

ADVISORY OPINION NO. 90-170

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

A County Solid Waste Authority

OPINION SOUGHT

Whether it is a violation of the Ethics Act for a County Solid Waste Authority to consider employing the Chairman as the Director of the Solid Waste Authority?

OTHER FACTS RELIED UPON BY THE COMMISSION

A County Solid Waste Authority created a new Director's position. The Director will serve under the direction of the Authority and will receive a salary plus expenses.

The position has been publicly advertised and twelve applications have been received. The Chairman of the Solid Waste Authority has applied for the position.

The Chairman has abstained from participating in any discussion or voting on the matter.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states 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 Section 6B-2-5(d)(1) states in pertinent part that...no...public official...may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which he...may have control: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, that nothing herein shall be construed to prohibit a...part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he may have control when such official has been recused from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract.

West Virginia Code Section 6B-1-2(c) states that...certain conflicts of interest are inherent in part-time service...when such conflict becomes personal to a particular public official...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.

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Private Gain

Subsection 6B-2-5(b)(1) of the Ethics Act states that a public official may not knowingly and intentionally use his office for his own private gain or for that of another person. A prohibition against nepotism is included within this subsection. Nepotism has been defined by the Commission as favoritism shown or patronage granted by persons in high office to relatives or close friends in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. The Commission assumes that the Authority Chairman would be considered a "close friend" of the other Solid Waste Authority Members.

The Commission has established certain guidelines to follow in order to aid public officials in avoiding the appearance of nepotism when they are considering hiring a relative or close friend for a public position:

- a. Provide an adequate and meaningful public notice to all possible applicants.
- b. Remove himself from the decision making process and substitute independent, impartial decision-makers.
- c. Insure that the relative or close friend possesses the qualifications necessary for the position.

If the County Solid Waste Authority and the Chairman have followed the steps outlined above it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Chairman to be considered along with the other applicants for the position.

The Commission would emphasize that the Chairman of the Solid Waste Authority should be mindful of subsection 6B-2-5(b)(1) of the Ethics Act which provides that a public official may not intentionally use his office or prestige for his own private gain.

Voting

Further, subsection 6B-1-2(c) of the Ethics Act provides that in part-time public service certain conflicts of interest are inherent and when such conflict becomes personal to a particular public official, 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.

Therefore, a public official is not permitted to vote on or decide a matter that has become "personal" to that individual. The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, is affected in a manner which may influence his vote or would give the appearance of impropriety.

Obviously, the matter of considering who to hire when a Board Member is a candidate for a position would be personal and requires the recusal of that member. For a public official's recusal to be effective, it is necessary for the official to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclosing his interest and recusing himself from voting on the issue.

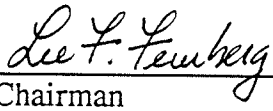
Public Contracts

Pursuant to subsection 6B-2-5(d)(1) of the Ethics Act, no public official may be a party to or have an interest in the profits or benefits of a contract (such as an employment contract) which such official may have direct authority to enter into, or over which he or 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.**

Also, nothing contained within the Ethics Act shall be construed to prohibit a part-time appointed public official from entering into a contract which such part-time appointed public official may have direct authority to enter into or over which he or she may have control when such official has been **recused** from deciding or evaluating and excused from voting on such contract and has fully disclosed the extent of such interest in the contract. As previously noted, for a public official's recusal to be effective, it is necessary for the official to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclose his interest and recuse himself from voting on the issue.

Therefore, based on the facts presented it would not be a violation of 6B-2-5(d)(1) or subsection 6B-2-5(b)(1) if the steps outlined were followed, for the County Solid Waste Authority to consider employing the Chairman as the Director of the Authority.

However, the Commission would remind the Chairman that he should not participate in any discussion or decision making process regarding the hiring of the Executive Director when the matter is "personal" as outlined above.


Chairman