# ADVISORY OPINION NO. 2012-45

**Issued On January 10, 2013 By The**

**WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

A **County Attorney** asks whether it is a violation for him to be paid additional compensation for work he performed on behalf of the County Building Commission.

## FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by the County Commission and also maintains a private practice. His duties for the Commission include handling lawsuits and other legal matters, as well as functioning as general counsel to the governing body. His responsibilities cover all legal matters in which the County is interested. The broad range of his authority makes his position comparable to a County Manager. He has served in this capacity for 22 (twenty-two) years.

In January 2011, the County Building Commission began its efforts to construct a County Judicial Annex. The Building Commission is comprised of three individuals.[1] The Building Commission determined that it could save over $150,000 by hiring someone to coordinate the purchase of materials, supplies and labor; and, to meet with public officials to determine their needs and demands. The Building Commission asked the Requester to fill the position of project coordinator for the construction of the County Judicial Annex at $3,000/month until the project was complete. The County Commission was advised, and approved of the Requester operating as project coordinator until the project was complete; the Requester was still responsible for his duties to the County Commission on legal matters.

The Requester states that the position was time consuming and that the services provided were not legal in nature. Thus, the work was in addition to-and separate and apart from-his official duties as County Attorney. He performed the duties of the project coordinator and submitted an invoice to the Building Commission in the amount of $36,000, for 12 (twelve) months' work as project coordinator.

## CODE PROVISIONS RELIED UPON BY COMMISSION

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

[1] Until January 1, 2011, the Requester had served day to day as secretary as a non-voting member of the Building Commission. Effective January 1, 2011, he had not affiliation with the Building Commission.

> 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(d)(1) provides in relevant part:

> [N]o ... appointed public official or public employee ... may be a party to or have an interest in the profits or benefits of a contract which the official or employee 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: *Provided, however,* That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

Further, W. Va. Code§ 6B-2-5(d)(3) states:

> If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. ...

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

> It is unlawful for any member of a county commission, ... or any other county or district 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 ... he or she may have any voice, influence or control....

## ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public service. The expressed goal was to assist

public servants in avoiding conflicts between their public service and any outside personal interests. W. Va. Code§ 6B-1-2(d).

In furtherance of this goal, the Legislature established certain limits and prohibitions on a public servant contracting with his/her own governmental entity. In particular, the Ethics Act prohibits public servants from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code§ 6B-2-5(d)(1).[2] This prohibition does not apply to "the employment of any person with any governmental body". In addition, W. Va. Code§ 61-10-15, a criminal misdemeanor statute, prohibits public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them voice, influence or control. Unlike the public contract provision of the Ethics Act, however, W. Va. Code§ 61-10-15 prohibits employment contracts except for those expressly set forth in the statute.[3]

Additionally, the Ethics Act prohibits public servants from using their public office for private gain, and from receiving compensation for "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services." W. Va.Code§ 6B-2-5(b).

Here, the Ethics Commission is put in an awkward position since the Requester did not seek advice before entering into the contract with the Building Commission. Instead, after having worked for a year, the Requester seeks permission to accept compensation therefor, even though the arrangement had not been submitted to the Ethics Commission for review and approval in advance. Thus, the Commission must apply its interpretation of the law while balancing the Requester's right to be compensated for work performed.

Although the Requester is a private attorney hired to represent the County Commission, given the broad range of his responsibilities, he is comparable to a County Manager or Prosecuting Attorney. Thus, the Commission finds that the nature of the Requester's responsibilities as the County's Attorney vests in him the direct authority or control over the County's public contracts contemplated by W. Va. Code§ 6B-2-5(d). Similarly, the Requester's position as the County Attorney gives him "voice" and "influence" over all County contracts for purposes of W. Va. Code§ 61-10-15. Nonetheless, although his responsibilities are similar to that of a Prosecuting Attorney, the position itself is not a county office for purposes of W. Va. Code§ 61-10-15. *See generally* Advisory Opinions 97-34, 2010-06, 2010-24 and 2012-03 (all analyzed who is a "county officer".) Thus, the Requester is **not** subject to the stricter provisions of W. Va. Code§ 61-10-15.

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[2] For purposes of this provision, a limited interest is one that does not exceed one thousand dollars in the frofits or benefits of a contract in a calendar year. W. Va. Code§ 6B-2-5(d)(2)(A).

The Legislature has excepted certain employment positions not relevant to this opinion. Further, unlike the Ethics Act, W. Va. Code§ 61-10-15 has no dollar threshold.

Having found that the County Attorney has an interest in the Building Commission's contract for the services of a project coordinator, the Commission must now consider whether it is a prohibited contract under the provisions of the Ethics Act, W. Va. Code §§ 6B-2-5(b) and (d).

In Advisory Opinion 2000-31, a Prosecuting Attorney sought to perform work for a Regional Council retained by the County Commission to administer a grant. In denying the Prosecutor's request, the Commission wrote: "[I]t is clear that the Commission continues to exercise oversight of the Council's work and has a degree of control over the award of the legal services contract the project requires." The Ethics Commission takes administrative notice that, as the titular head of county government, County Commissions retain oversight over their sub-units' contracts.

