ADVISORY OPINION NO. 2013-61

Issued On February 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor** asks if the Ethics Act permits him to communicate in his public capacity with public agencies on matters of concern to the City.

FACTS RELIED UPON BY THE COMMISSION

According to the Requester, as Mayor, he contacted the City Building Commission to request compliance with a section of the State Building Code. He then states that he wrote a letter to the City Building Commission inquiring about the state of its financial affairs. The Requester also states that he received no response in over a month's time, and accordingly contacted the State Auditor's Office. Concurrently, he also contacted the West Virginia Ethics Commission regarding a conflict of interest issue.

He purports to have undertaken all of the aforementioned correspondence in his public capacity on the City's behalf, and used his official title. He additionally states that he uses his "personal letterhead," private secretary, and does not otherwise use City resources to send those letters.

Finally, the Requester states that at a City Council meeting that he did not attend, members of said Council stated that they would stop the Mayor from further correspondence as Mayor without prior approval by City Council.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) states:

> 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. 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.

ANALYSIS

This is a matter of first impression for the Commission. Never before has this body been asked to determine whether it would violate the Ethics Act for a public official to use his or her title to communicate with other entities about matters that directly concern the public. Nevertheless, the Commission will answer the question presented.

Nothing in the Ethics Act prevents a public official from using his or her public position to communicate with other public entities about matters of public concern. Rather, the Ethics Act explicitly states that "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals ... does not constitute the use of prestige of office for private gain."

Additionally, although the Requester states that, other than his title, he does not use public resources for the described correspondence, W. Va. Code§ 6B-2-5(b), as above, permits the use of public resources for the fulfillment of his Mayoral duties. It is unquestionably within the scope of the mayor's "usual and customary duties ... or public policy goals" to communicate with other public agencies, constituents, other organizations, or individuals on issues that directly affect the City which he serves, and to use public resources to do so.

The Ethics Commission recognizes that there are different types of municipal governments across the state. W. Va. Code§ 8-3-2 outlines different plans for municipal governments. Here, the Requester is the Mayor in a "Mayor-Council" form of government. Accordingly, both the Mayor and the Council share governance and administrative duties, and it would be "usual and customary" for the Mayor to communicate with organizations and individuals on behalf of the town, as above. The same is true of a "Strong Mayor" form of government, where the Mayor is the administrative authority and the Council is the governing body.

In a "Manager-Mayor" form of government, however, the Mayor is merely an elected member of the Council, the Council is the governing body, and an appointed City Manager is the administrative authority. In such a situation, the Mayoral position is merely ceremonial, and it would not be "usual and customary" for a Mayor in that position to communicate in a public capacity on behalf of the municipality.

The Ethics Commission does not interpret municipal law, city charters or ordinances, and makes no comment on whether the City Council may permissibly block the Mayor from corresponding with public agencies. The Commission recommends that all involved parties consult with the City Attorney for advice on complying with all relevant laws and ordinances.

The Commission takes this opportunity to encourage members of all governing bodies to work together for the public good. Additionally, the Commission further cautions all public officials that the use of public office to protect impermissible personal interests, be it their own or those of other parties, could violate W. Va. Code§ 6B-2-5(b); this

includes use of public office to knowingly and deliberately withhold public information from parties who are authorized to receive it.

In conclusion, the Commission holds that in forms of government where the Mayor holds or shares administrative authority, the Mayor may communicate in a public capacity with other public agencies, constituents, other organizations, or individuals on behalf of the municipality. Nothing in this opinion, however, should be construed to prevent a "weak" or ceremonial Mayor from corresponding with public agencies in his or her private capacity.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman