and would not be performed during City work hours.

However, approximately 35% of the steering committee's work, which was completed by the requesters in their capacity as public employees and conducted while on city time, would be utilized in this feasibility study.

The project does not require financing by the City and the City is not responsible for implementation of the project. However, the City would have some regulatory authority over the project if it comes to fruition. Specifically, the City may have to take action on zoning requests, construction permits, and building inspections. These zoning actions would be taken by the Zoning Administrator or the Office of Code Administration. The employees in these divisions of City government are subordinate to one of the requesters.

The requesters have also asked the Commission to consider granting them an exemption from the provisions of WV Code §6B-2-5(h)(1) if it finds that doing the feasibility study would violate that provision of the Ethics Act.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

West Virginia Code §6B-2-5(h)(3) states that a full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition against seeking employment with a person who is or may be regulated, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption, but shall decide upon each application on a case-by-case basis.

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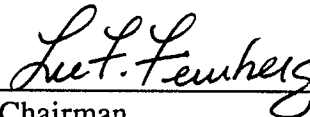
West Virginia Code §6B-2-5(h)(1) provides that full-time public servants with policymaking, nonministerial or regulatory authority may not seek or accept employment from any person who is or may be regulated by the government agency with which they are employed. The Commission has determined that the requesters have the requisite nonministerial authority and are therefore subject to this provision of the Ethics Act.

The private, non-profit agency that wants to build the project and hire the requesters to conduct the feasibility study will, during the course of the project, be subject to the City's regulatory authority in several areas. First, the Zoning Administrator must determine that the project complies with all applicable zoning regulations. Second, the City's Code Administration office will monitor construction to assure compliance with all building codes. Finally, this City department will also be responsible for granting any necessary building permits related to the project.

Although the requesters will not be personally responsible for conducting any of the above regulatory functions for the City, individuals subordinate to one of them will take those actions regarding zoning.

Therefore, since the organization that wants to build the project is subject to the regulatory authority of the City, it would be a violation of WV Code §6B-2-5(h)(1) for the requesters to accept an employment offer from that organization to perform a feasibility study related to the project.

After a thorough consideration of the facts surrounding this request, the Commission declines to grant an exemption from the prohibition contained in WV Code §6B-2-5(h)(1).


Chairman