By contrast, in Advisory Opinion 01-32, a public school teacher asked whether it was permissible for her to be compensated for performing work funded by a school grant which she helped obtain. The Commission concluded that it was generally permissible, but added these words of caution:

> [I]t would be a violation for the teacher to accept responsibility for hiring the summer teacher and then pervert the process by arbitrarily hiring herself. This could also be a violation of WV Code 61-10-15, a criminal misdemeanor statute which prohibits public servants from having a personal financial interest in a public contract over which their public position gives them control.
>
> With the authority to hire comes a duty to act responsibly and use a selection process which is fair and evenhanded, a process which is reasonable and objective. If the teacher is to be considered for a position, she must be excluded from the selection process - a candidate may not be part of the selection process.
>
> The teacher's personal financial benefit from a project financed by a grant she helped obtain is a problem only if her personal gain resulted from a misuse of her public position. It would not be a violation for the teacher to be hired for the summer teaching position, if she had been selected by an independent and objective person or group using a process which was fair and evenhanded.

A different result obtained in Advisory Opinion 2012-29; there, a County Emergency Services Director asked whether it was permissible for him to privately contract with the County to manage a federal grant given to the County for flood mitigation projects. In denying the request, the Ethics Commission wrote, "Given the overlap between the Director's floodplain duties and the mitigation projects, the Commission hereby finds

that the contract with the County is impermissible under the Ethics Act." The opinion further noted:

> In reaching this conclusion, the Commission notes that the Requester was involved in the approval and securing of the grant, even though the Requester has no formal voting authority on the County Commission. In particular, the County Commission delegated the grant process to Requester. He was responsible for obtaining the grant guidelines and in preparing the grant application to the State/Federal entity. Additionally, there is a clear appearance of control over the county contract since Hazardous Mitigation Project grants are only issued upon declaration of an emergency, and the stated mission of the Director is to "[t]o guide and assist in response and recovery in times of disaster in [the] County".

Unlike the situation in Advisory Opinion 2012-29, however, the Requester's additional compensation is for additional and **unrelated** duties, not "the performance of usual and customary public duties" as prohibited by W. Va. Code§ 6B-2-5(b). Thus, the situation presented does not directly violate W. Va. Code§ 6B-2-5(b) unless the Requester "steered" the contract to himself. *See also* 51 W. Va. Op. Att'y Gen. 69 (1964) ("We have been unable to find any court decision in this State which considers the right of a public employee to hold two or more positions during the same period and to collect a salary for service in each position; however, we believe that such right is analogous to a public official who holds two positions or performs extra work outside of, and not in any way related to, the duties which he is required to perform by virtue of his other office. The general rule is that in the absence of an express or implied statutory provision, a public official may hold two or more separate and distinct offices, which are not incompatible, and receive the compensation fixed for each. *Bordeau v. United States,* 130 U.S. 439, 32 L.Ed. 997; *Congdon v. Knapp,* 106 Kan. 206, 187 Pac. 660. In order to receive the extra compensation, the service must be additional services having no relation to or connected with the duties performed in connection with the other public office... It is our conclusion that, although the employment of one person to perform duties for two different governmental agencies (especially, if the funds are budgeted by the same fiscal body) should be viewed with caution and seldom permitted because of possible fraud and public criticism ....")

It is unclear from the facts provided, what role, if any, the Requester had in selecting the project coordinator. The Commission recognizes that the appointment of a person to fill the position of County Attorney requires more than identifying an applicant who simply meets the minimum qualifications for holding the position. Appointment of an attorney to represent the County and provide legal advice to the governing body involves selecting a qualified individual in whom the elected officials have the special trust and confidence required to perform these duties. A reasonable person could conclude that the Building Commission had good reason to select the same individual that the County Commission relies on to provide legal advice and representation.

Thus, based on the foregoing analysis, the Ethics Commission hereby finds that it would violate the Ethics Act for the Requester to accept additional compensation for work he performed on behalf of the County Building Commission, absent a contract exemption. The Ethics Commission recognizes that it is simply a basic right that workers are entitled to be paid for work performed. Nonetheless, public servants may not use their public positions to hire themselves without offering other qualified applicants an opportunity to compete for the work.

As a result of the foregoing, the County Building Commission or the County Commission may request a contract exemption from the Ethics Commission to allow the Requester to be paid additional compensation for work he performed on behalf of the County Building Commission. In its request, the governing body must state:

- why the Requester was chosen over other qualified individuals and how the County Building Commission and/or the County Commission reached its conclusion that the Requester was the best qualified for the position;
- whether the work performed for the County Building Commission constituted additional services having no connection with the duties which he is required to perform as County Attorney;
- whether the Requester's performance of work for the County Building Commission did not interfere with the performance of his duties to the County Commission;
- whether such employment was bona fide and not used simply for the purpose of increasing the Requester's income; and
- whether the Requester advocated for his selection for the position as project coordinator.

Until such time as the County Building Commission or the County Commission seeks and obtains a contract exemption from the Ethics Commission, the Requester may **not** accept additional compensation for work he performed on behalf of the County Building Commission.

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