

ADVISORY OPINION NO. 93-01 (Revised)

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON FEBRUARY 4, 1993

GOVERNMENTAL BODY SEEKING OPINION

Chairperson of a State Council

OPINION SOUGHT

Is it a violation of the Ethics Act for a State Council and a private non-profit corporation to enter into an agreement whereby the non-profit corporation pays a portion of the State Council's Executive Director's base salary?

FACTS RELIED UPON BY THE COMMISSION

A State Office was created for the purpose of promoting economic development within the state. This State Office is authorized to enter into contractual or joint venture agreements with a non-profit corporation for such purposes. Agreements with a private non-profit corporation may provide "for the payment of performance-based incentives to the director of the ... Office as well as other expenses." The receipt of performance-based incentives and other payments authorized by a particular provision of the West Virginia Code are specifically exempt from the Ethics Act prohibitions relating to private gain and interests in public contracts contained in WV Code §6B-2-5(b) and (d).

A Council was created to oversee the activities of the Office. This Council was authorized to employ an Executive Director for the Office and fix his or her salary. The Executive Director is not a public officer, agent, servant or contractor within the meaning of the Constitution of the state. The Council has employed an Executive Director and would like to pay a portion of the base salary from state funds, with the remainder being paid by a private non-profit corporation. Any portion of the base salary not paid by the non-profit corporation would be borne by the state.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 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. 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.

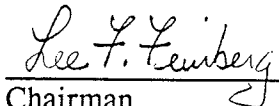
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West Virginia Code §6B-2-5(a) states that the provisions of the Ethics Act apply to all elected and appointed public officials and public employees, whether full or part time, in state, county municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards. However, pursuant to WV Code §5B-2-2(d), the Executive Director of the Council is not considered a public officer, agent, servant or contractor within the meaning of Article VI, section 38 of the West Virginia Constitution. Therefore, giving effect to the presumption of the constitutionality of acts of the Legislature, the Executive Director would not be subject to the provisions of the Ethics Act found in WV Code §6B-2-5.

The Commission notes that the individual Council members would be considered public officials and as such are subject to the provisions and prohibitions established in the Ethics Act. Pursuant to WV Code §6B-2-5(b)(1), public officials may not use their office or the resulting prestige for their own private gain or for the private gain of another. The members of the Council, however, do not derive any private gain from the contract described in this opinion. Further, there are no facts which would suggest that any member of the Council wrongfully used his or her position to obtain for the Executive Director a salary not justified by background, experience, and marketplace conditions or that any member of the Council coerced a private entity to pay a portion of the Executive Director's base salary.

Therefore, the Council would not violate the Ethics Act by entering into an agreement with a private, non-profit corporation whereby the non-profit corporation pays a portion of the State Council's Executive Director's base salary.

While the Commission finds that the contract described in the request letter does not violate the Ethics Act, it expresses no opinion on whether the contract is an otherwise lawful expenditure of public funds.


Chairman