

ADVISORY OPINION NO. 90-166

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

An Attorney for the County Commission

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a County Surveyor of Lands to operate a personal, for-profit business, out of the office provided for him by the County?

OTHER FACTS RELIED UPON BY THE COMMISSION

The West Virginia Code §7-2-3 requires that the County Commission furnish the County Surveyor of Lands with an office in the County courthouse.

A County Surveyor is operating a private for-profit business out of the office provided for him by the County. This office is located in the County Courthouse and is paid for by the taxpayers of the County. However, the employees of his private company are not paid with County funds.

The requestor states that the County Surveyor of Lands is an elected public official who does not have any official job responsibilities and receives no compensation from his position.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 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. The performance of usual and customary duties associated with the office or position...does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(b)(2) states in pertinent part that...the Legislature...recognizes that there may be certain public officials...who bring to their respective offices...their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. Accordingly, the Commission is directed, by legislative rule, to establish categories of such public officials...identifying them generally by the office...and offering persons who fit within such categories the opportunity to apply for an exemption...

Such exemptions may be granted by the commission, on a case-by-case basis, when it is shown that: (A) The public office held...is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the office held...is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

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West Virginia Code 6B-2-5(b)(1) provides that a public official may not use his office, or the prestige thereof, for his own private gain, or for the private gain of any other person. At the same time, however, the Legislature recognized that there may be certain categories of public officials who should be treated differently because they bring to their respective public offices unique personal prestige which inures to the benefit of the State.

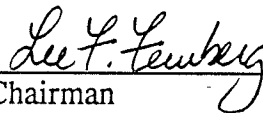
In such instances, the Legislature recognized that it would be contrary to the best interests of the State to deny such persons the right to hold public office on the grounds that they would, in addition to the emoluments of their office, be in a position to gain financially from the personal prestige which otherwise inheres them.

Therefore, in order to promote the best interest of the citizens of the State by permitting persons to hold public office who bring to that office their own unique personal prestige, the Legislature directed this Commission to establish categories of such public officials and to grant exemptions, on a case by case basis when it is shown that:

1. The public office held is such that it would not ordinarily be available or offered to "a substantial number or citizens of this State". There is only one elected Surveyor of Lands per County and the Commission believes that it is an office not available to substantial numbers of citizens in the State.
2. The office held is such that it normally or specifically requires a person who possesses personal prestige (to be elected as a County Surveyor of Lands at least implicitly requires that an individual possesses personal prestige).
3. The person's employment contract or letter of appointment provides or "anticipates" that the person will gain financially from activities which are not a part of his office (although the Commission has not been provided with an employment contract or letter of appointment in connection with the particular request, the Commission believes that past practice and custom at least arguably has allowed the County Surveyor of Lands to anticipate that he would be able to use his office facilities in his private surveying business, which would necessarily result in the receipt of some financial gain to this official). Also, the County Surveyor does not have any specific job duties or responsibilities.

The Commission understands that the County Surveyor is operating a private surveying business out of his public office. The Surveyor is paying his support staff out of private funds. Further, according to the West Virginia Code the County must provide the County Surveyor with an office in the Courthouse, even though he does not have any specific responsibilities or duties.

Therefore, based on past practice, history and the types of benefits contemplated by the statute there does not appear to be a violation of subsection 6B-2-5(b)(1) of the Ethics Act because these benefits received by the County Surveyor of Lands were anticipated by the part-time public official when deciding to seek the elected position.



Chairman