ADVISORY OPINION NO. 2012-01

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor** asks whether a City Council Member may be employed by the City as its Building Official and, if so, what limitations apply under the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The City, by ordinance, has created the position of Building Official. It is the duty of the Building Official to enforce all laws and ordinances relating to the construction, alteration, repair and other matters relating to the regulation of buildings or other structures within City limits. In general, the position of "Building Official" is equivalent to the more commonly used term "building inspector".

The Building Official is appointed by the City Council and his or her appointment terminates at the next succeeding general election. The City's ordinance provides that he or she is subject to the will of City Council and is under the control of the Mayor. The Requester states that the Building Official does not take an oath of office.

The City passes building code ordinances which the Building Official enforces. If a citizen has a complaint about the Building Official's enforcement of any such ordinance, that citizen has the right to come before Council to complain. As a result, the Requester states that she has a concern about the Building Official serving on Council.

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.

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such 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 make unlawful the employment of any person with any governmental body....

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

U) *Limitations on Voting.*

(1) Public officials ... may not vote on a matter:

(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, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(11) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

ADVISORY OPINION

The Ethics Act imposes limitations on public officials from having an interest in a public contract over which they exercise control. W.Va. Code§ 6B-2-5(d). While this code section imposes limitations, it also contains exceptions, including the exception that "that nothing herein shall be construed to make unlawful the employment of any person with any governmental body."

The Commission has previously addressed the question posed. Specifically, in A.O. 92-26, the Commission ruled that nothing in the Ethics Act prohibits a City Council Member from also serving as the city building inspector. See *also* A.O.s 91-21 and 96-30. As such the Commission reaffirms its prior decisions herein.

The conclusion of the Ethics Commission is consistent with the plain language of the Act. Indeed, a historical review of the Municipal Code appears to compel this conclusion.

In particular, previously **(emphasis supplied)** the West Virginia Code contained a provision which appears to have prohibited the employment in question. The prior provision read:

> It shall be unlawful for any council or board of commissioners of any town, or any member thereof, or other officer or officers thereof, to be interested personally, either directly or indirectly, or as a member, manager, officer or stockholder of any partnership, business, firm or corporation, in any contract furnishing material and supplies to any town, or to any contractor, or workmen for any town, or in any manner whatsoever, whereby the taxpayers of any such town shall become the paymaster, either directly or indirectly. Any violation of the provisions of this section, by any member of a town council or other officer or officers thereof, is a misdemeanor and, upon conviction thereof, such member or officer shall be fined not less than fifty nor more than five hundred dollars, and shall be removed from office

Relying upon this code provision, in 1949 the Attorney General issued an opinion stating that a City Recorder may **not** be employed by the City where he served on Council. 43 W. Va. Op. Att'y Gen. 338 (1949), citing W.Va. Code 8-4-22 (since repealed). Additionally, the West Virginia Supreme Court interpreted substantially similar language as prohibiting the employment of a City Council Member by the City where he or she serves.[1]

Based upon information and belief this code provision was repealed in 1969 when the Municipal Code was rewritten. W.Va. Code§ 8-1-1. Regardless of the exact year when this section was repealed, this strict conflict of interest provision governing municipalities is no longer in the Code.[2] Instead, the Municipal Code now contains a conflict of interest provision which leaves to the discretion of each City as to whether to adopt a conflict of interest policy. This provision reads:

> Every city shall have plenary power and authority to provide by charter provision, and every municipality shall have plenary power and authority to provide by ordinance, that it shall be unlawful for the governing body, or any member thereof ... to be interested personally, either directly or indirectly... in any contract furnishing material, services or supplies to the municipality, or to any contractor, or workmen for the municipality, or in any manner whatsoever, whereby the taxpayers of such municipality shall become the paymaster.

W. Va. Code§ 8-5-19.

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[1] *See* Arbogast v. Shields, 14 S.E.2d 4 (W.Va. 1941) wherein the Supreme Court interpreted a similar provision incorporated into the City of Clarksburg's Charter.

In contrast, similar language in W.Va. Code 61-10-15 strictly limits the employment of **County** Officials and their spouses.

Based upon the history of the Municipal Code, it is possible that the proviso expressly permitting for employment by any "governing body" was incorporated into the Ethics Act to make it consistent with municipal law governing this matter. Regardless, there is nothing in the Ethics Act which prohibits the employment in question.[3]

While nothing in the Ethics Act prohibits a building inspector/city employee from serving on City Council, limitations apply. **First,** a city employee/city council member may not vote on a personnel matter which affects him or her directly as opposed to affecting five or more employees in the same or similar manner. *See* W.Va. Code§ 6B-2-5U)(ll)(A). **Second,** the City Council Member may not use his public office for his own private gain.[4] **Third,** he must perform his City Council duties on his own time, **not** during his public work hours.

