ADVISORY OPINION NO. 2012-51

Issued On January 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Assistant Attorney General** asks whether he may serve as an elected City Council Member.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an attorney. He is leaving the private sector to join the Office of the Attorney General.

He presently serves an elected City Council Member. He states that if he continues serving as a Council Member, he will perform the functions of his City Council position on his own time, not during his public work hours. He asks whether there is anything in the Ethics Act which prohibits him from remaining on City Council once he becomes an Assistant Attorney General.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> 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.

ADVISORY OPINION

In general there is no provision in the Ethics Act which prohibits employees of the State of West Virginia from holding an elected public office. In A.O. 90-87 the Commission ruled that an employee of a State Park may serve on City Council. In A.O. 96-16 the Commission ruled that a State University Professor may serve as a member of a State Board. *See also* A.O. 2012-23 wherein the Commission reiterated that there is nothing in the Ethics Act which prohibits part-time public servants from accepting any particular employment position or holding another public office.

The position of City Council Member is a part-time position. Based upon the plain language of the Ethics Act, and its prior opinions, the Commission finds that for purposes of the Ethics Act it is permissible for an Assistant Attorney General to also serve as an elected City Council Member.

Limitations apply. Specifically, the Requester must perform his City Council duties on his own time, not during his public work hours. W.Va. Code§ 6B-2-5(I). If the Requester has regular work hours at his State job, and if he is authorized to make-up hours to perform the duties of his City Council position, then he must contact the Ethics Commission for further advice as he may be required to file time records with the Commission. W.Va. Code§ 6B-2-5(I) and W.Va. C.S.R. § 158-14-1 *et. seq.*

While nothing in the Ethics Act prohibits an Assistant Attorney General from serving as an elected City Council Member, the Commission has no jurisdiction to rule whether the West Virginia Constitution permits it, or the applicability, if any, of the common law doctrine of incompatibility. This doctrine stands for the proposition that "incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to each other, rendering it improper, from considerations of public policy for one person to perform the duties of both." State ex rel. Thomas v. Wysong, 125 W. Va. 369, 24 S.E.2d 463,466 (1943). *See also* 49 W.Va.Op.Atty.Gen. 398 (1962)(setting forth various positions which are incompatible) and 31 W.Va.Op.Atty.Gen. 87 (1924)(wherein the Attorney General opined that it did not violate this doctrine for a Member of the House of Delegates to also serve as an elected Member of the City of Charleston Council).

Public employees seeking to hold public office should also consult with their agency's attorney to ensure that no personnel policies of their agency, State laws, or federal laws, e.g. the Hatch Act, restrict their employment.

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 similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman