ADVISORY OPINION NO. 2013-35

Issued on August 1, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Housing Authority** asks if it may continue to employ a part-time Section 8 Inspector who was recently elected Mayor of a Town within its service area.

FACTS RELIED UPON BY THE COMMISSION

A Housing Authority has employed a part-time Section 8 Inspector since November 2012 who was recently elected Mayor of a nearby Town within the Housing Authority's service area. The Section 8 Inspector's responsibilities include inspecting units for compliance with HUD's Housing Quality Standards. The Mayor/Inspector does not make or revise any of the Authority's policies or make any purchases on its behalf. The Authority stipulates that the Inspector will not conduct any inspections inside the Town limits of the Town to which he was recently elected Mayor.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1):

> 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.

W. Va. Code § 6B-2-5U):

> (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:
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> (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, **employee** (emphasis supplied), compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W. Va. Code§ 6B-1-2(a).

In creating these ethical standards for public officials, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service ... " W. Va. Code§ 6B-1-2(c).

The Ethics Act's prohibition against use of office for private gain was designed to steer public servants away from inherently questionable situations. This prohibition is intended to prevent not only actual impropriety, but also situations that give the appearance of impropriety. Here, the Requester recognizes that the Mayor/Inspector's duties as Section 8 Inspector could overlap with his Mayoral duties and will make arrangements to ensure that the Mayor/Inspector does not inspect any locations within the Town limits where he is Mayor.

The Ethics Act does not, however, prevent public employees from holding public office. In Advisory Opinion 1996-14, a County Employee was permitted to run for the office of Magistrate. Additionally, in Advisory Opinion 1996-30, the Commission found that a Town Council member may also serve as a police officer for the Town. More recently, in Advisory Opinion 2012-01, a City Councilperson was permitted to be employed as the City Building Official.

While the Ethics Act does not prohibit a part-time Inspector for a Housing Authority from serving as Mayor for a town within the Housing Authority's service area, limitations apply. First, the Mayor must recuse himself on any matters which come before Council that involve his employer, the Housing Authority. For example, in Advisory Opinion 2012-05, the Commission found that a Board of Education employee seeking election to a County Commission, if elected, may not vote on matters which uniquely affect his employer.

For recusal to be proper under the Ethics Act, the Mayor must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the affected official left the room during all discussion and vote on the item under consideration.

Second, the Mayor may not use his public office for his own private gain. In Advisory Opinion 2012-02, the Commission held that a County Commissioner who is also a licensed real estate associate may not use his position to influence the purchase of property, i.e. he may not communicate with his fellow County Commissioners, Members

of the Building Commission, or their respective staffs, on matters relating to the property.

Advisory Opinion 2012-07 also notes that West Virginia law permits mayors to preside over municipal court. W. Va. Constitution Article 8, §1. *See also* W. Va. Code§ 8-10-1. Thus, if the Mayor also serves as municipal judge, he needs to take special care if someone currently under his jurisdiction as housing inspector appears before him in his judicial capacity. The fact that a citizen has been subject to his authority as housing inspector in the past is generally insufficient to require the Mayor to recuse himself from the proceeding. The Mayor shall, however, disclose the conflict, and if either party requests that the Mayor recuse himself from the proceeding following such disclosure, the Mayor shall do so. Further, he is prohibited from presiding over a judicial matter involving a party when an inspection occurred within the preceding six months.

The Ethics Act, therefore, does not prohibit a Housing Authority from continuing to employ a part-time inspector who was recently elected Mayor of a nearby Town, with the limitations hereinabove set forth.

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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak
Jonathan E. Turak, Acting Chairperson