overruled, in part, by AO 2016-04

ADVISORY OPINION NO. 2012-04

Issued On February 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Attorney for a Municipal Water Board asks if the Ethics Act permits the Board to employ the Board's Chairperson as its Supervisor

FACTS RELIED UPON BY THE COMMISSION

City Council appoints the Members of the Water Board. There are five Members. The Board Members select the Chairperson from the Members of the Board. The Supervisor oversees the day-to-day operations of the Water Board, and is effectively the Executive Director. Among other duties, the Supervisor oversees the office, billing, all aspects of the financial operation, operation, maintenance, all expenditures, overtime and scheduling. Additionally, the Supervisor supervises employees.

The Requester states that the Board has advertised the position in the local paper as a part time position that requires the employee to be available as needed, around the clock, with no additional compensation. Further, the Supervisor must reside in the area of the municipality. The pay rate will not exceed $20 per hour. Finally, the Supervisor is prohibited from being employed elsewhere during normal business hours.

Only the Board's Chairperson and a current full-time Board employee applied for the position. According to the Requester, the Board employee stated that he had not seen the advertisement before applying and signed a written statement withdrawing his application upon learning that he could not also retain his full-time position with the Board. Thereupon, the Board hired its Chairperson as its paid Supervisor. The Board has put in place a procedure whereby the Board will supervise the Supervisor.

The Requester asks whether the Ethics Act permits its Chairperson to continue as both Chairperson of the Board and its paid part-time Supervisor.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads, in relevant part:

> A public official or public employee may not knowingly or 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.

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§ 68-1-2(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 which give the appearance of impropriety.

Many years ago, in Advisory Opinion 91-16, the Commission was presented with multiple questions concerning the employment of the Solid Waste Authority's Chairperson as its part-time Executive Director. After addressing the other issues at length, the Commission concluded, without further analysis, "The Commission would note that the public employee may not serve as the Chairman [sic] of the Solid Waste Authority and the Executive Director of the Solid Waste Authority simultaneously."

Thereafter, in A.O. 91-50, relying on A.O. 91-16, the Commission affirmed its conclusion and stated, "Consequently, the Solid Waste Authority Chairman [sic] must resign his position as an appointed member of the Authority before accepting the paid position as Director of the Solid Waste Authority."

The Commission recognizes that the Ethics Act has a provision that expressly allows the employment of persons with a government body.[1] For example, in AO 2012-01 issued on this date, citing earlier advisory opinions authorizing such, the Commission reaffirmed that a City Council Member may be employed by the City wheres/he serves as an elected Council Member. The Commission noted, however, that other rules may limit such dual employment/service.

As it relates to the employment of the Chairperson of a Board, a different rule of law applies. This situation is more analogous to the employment of a Mayor by a municipality. In fact, the Commission has frequently interpreted Ethics Act in the context of the employment of a Mayor by the municipality. For example, in A.O. 2006-05, the Commission ruled that a Mayor in a Strong-Mayor form of government could not

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[1]" ... (N]o elected or 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...** " (Emphasis added). W. Va. Code§ 6B-2-5(d)(1).

be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees.

The Commission summarized the basis for this prohibition as follows:

> Although both positions are part-time and the Mayor would be able to fulfill both job responsibilities during the course of a work week, an inescapable conflict exists as the Mayor must supervise the City's employees. The conflict could not be avoided by the Mayor recusing himself on relevant votes or even delegating management responsibilities over his other positions. While the Mayor may be able to balance these job responsibilities and perform his positions in an impartial manner, as a matter of public policy and due to the conflicting nature of the duties and responsibilities, the Ethics Commission finds that the Ethics Act prohibits the Mayor from also being regularly employed by the City.

Advisory Opinion 2006-05; *See also* Contract Exemption 2009-01.[2]

Here, the Board has proposed to supervise the Supervisor, removing a direct conflict similar to that presented in the Strong Mayor opinions. The Supervisor retains, however, the remaining administrative powers. Yet, even in a municipality where the Mayor and Council members share the administrative powers, the Commission found that the Mayor is prohibited under the Ethics Act from being regularly employed by the municipality. In Contract Exemption 2010-03, the Commission held:

> The Commission hereby finds that because the Mayor and Council members share the administrative powers of the Village, the Mayor is in a position similar to that of a Mayor in a Strong-Mayor form of government. Hence, the analysis and prior precedents of a Strong-Mayor form of government are applicable to the Mayor in a Mayor-Council form of government. Accordingly, the Commission finds that the Mayor is prohibited under the Ethics Act from being regularly employed by the Village.

The Chairperson of a municipal board has an inherent, over-riding interest in every aspect of each employee's employment with the board. Simply removing the oversight of his own employment is insufficient to negate the conflict of interest inherent in being one's own boss. Therefore, the Commission hereby generally finds that the Ethics Act prohibits a Chairperson (or Board President) from being employed by the Board simultaneously. Thus, under most circumstances, if a Board believed that its

[2] In Contract Exemption 2009-01, the Commission found that it would violate W. Va. Code§ 6B-2-5(d)(1) for the Mayor of the Town of Mabscott to continue to be employed as Police Chief; Head of the Street Department; and/or Assistant Fire Chief during his service as the Town's Mayor. The Commission's ruling relied upon prior precedent and prohibition of employment of the Mayor in a Strong-Mayor form of government.

Chairperson (or Board President) is the best candidate to be employed by the Board, then the Chairperson (or Board President) must resign his position as Chairperson (or Board President) of the Board, but may remain a member of the Board.[3] Additionally, in such circumstances, the employee/Board Member may not be a member of the Board Personnel Committee.

In this particular instance, however, the Commission finds the facts to be so unique that it cannot permit the Board to hire its Chairperson even if he resigns his position as Chairperson. The Commission finds that it appears that the Board may have tailored the job description in such a way that only the Board's Chairperson meets the qualifications. For example, the Supervisor position requires 15 years managerial experience in municipal potable water, which the Chairperson has from his years on the Board. The position does not require the Supervisor to have any professional license or certification. Further, the Commission takes administrative notice that few, if any, jobs require a part-time position to be available around the clock and not have other employment during normal business hours.

In Advisory Opinion 92-20, a Mayor and City Council sought permission to hire the Mayor's spouse without giving public notice of the position and by transferring the Mayor's salary to the spouse. The Commission noted that the position was created specifically for the Mayor's spouse and was not available to other qualified and interested individuals. Denying the request, the Commission ruled that while W. Va. Code§ 6B-2-5(b)(1) does not presumptively prohibit the employment of a Mayor's spouse, here the Mayor and City Council failed to follow the Commission's nepotism guidelines, e.g. advertising the position, considering all qualified applicants, and removing the Mayor from the process.

Here, although the Board advertised the position and the Chairperson was removed from the process, it does not appear that any other person had a meaningful opportunity to be considered for the position because the job was so narrowly tailored. Even before the position was advertised, when the Board learned that the previous Supervisor was retiring, in discussions among the Members they concluded that their Chairperson was the best candidate, without having advertised the position. In Advisory Opinion 91-16, the Commission reviewed the proposed employment of the Chairperson of a County Solid Waste Authority by the Authority, and stated:

> Nepotism has been defined by the Commission as favoritism shown or patronage granted by persons in high office to relatives or close friends in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. The Commission assumes that the Authority Chairman [sic] would be considered a "close friend" of the other Solid Waste Authority Members.

[3] This opinion clarifies AOs 91-16 and 91-50 which could be interpreted to require the Chairperson to resign as a member of the board before accepting employment with the board.

This opinion should not be interpreted to require all municipal and county governing bodies to publicly advertise every employment opportunity, especially if it is a short-term, temporary position or an emergency situation. Instead, when the public body knows in advance that one of its preferred candidates is a relative. close friend, or fellow member of the public body, in order to avoid violating W. Va. Code§ 6B-2-5(b) (1), then the public body must follow the Commission's nepotism guidelines more fully set forth at W.V.C.S.R. § 158-6-3.

Thus, the Ethics Commission concludes that the Requester may not employ its Chairperson as its Supervisor. If the Requester is unable to find a qualified candidate after a meaningful search using relevant, less unnecessarily restrictive requirements, then it may return to the Commission to seek a Contract Exemption to hire the Board's Chairperson; to do so requires the Board to prove that hiring anyone else would result in undue hardship, excessive cost, or substantial interference with government operations.

The Board shall, within thirty (30) days, notify the Ethics Commission how it will comply with this opinion. Further, the Board is hereby granted a transition period of ninety (90) days from the date of this opinion to comply with this opinion.

During this time, the Commission encourages the Board to examine its job description carefully to determine whether the restrictions noted herein are necessary for the Supervisor to be effective. Further, the Board, if it elects to re-advertise the position. shall widely advertise the position throughout the area, not just in the local paper, and shall allow sufficient time for the advertisement to run, but not less than one week.

The Commission appreciates the Board's cooperation in seeking advice, and is confident that the Board will follow the guidance set forth herein.

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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman

ADVISORY OPINION 2016-04

Issued on February 4, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Council** asks whether its Mayor may continue to serve as City Administrator.

FACTS RELIED UPON BY THE COMMISSION

In 2006. the Requester voted to appoint its Mayor as City Administrator, a full-time position. The position of Mayor is part-time.

The Mayor recused himself from the vote and deliberations on the appointment The Requester states that the Mayor has at all times since his appointment as City Administrator recused himself from matters affecting his compensation as City Administrator or Mayor.

The Requester is a Class Ill city. The City Council is the governing body and consists of five members. The Mayor votes only in the event of a tie.

The City has a charter, but it does not designate a form of government for the City. The Requester states because it is "a Class Ill (c]ity, the law assigns no presumptive or default form of government." The Requester further states the act of hiring its Mayor as City Administrator "may be considered a *de facto* change in the form of City government to a "Strong Mayor Plan," in which the Mayor is the administrative authority and Council the governing body."[1] According to the Requester, the Mayor "continues to serve the City as its administrative authority, responsible for the conduct and management of the affairs of the City in accordance with the ordinances, resolutions. and orders of the governing body."

The Requester asserts its City is well-run and is an ·'award-winning economic, cultural and tourism hub" of the county where it is situated. The Requester states its objective in having its Mayor continue to serve as the City Administrator is to allow it to amend or reenact its charter for purposes of legally codifying its form of government

The Requester states that if the Ethics Commission allows its Mayor to continue to serve in this position, it will allow its citizens "to objectively determine the best form of government for the City while avoiding the cost and turbulence of a potentially unnecessary and certainly undesirable change in City administration during the process."

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[1] The Requester cites W Va Code § 8-3-2 in suppor1 of its conclusion

The City will seek to amend its charter either by ordinance or through the election process wherein voters select seven members to serve on a charter board which proposes amendments to the charter in accordance with the process established by the West Virginia Code. *See* W.Va. Code§§ 8-4-7 and 8-4-8.

The Requester submits it only seeks authority for its Mayor to serve as City Administrator until the enactment of charter provisions designating the form of government of the City pursuant to W.Va Code§§ 8-3-1 through 8-3-10. The Requester further represents it will adopt the following ordinances if the Ethics Commission authorizes the continued employment of its Mayor: (1) an ordinance authorizing and directing citizens to bring complaints or concerns about the City Administrator to City Council, and (2) an ordinance mandating the Mayor's recusal from the vote and deliberations on matters affecting the City Administrator's compensation and prohibiting any compensation to the City Administrator beyond the legislated annual salary.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) 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) reads in relevant part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family ... 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...

ADVISORY OPINION

Nothing in the Ethics Act expressly prohibits a public official from being employed by the governing body on which he or she serves. This conclusion is based upon the plain language in the Act, which reads: "nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body ..." *See* W.Va. Code § 6B-2-5(d)(1).

The Ethics Commission has examined the application of this Code provision in past Opinions. In Advisory Opinion 2012-01, the Commission considered whether a city may

employ a city council member as a building official[2] The Commission, relying upon prior Advisory Opinions and the plain language in the Ethics Act, held "that nothing in the Ethics Act prohibits a City Council Member from also serving as the city building inspector." *Id.* at 2.

In contrast, the Commission ruled in Advisory Opinion 2006-05 that a mayor in a strong mayor form of government could not also be employed by the town. The Commission reasoned "that the spirit and intent of the prohibition" against use of office for private gain "would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees." *Id.* at 3. *See also* Advisory Opinion 2012-04. The Commission qualified its holding with the recognition "that there may be times. particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities.·· *Id.*

The Ethics Commission takes this opportunity to reconsider and overrule Advisory Opinions 2006-05 and 2012-04. While the Commission believes conflicts may arise if a city council hires its mayor, the Commission finds there is nothing in the Ethics Act which prohibits a city council from employing its mayor.

Further, as the Ethics Act authorizes the employment of a mayor by the city where he or she serves. it is not necessary for a city council to seek a contract exemption prior to employing its mayor.[3] The hiring decision must be based upon merit, not favoritism.'[1]

The Commission holds the Requester may continue to employ its Mayor as City Administrator. The Requester may not show favoritism or give special treatment in making employment decisions concerning its Mayor. The Mayor may not vote on personnel matters affecting him or her directly as opposed to affecting five or more employees in the same or similar manner. W.Va. Code § 68-2-5U)(ll)(A). *See* Advisory Opinion 2014-14.

County elected and appointed officials are cautioned that they are subject to the stricter limitations in W.Va. Code§ 61-10-15, which in most instances prohibits the employment of elected county commissioners and their dependents in the counties whether they serve, and the employment of county officials and their dependents by the county agencies on whict, they serve as board members. Many state boards and commissions are also subject to W.Va Code§ 30-1-11(d). which expressly prohibits state board members from being employed by the board on which they serve.[5]

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[2] *See* a/so 2014-14 generally addressing this issue as It relates to a city council member being employed by the city in a municipality organized as a mayor-council plan of government

[3] *See generally* Contract Exemptions 2008-08 2009-01. 2011-04, 2012-06 and 2014-03

[4] This ruling also applies to other governing bodies

[5] This Code section reads "[n]o member of any board In this chapter may receive compensation as an employee of the board." *Id.*

In conclusion, the Ethics Commission holds that the Requester may continue to employ its Mayor as City Administrator. The Requester may not show favoritism or give special treatment in making employment or personnel decisions affecting the Mayor in his capacity as City Administrator. The Mayor must recuse himself from the vote and deliberation on personnel matters which directly affect him.[6]

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this Opinion invalid.

This Advisory Opinion is limited to questions arising under the Ethics Act at W.Va. Code §§ 68-1-1 through 68-3-11 and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 68-2-3, 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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson

[6] The Comm1ss1on supports the Requester's statement that ,twill seek to amend ,ts charter either via ordinance or through the election process wherein voters select seven members to serve on a charter board which proposes amendments to the charter and suggests that it take this action as soon as possible.