The Requester also inquires whether it is a conflict for the Building Official to be a City Council Member when citizens who are affected by actions of the Building Official may come before Council to address or dispute such actions. In these instances, the Commission finds that the City Council Member/Building Official must recuse himself. *See* C.E. 2010-06. For recusal to be proper under the Ethics Act, he 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 of the meeting must reflect the basis for the recusal and that he left the room during all consideration, discussion and vote on the item(s) under consideration.

Although there is nothing in the Ethics Act which prohibits a City Council Member from being employed by the City where he or she serves, the Commission takes this opportunity to caution public officials that in many circumstances other rules of law or prior decisions of the Commission may prohibit their employment by the governing body on which they serve. For example: (1) A Mayor may not be employed by the City where he or she serves as elected Mayor. A.O. 2006-05; (2) County Officials may not be employed by County Agencies. W.Va. Code§ 61-10-15[5]; (3) Public Officials serving on a **County** (emphasis supplied) Board or Commission may not be employed by the Board or Commission on which they serve. In fact, they must resign before being considered for employment. A.O. 99-31 and W.Va. Code § 61-10-15; (4) PSD Board

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[3] The Commission finds that this same conclusion applies regardless if the City is organized with a strong-mayor or mayor-council form of government. W.Va. Code § 8-3-2.

[4] Here, if elected, the City Council Member's employment will pre-date his election. If a City is considering hiring one of its own members for employment, it must make this decision based upon a fair and impartial hiring procedure, not favoritism. In other words, the position must be advertised and all qualified candidates given equal consideration. Moreover, the affected City Council Member must be recused from all discussions and votes on this matter, including decisions relating to the job description and whether the position should be created or filled. *See* Legislative Rule on nepotism, Title 158, Series 6.

[5] In general, these same prohibitions in W.Va. Code§ 61-10-15 also prohibit the spouses of County Officials from being employed by the County or its agencies. There are limited exceptions.

Members may not be employed by the PSD on which they serve. W.Va. Code§ 61-10-15 and W.Va. Code§ 16-13A-3; (5) Elected School Board Members may not be employed by the County School Board. W.Va. Code 18-5-1a; and, (6) Members of Chapter 30 Boards may not be employed by the Board on which they serve. A.O. 2006-14 and W.Va. Code§ 30-1-11. Additionally, if a City or governing body believes that for public policy reasons a member of the governing body should not also be an employee, then they are free to impose stricter standards on public officials than those contained in the Ethics Act. In fact, based upon information and belief, some Cities, by ordinance, prohibit City Council Members from being employed by the City or its agencies, boards and commissions.

The limitations cited above are not intended to be inclusive of all limitations which may prohibit employment. In making hiring decisions, as with other matters, public agencies should not only be cognizant of the limitations in the Ethics Act and W.Va. Code§ 61-10-15, but should always consult with their attorneys to determine what other rules of law may apply.

Additionally, while the Requester states that the Building Official is an employee, **not** a public official who is required to take an oath of office, nevertheless, the Requester may want to verify this fact through the City's attorney.[6] Whether the Building Official is a public officer or public employee does not alter the analysis herein. Nevertheless, the common law doctrine of incompatibility, or the doctrine prohibiting self-appointment, may limit such dual office holding. See Thomas v. Wysong, 24 S.E.2d 463 (W.Va. 1943) wherein the Court reasoned, "'Incompatibility of offices' rests not upon physical inability to perform the duties of two offices but upon 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 offices." !5;L at 463.). See *also* Honorable Haymon H. Boggs, 38 W.Va. Op. Atty. Gen. 15 (1938) citing the common law doctrine against self-appointment which stands for the proposition, "It is contrary to public policy to permit an official board having the power to appoint to an office to exercise that power by appointing one or more of their own body. When a statute confers the appointing power, and does not expressly authorize self-appointment, the appointment of some other than self is always contemplated."

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.

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[6] The fact that the position of "Building Official" is an appointed position created by Ordinance may be relevant to the analysis of whether he is a public official; however, the Ethics Commission has no authority to determine whether he is a public official for purposes of analyzing the applicability, if any, of the cited common law doctrines.

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