

ADVISORY OPINION NO. 92-42

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON OCTOBER 1, 1992

GOVERNMENTAL BODY SEEKING OPINION

Chairman of a State Board

OPINION SOUGHT

Is it a violation of the Ethics Act for a Chairman of a State Board to also serve temporarily as its acting Executive Director?

FACTS RELIED UPON BY THE COMMISSION

During the 1992 regular session the Legislature created a State Board. This Board is empowered to promote economic development in the state by investing funds made available to the Board in a variety of forms, including loans and equity investments in eligible businesses.

The Board consists of thirteen members who are not compensated for their service. Five of the Board members serve by virtue of their respective positions in State government. Two additional members are appointed by the Governor from a list of four names submitted by the Board of Directors of a related State Fund. The final six members are appointed by the Governor "from the general public" although they must represent the business, investment, accounting and labor communities. A Chairman is then elected by the members of this Board.

The Board is required to hire an Executive Director to carry out the day-to-day management of the Board and to control and promote economic development. Pursuant to the statute, the Board cannot make an investment until the Executive Director reviews and approves the investment. The Executive Director must be or have been a senior executive of a major financial institution or similar institution with extensive experience in capital market development.

In June the requestor was appointed to the Board by the Governor from a list of four names submitted by the Board of Directors of the related State Fund. During the Board's organizational meeting, the requestor was elected to serve as the Chairman of the Board. As the Chairman of the Board, the requestor directed the creation of committees to draft bylaws, to draft investment guidelines and to search for an Executive Director. He was also authorized by the Board to retain legal counsel.

Shortly thereafter, the requestor was contacted by the Governor's office regarding the possible location of a major manufacturing facility in the state. Upon further investigation it became clear that the company was interested in locating its facility in the state and that such a decision hinged largely upon the Company's ability to raise several million dollars in operating capital from private and public investors. Funding for the project was required by the first of September but the Board had not yet employed a permanent Executive Director despite its efforts. As previously noted, no investment may be made by the Board until the Executive Director reviews and approves the investment.

During the Board's next meeting, the members considered the manufacturing company's proposal. However, before acting on the proposal, the Board adopted a resolution naming the requestor the Acting Executive Director since the Chairman's experience in state government and private business satisfied the requirements for the position. The resolution declared that such appointment would be effective immediately and would continue until the end of the year or until the Board hired a permanent Executive Director. The resolution further stated that the Acting Executive Director will receive \$5,000 per month for his services. The requestor did not initiate or participate in the deliberations or vote of the Board regarding his appointment as Acting Executive Director.

As the Acting Executive Director, the requestor then signified his approval of the loan to the manufacturing company and the Board approved the loan at the same meeting.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and 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 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.

Shortly thereafter, the requestor was contacted by the Governor's office regarding the possible location of a major manufacturing facility in the state. Upon further investigation it became clear that the company was interested in locating its facility in the state and that such a decision hinged largely upon the Company's ability to raise several million dollars in operating capital from private and public investors. Funding for the project was required by the first of September but the Board had not yet employed a permanent Executive Director despite its efforts. As previously noted, no investment may be made by the Board until the Executive Director reviews and approves the investment.

During the Board's next meeting, the members considered the manufacturing company's proposal. However, before acting on the proposal, the Board adopted a resolution naming the requestor the Acting Executive Director since the Chairman's experience in state government and private business satisfied the requirements for the position. The resolution declared that such appointment would be effective immediately and would continue until the end of the year or until the Board hired a permanent Executive Director. The resolution further stated that the Acting Executive Director will receive \$5,000 per month for his services. The requestor did not initiate or participate in the deliberations or vote of the Board regarding his appointment as Acting Executive Director.

As the Acting Executive Director, the requestor then signified his approval of the loan to the manufacturing company and the Board approved the loan at the same meeting.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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-1-2(c) states in pertinent part that...the State government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and 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 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.

ADVISORY OPINION

Private Gain

WV Code §6B-2-5(b)(1) provides that a public official may not knowingly and intentionally use his office for his own private gain or for that of another person. Under the facts of this particular matter the Commission does not believe that there has been a wrongful use of public office for private gain.

First, the requestor will serve as the **Acting** Executive Secretary only until a permanent qualified successor can be found. Second, the Board was operating within crucial time constraints since the manufacturing company's decision to locate their facility in the state was dependent largely upon the manufacturer's ability to raise several million dollars in operating capital. The appointment of the Chairman of the Board to serve as the Acting Executive Director was necessitated by the exigencies of the Act's requirement that an Executive Director review and approve all potential investment projects contemplated by the Board. Without this appointment, the Board would have been precluded from taking actions which could have an immense economic benefit for the State.

Finally, the requestor did not actively seek the temporary position, took no part in the decision to hire an Acting Executive Director, and did not vote on his appointment.

The Commission notes that Advisory Opinion #91-16 and Advisory Opinion #91-50 established that an individual may not serve simultaneously as a member of a Board and as the paid Executive Director of such Board. In each case the Board member's employment as the Executive Director of such Board was intended to be a long term permanent position. However, the circumstances relating to those cases are clearly distinguishable from the facts presented in this instance since the Board Chairman's service as the Acting Executive Director is strictly a temporary arrangement necessitated by the regulations imposed by the legislation which established the State Board.

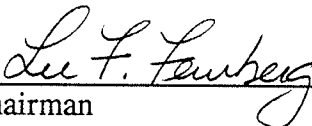
Therefore, it would not be a violation of WV Code §6B-2-5(b)(1) for the Chairman of the State Board to simultaneously serve and receive compensation as the Acting Executive Director of such Board on a **temporary** basis. **This opinion is contingent upon the Board's continued good faith effort to retain a permanent Executive Director.**

Personal

WV Code 6B-1-2(c) provides that a part-time public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". 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 manner which may influence 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.

Therefore, the requestor should not vote on any matter which may affect his temporary position as Executive Director of the Board, such as his compensation package or the employment of a permanent Executive Director.

The Commission notes that this opinion is strictly limited to an analysis of the facts presented under the provisions of the Ethics Act. The Commission is without authority to provide advisory opinions on the application of other statutes.


Chairman