

**ADVISORY OPINION NO. 93-34**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON OCTOBER 7, 1993**

**GOVERNMENTAL BODY SEEKING OPINION**

City Sanitary Board and its Chairman

**OPINION SOUGHT**

Is it a violation of the Ethics Act for the Chairman of a City Sanitary Board to perform private work for individuals building sewage treatment projects?

**FACTS RELIED UPON BY THE COMMISSION**

The requestor is a City Manager who is also, pursuant to W.Va. Code §16-13-18, the *ex officio* Chairman of the City Sanitary Board. Privately he is a licensed engineer and surveyor and sole owner of a local engineering corporation.

Most of the City's sewage is treated in a plant located out of state and run by an out of state private, non-profit corporation. Three of the five board members of that corporation are members of the City Sanitary Board and the five shares of corporate stock are held, one each, by the members of the Sanitary Board, the Mayor and the Chairman of the City Sanitary Board.

On occasion, the requestor's private company is employed by private individuals to do surveying and engineering work for construction or expansion of sewage projects. Some of these projects are located in the City and require the issuance of a business license by the City while others are located outside the City but would still require the City Sanitary Board to provide service to the project. The City Sanitary Board requires projects to meet certain specifications before it will agree to provide service and allow the project to connect into the system.

From time to time the City Sanitary Board uses its own crews to install the sewer lines for such projects. In other cases a private construction company does the work. Regardless of who installs the lines, the City Sanitary Board must approve the work on those lines before taking them over as part of the system. Some of the work the requestor's private company does involves designing interfaces with the existing Sanitary Board system.

### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code §6B-2-5(b)(1) states 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.

West Virginia Code §6B-1-2(c) states in pertinent part 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 or public employee, 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(d)(1) states in pertinent part that...no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which such official or employee may have direct authority to enter into, or over which he or she may have control...

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.

### **ADVISORY OPINION**

#### **Employment**

Pursuant to WV Code §6B-2-5(h)(1), a full-time public servant with policymaking, nonministerial or regulatory authority may not seek or accept employment with any person who is or may be regulated by his governmental agency.

The requestor's position as the City Manager and Chairman of the City Sanitary Board clearly afford him the authority contemplated by WV Code §6B-2-5(h)(1) and makes the restrictions against seeking or accepting outside employment applicable.

When the requestor accepts employment through his private engineering and surveying company to work on construction projects involving sewage systems, he accepts employment from a person his agency regulates.

Therefore, it would be a violation of WV Code §6B-2-5(h)(1) for the requestor to perform private work in the area of West Virginia served by his Sanitary Board for individuals building sewage treatment projects since the prospective clients are regulated by his governmental agency.

### **Private Gain**

Pursuant to WV Code §6B-2-5-(b)(1), a public servant may not use his position for his own private gain or for the private gain of another. Therefore, the requestor may not use his public office or his position on the City Sanitary Board to influence, obtain, increase or promote business for his private company or promote the interests of clients of that company. Obviously, if the requestor seeks private contracts for his private firm by promising favorable treatment before the City Sanitary Board or if the requestor attempts to use his position on the Sanitary Board to obtain special treatment for a private client, he would be using his position for private gain. Further, the requestor may not use public time, equipment and resources for such private activities.

### **Public Contract**

Pursuant to WV Code §6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control. This prohibition also applies to companies in which a public official has more than a 10% ownership interest.

As City Manager and Chairman of the Sanitary Board, the requestor has authority and control over the contracts of those agencies. Therefore, the requestor's private company may not enter into public contracts with either the City or the Sanitary Board. Under the facts provided, however, the private company owned by the requestor does not enter into contracts with either governmental entity but rather contracts with private individuals to do surveying and engineering work for construction or expansion of sewage projects.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for the Chairman of a City Sanitary Board to perform private work for individuals building sewage treatment projects since neither he nor his company would be a party to a public contract.

### **Voting**

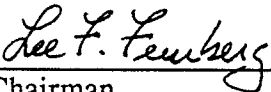
West Virginia Code §6B-1-2(c) provides that a public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal" to that official.

The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a matter which may influence his vote, or when voting would create 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 Sanitary Board is called upon to consider issues which directly affect or are related to the requestor's private company, work performed by the company or the clients of such company, he should recuse himself and take no official action regarding these matters since failure to do so would give the appearance of impropriety.

However, the Commission previously determined that the voting prohibition contained in WV Code §6B-1-2(c) does not apply to actions which involve the creation of laws, rules, regulations or policies which affect the public officials or his clients' financial interests **as a member of a class**. There is no conflict of interest if the public official or his private clients are not pecuniarily affected to a greater extent than any other member of the profession, occupation, group or class.

Therefore, the Commission finds that the requestor should not vote on any matter that may specifically and uniquely affect his company or private clients to a greater extent than other comparable individuals. This prohibition would include any decision by the City Sanitary Board which would affect work done on a project in which the requestor's firm participated.

  
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Chairman