

ADVISORY OPINION NO. 92-48

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 3, 1992

GOVERNMENTAL BODY SEEKING OPINION

Executive Director of a County Solid Waste Authority on behalf of an Authority employee

OPINION SOUGHT

Is it a violation of the Ethics Act for a County Commissioner to be employed simultaneously by that County's Solid Waste Authority?

FACTS RELIED UPON BY THE COMMISSION

After the County Commission opened the County Landfill it contracted with the requestor to manage the operation. Later, the County Commission gave the landfill to the County Solid Waste Authority to own and operate. The County Commission is responsible for appointing two of the five members of the County Solid Waste Authority. Further, WV Code 20-9-6 provides that the County Commission has some budgetary control over the County Solid Waste Authority.

The County Solid Waste Authority continued to employ the requestor. The Solid Waste Authority reserved the managerial and clerical functions of the operation for its own, however, and the requestor became primarily responsible for the day to day operation of the landfill as an employee of the Solid Waste Authority. The requestor has since been elected to serve as a member of the County Commission.

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 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.

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. 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.

West Virginia Code §61-10-15 states in pertinent part that...It shall be unlawful for any member of a county commission...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

ADVISORY OPINION

The Ethics Act

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 no provision of the Ethics Act per se prohibits a County Commission member from being simultaneously employed by the County Solid Waste Authority.

However, West Virginia Code §6B-1-2(c) provides that a part-time elected 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.

As a member of the County Commission, the requestor should recuse himself from voting, deliberating or taking any official action regarding the County Solid Waste Authority which may affect his employment with the Authority. This would include voting on the County Commission's appointments to the Solid Waste Authority.

Further, pursuant to WV Code §6B-2-5(b)(1), public officials may not use their office or its resulting prestige for their own private gain or for the private gain of another. Therefore, the requestor may not use his position as a County Commission member to influence, obtain, increase, or promote his personal interests as an employee of the County Solid Waste Authority.

WV Code §61-10-15

West Virginia Code §61-10-15 provides that it is illegal for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of **any** contract or service when he may have voice, influence or control over the letting of such contract. Any person who violates this provision is guilty of a misdemeanor and subject to removal from office. The recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest is not sufficient to immunize that official from the sanctions contained in the statute.

The requestor is a paid employee of the County Solid Waste Authority and was recently elected to serve as a County Commission member. The County Commission appoints two members of the Solid Waste Authority. Further, WV Code §20-9-6 provides the County Commission with some budgetary control over the County Solid Waste Authority.

The requestor's employment contract with the County Solid Waste Authority is one in which he has a direct pecuniary interest. However, neither the requestor nor his fellow County Commissioners directly control that contract. The Solid Waste Authority's employment contracts are established and controlled by its five member board, not by the County Commission.

The Ethics Commission finds that the power of the County Commission to appoint two of the five members of the County Solid Waste Authority is sufficient to give the requestor voice, influence or control over the Authority's employment contracts. Consequently, the requestor's position as a County Commissioner does give him the degree of control contemplated by WV Code §61-10-15.

Therefore, it would be a violation of WV Code §61-10-15 for a County Commissioner to be employed simultaneously by that County's Solid Waste Authority. The Commission notes that it is without authority to grant exemptions to WV Code §61-10-15.

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Chairman