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ADVISORY OPINION NO. 2012-23

Issued On June 28, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the West Virginia Legislature** asks whether he may simultaneously serve as the recorder for a municipality.

FACTS RELIED UPON BY THE COMMISSION

An elected Member of the West Virginia Legislature may be appointed to fill the vacant term of a City Recorder, an elected position. The Recorder position is not a full-time position nor does the City's ordinance or charter require the Recorder to have regularly scheduled work hours or to work a certain number of hours. The Recorder's compensation is $500.00 per month.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

ADVISORY OPINION

In general there is no provision in the Ethics Act that prohibits part-time public servants from accepting any particular employment position or holding another public office. While the Ethics Act places employment limitations on full-time public servants, a different standard applies to part-time public servants, most of whom must balance their public responsibilities with the need to make a living and support their families. *See* A.O. 2012-19 reaffirming prior decisions of the Commission citing this principle. *See contra* A.O. 2012-17 wherein the Commission ruled that under the particular circumstances of that case, it presented an inescapable conflict for a Presiding Officer of the Legislature to hold certain employment.

In A.O. 99-12 the Commission held that it did not violate the Ethics Act for a member of the West Virginia Legislature to serve as a member of a State Commission and to accept a statutorily established per diem allowance. The Commission qualified its holding with the statement that its opinion had no bearing on whether the Legislator's service on the State Commission in question was consistent with Article 6, Section 15 of

the WV Constitution which imposes limitations on Members of the Legislature from holding other lucrative offices.

Here, in accordance with A.O. 99-12, the Commission finds there is nothing in the Ethics Act which prohibits an elected Member of the Legislature from serving as a Recorder for a municipality; particularly when it is a part-time position with no requirement that he work a certain number of hours or keep office hours. While the Ethics Act permits this dual service, 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).

While the Ethics Act does not prohibit a part-time elected member of the Legislature from serving as a Recorder, limitations apply. Specifically, the Requester may not use his or her position to influence the appropriation of monies to the municipality. The Commission makes this finding based upon his financial interest in the City arising from his service in a compensated position. *See* A.O. 2006-06 wherein the Commission ruled that a Member of the Legislature may not use her Legislative position to steer appropriations to her private employer; and, A.O. 2012-05 wherein the Commission discussed that an elected official has a financial interest in the affairs of their public employer.

A Recorder must, by statute, perform certain duties. W. Va. Code§§ 8-10-3 & 4. If the Requester is unable to perform those statutorily mandated duties while serving in the Legislature, he may not be compensated therein. For him to be compensated for this position if he is not performing his duties, would constitute the use of office for private gain. W.Va. Code§ 6B-2-5(b). Additionally, failure to perform the duties may subject him to removal from office for neglect of duty. W.Va. Code § 6-6-7.

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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson