ADVISORY OPINION NO. 2013-51

Originally Issued on December 12, 2013 and

Ratified on January 21, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks if:

(1) A full-time Commercial Supervisor at a County Assessor's Office may lease residential property to citizens of the County in which he works;
(2) A full-time Commercial Supervisor at a County Assessor's Office may purchase, sell, or lease commercial property to citizens of the County in which he works;
(3) A full-time Supervisor of a County Assessor's Office may participate and/or purchase property during public auctions from the County in which he works; and
(4) Any full-time employee at an Assessor's Office may engage in the real estate business within the same county as the Assessor's Office. (Real estate business meaning regularly leasing, purchasing, and/or selling properties as a source of regular income.)

FACTS RELIED UPON BY THE COMMISSION

A County Assessor employs a Commercial Supervisor who, along with his numerous subordinates, is responsible for appraising the value of all commercial real estate within the County. The amount of property taxes owed is, in large part, based upon the assessed value of the property and its classification, e.g. residential, business or other. The Supervisor owns multiple commercial and residential properties in the County. The Assessor currently assigns employees outside of the Commercial Real Estate Department to appraise the Supervisor's properties.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (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-2-5 (h) reads, in relevant part:

> (1) No full-time official or full-time public employee ... may seek ... to purchase, sell or lease real or personal property to or from any person who:
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> > (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
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> > (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

Legislative Rule §158-6-8. Private Work During Public Work Hours.

> Full-time appointed public officials and part-time and full-time public employees may not receive private compensation for performing private work during public work hours. This section shall not apply to *de minimis* private work.

ADVISORY OPINION

The Ethics Act prohibits full-time public servants from seeking to purchase, sell or lease real or personal property to or from any person who is, or has been within the preceding twelve months, subject to their regulatory authority or the regulatory authority of a subordinate. W. Va. Code§ 6B-2-5(h)(1). The rationale behind such prohibition, including an attempted sale or purchase, is to prevent a conflict of interest and/or a coercive contract. After discussion, the Ethics Commission tabled this opinion at its November 7, 2013 meeting. Thereafter staff sought comments from the County Assessors in West Virginia. In response, the Commission received only one comment. This comment was considered by the Commission in making its ruling today.

W. Va. Code§ 11-3-1 mandates that all property be assessed annually as of the first day of July at its true and actual value. The responsibility for determining the annual assessment for each property lies with the elected County Assessor and those in his/her employ. This assessment is used as the basis for the levy of a property tax upon the property owner. This assessment is a governmental action by the County Assessor, and constitutes a "regulatory action" upon each property owner within the county. Advisory Opinion 1996-52.

In Advisory Opinion 1996-52, a County Assessor asked whether he was permitted to moonlight doing land survey work in his county, pursuant to W. Va. Code§ 6B-2-5(h). In Advisory Opinion 1996-52, the Commission recognized that County Assessors annually take regulatory action on persons who own land located in their counties. The

Commission, therefore, concluded, "This regulatory action is taken either personally or through subordinates who are employed by the Assessor. For this reason, the requester may not be employed by any person who owns land located in that County."

Likewise, in Advisory Opinion 2011-14, a Candidate for County Assessor asked whether he may, if elected, continue his career as the owner and broker of a real estate business. The Commission found that the Candidate, if elected, may not seek to purchase, sell, or lease real property to or from any person in the county in which he serves and may not continue his career as the owner and broker of a real estate business within the county in which he serves.

Last, the Ethics Commission held, in Advisory Opinion 2013-05, that since a County Assessor exercises regulatory control over commercial entities located in the county, he was prohibited from moonlighting with a photography firm in the same county.

Based upon the Advisory Opinions discussed above, the Ethics Commission answers the questions presented as follows:

(1) - May a Commercial Supervisor lease residential property in the county in which he is employed?

Commercial Supervisors do not regulate residential property, only commercial property. A Commercial Supervisor who has not taken any regulatory action, individually or through a subordinate, on residential property may lease residential property to citizens of the County in which he works.

(2) - May a Commercial Supervisor purchase, sell, or lease commercial property in the county in which he is employed?

