ADVISORY OPINION NO. 2013-09

Issued On March 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Prosecutor asks whether an **Assistant Prosecutor** may simultaneously serve as an elected County Commissioner in another County.

FACTS RELIED UPON BY THE COMMISSION

Assistant Prosecutors serve at the will and pleasure of the Prosecutor. They take an oath of office.

The Requester, an elected Prosecutor, wants to know whether he may hire a person to serve as an Assistant Prosecutor if this person will simultaneously serve as an elected County Commissioner in another County.

The Requester states that the County where the Assistant Prosecutor would serve as a County Commissioner is in the same judicial circuit as the County where he would serve as an Assistant Prosecutor. Hence, as they are in the same judicial circuit, both counties share the same circuit court judge.

The Requester states that County Commissioners tend to the affairs of the county they represent, including matters which affect the judiciary. In particular, county commissions are charged with providing suitable office space to house the judiciary.[1] Nevertheless, it is the Supreme Court of Appeals of West Virginia, not County Commissions, which have supervisory control over the circuit courts and other courts in the judicial system.[2] Moreover, the salaries of circuit court judges are set by statute. Still, the Requester wants to ensure this dual service, i.e. Assistant Prosecutor in one county and elected County Commissioner in another, does not create a prohibited conflict of interest for purposes of the Ethics Act.

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[1] The county commission of every county, at the expense of the county, shall provide at the county seat thereof a suitable courthouse and jail, together with suitable offices for the judge of the circuit court and judges of courts of limited jurisdiction, clerks of circuit courts, courts of limited jurisdiction and of the county commission, assessor, sheriff, prosecuting attorney, county superintendent of schools, and surveyor, and all other offices as are or may be required by law... W. Va. Code§ 7-3-2.

[2] The court shall have general supervisory control over all intermediate appellate courts, circuit courts and magistrate courts. The chief justice shall be the administrative head of all the courts. He may assign a judge from one intermediate appellate court to another, from one circuit court to another, or from one magistrate court to another, for temporary service. The court shall appoint an administrative director to serve at its pleasure at a salary to be fixed by the court. The administrative director shall, under the

direction of the chief justice, prepare and submit a budget for the court. W. Va. Const. ait. VIII, § 3

The Requester also states that at times Assistant Prosecutors are appointed by the Supreme Court of Appeals of West Virginia to serve as Special Prosecutors in other counties.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> 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.

W. Va. Code§ 6B-2-5(d)(1) reads, in pertinent part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... official ... or member of ... her immediate family ... may be a party to or have an interest in the profits or benefits of a contract which the official ... may have direct authority to enter into, or over which ... she may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body....

W. Va. Code§ 61-10-15(a) states, in pertinent part:

> (a) It is unlawful for any ... county ... officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: Provided, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer... as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

ADVISORY OPINION

In general there is no provision in the Ethics Act which prohibits an elected official from holding another public office. See A.O. 2012-23 wherein the Commission ruled that an Elected Member of the West Virginia Legislature, a part-time position, could also simultaneously serve as an elected recorder for a municipality.[3] In the present case, the Commission finds there is nothing in the Ethics Act which prohibits the dual service,

[3]The Commission also reached a similar conclusion in A.O. 2012-51 wherein it held that nothing in the Ethics Act prohibits employees of the State of West Virginia from holding an elected public office. Hence, an Assistant Attorney General could also serve as an elected City Council Member.

i.e. Assistant Prosecutor in one county and elected County Commissioner in another.

While as an elected County Commissioner in "County A" he will exercise some budgetary control over a judge before whom he will appear in "County B", this type of control does not rise to a prohibited financial interest or create an inescapable conflict of interest. For example, in A.O. 2012-39, the Ethics Commission ruled that a County Commissioner who owns a business with the County Prosecuting Attorney may vote on matters relating to the Prosecuting Attorney's Office, particularly as the County Commission exercises no control over the Prosecutor's salary which is set by statute, not by the County Commission. Hence, the Commission concluded in A.O. 2012-39 that the County Commissioner did not have a prohibited financial interest in regard to matters affecting the operation of the Prosecutor's Office.

Similarly, here, while a County Commissioner in "County A" may exercise some control over matters affecting a Judge before whom he will appear in "County B", the control exercised does not affect the financial livelihood of the Judge. Instead, the Judge's salary is set by statute and he is under the supervision and control of the Supreme Court of Appeals of West Virginia.

The Commission has also considered the prohibitions against a public employee or public official from having a prohibited interest in a public contract. W.Va. Code§ 6B-2-5(d) and W.Va. Code§ 61-10-15. The Commission concludes these provisions are inapplicable as, in his capacity as an elected County Commissioner, he exercises no voice, influence or control over the Prosecutor's office in the county where he may be employed or serve as an Assistant Prosecutor.

The Commission finds that nothing in the Ethics Act prohibits an Assistant Prosecutor from serving as an elected County Commissioner in another County, even if the counties are situated in the same judicial circuit; still, limitations apply. Specifically, the Assistant Prosecutor must perform his County Commission duties on his own time, not during his public work hours. W.Va. Code§ 6B-2-5(I). If the Requester has regular work hours at his prosecutor job, and if he is authorized to make-up hours to perform the duties of his County Commission position, then he must contact the Ethics Commission for further advice as he may be required to file time records with the Commission. W.Va. Code§ 6B-2-5(I) and W.Va. C.S.R. § 158-14-1 *et. seq.*

While nothing in the Ethics Act prohibits an Assistant Prosecutor from serving as an elected County Commissioner in another county, the Commission has no jurisdiction to rule whether the West Virginia Constitution permits it, or the applicability, if any, of the common law doctrine of incompatibility. This doctrine stands for the proposition that "incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both." State ex rel. Thomas v. Wysong, 125 W. Va. 369, 24 S.E.2d 463, 466 (1943). See *also* 49 W.Va.Op.Atty.Gen. 398 (1962)(setting forth various positions which

are incompatible) and 31 W.Va.Op.Atty.Gen. 87 (1924)(wherein the Attorney General opined that it did not violate this doctrine for a Member of the House of Delegates to also serve as an elected Member of the City of Charleston Council).

Public employees seeking to hold public office should also consult with their agency's attorney to ensure that no personnel policies of their agency, State laws, or federal laws, e.g. the Hatch Act, restrict their employment.

Additionally, the Commission has no authority to opine whether the Code of Judicial Conduct authorizes a Circuit Court Judge to preside over cases wherein the Assistant Prosecutor is an elected County Commissioner in his or her judicial circuit. As such, the affected Judge or Requester may want to seek advice from the West Virginia Judicial Investigation Commission on this question and on the question of whether he may be appointed as a Special Prosecutor in the county where he serves as an elected County Commissioner.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, et seq. and W. Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

Pursuant to W. Va. Code§ 68-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of section fifteen, article ten, chapter sixty-one of the code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.

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