A full-time Commercial Supervisor, either individually or through his subordinates, is deemed to have taken regulatory action on all commercial property throughout the County in which he works. Advisory Opinion 1996-52. He may not, therefore, purchase, sell, or lease commercial property to citizens of the County in which he works. This prohibition does not, however, apply to purely personal transactions; the Commercial Supervisor, and indeed all full-time employees of the County Assessor's Office, may buy and sell a personal home. See W. Va. Code§ 11-3-17 (authorizing the assessor to assess the property of deputy assessors, and a deputy assessor to assess the assessor's property). Instead, the Ethics Act, in W. Va. Code§ 6B-2-5(h), prohibits full-time public employees from engaging in real estate transactions for commercial purposes, either through a business or more informally by buying and selling property on the side, when that individual or a subordinate have taken regulatory action within the preceding twelve months.

(3) - May a Commercial Supervisor participate in and/or purchase property during public auctions in the county in which he works?

In Advisory Opinion 2011-20, the Commission explained the process of selling tax liens:

> Once the assessment process [by the County Assessor] is complete, the County Sheriff is responsible for collecting property taxes. W.Va. Code§ 11A-1-4. If a person fails to pay their property taxes, then the Sheriff may bring a civil action to recover the taxes or may sell the tax lien on the property. W.Va. Code§§ 11A-2-1, -2, and -10. The Code requires the Sheriff to sell tax liens at a public auction "to the highest bidder in the amount which shall not be less than the taxes, interest and charges which shall be due thereon ... " W.Va. Code§ 11A-3-2. Before the Sheriff's sale, the Sheriff must present a delinquent list to the County Commission for examination. If the County Commission finds the list to be correct, it directs the County Clerk to certify the list. W.Va. Code§ 11A-2-14. This list is then published before the sale.
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> If a tax lien is not sold at the auction, the Sheriff then certifies the property to the State Auditor for disposition. W.Va. Code§ 11A-3-8. The State Auditor's office may then sell the tax lien. The State Auditor must first attempt to sell the lien at a public auction. If it is not sold at the auction, then the State Auditor may sell the lien directly to interested purchasers.

The Commission further explained, in Advisory Opinion 2011-20:

> The law clearly prohibits the following public officials or employees from purchasing tax liens at Sheriffs' tax sales: sheriffs, clerks of the county commission or circuit court, **assessors,** State Auditor, **or deputies** or assistants of any of them. W.Va. Code§ 11A-3-6. In regard to tax liens sold by the Auditor, there are similar prohibitions. Specifically, the following public servants may not purchase property sold by the Auditor: deputy commissioners, sheriffs, clerks of the county commission or circuit court, **assessors, or deputies** of any of them. W.Va. Code§ 11A-3-49.

Based on the analysis for the second question and Advisory Opinion 2011-20, the Ethics Commission holds that the Commercial Supervisor is prohibited from purchasing any commercial property at public tax lien auctions. The Commercial Supervisor is, however, under the Ethics Act, permitted to purchase **residential** property at a public tax lien auction over which neither he nor a subordinate have regulatory control.

The only exception to this prohibition is if he seeks and receives an property exemption from the Commission. If the Requester submits a request, the Commission will consider it on its merits.

Additionally, any employee in the Assessor's Office who had any authority to select property for sale at auction and/or to control the price or value thereof is prohibited from purchasing said property at auction. W. Va. Code§ 6B-2-5(d).

(4)- May any full-time employee of a County Assessor's Office engage in the business of real estate in the county in which he or she works?

Consistent with the answers herein, all full-time public employees of the County Assessor's Office who take regulatory action are subject to the prohibitions contained in W. Va. Code§ 6B-2-5(h) when purchasing, selling, or leasing any real property within the County by which they are employed.

Finally, employees of the Assessor's Office may not engage in real estate transactions - including purchasing property at auction - while on the clock. Instead, they must do so on their own time to avoid violating W. Va. Code§ 6B-2-5(b) and Legislative Rule§ 158-6-8.

This opinion is not intended to impose liability under the Ethics Act on public employees subordinate to a County Assessor who have previously bought, sold, or leased property within the County in which he or she is employed. Consistent with the principles of due process, this opinion is prospective only.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code ' 6B-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' 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/ R. Kemp Morton, Chairman

Kemp Morton, Chairman