ADVISORY OPINION NO. 2011-21

Issued On January 12, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City** asks whether it may, through the adoption of an ordinance, compensate its Mayor for performing additional job duties.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a City which operates a bingo hall. It has a strong mayor form of government.

The City has an ordinance which establishes the monthly compensation for its Mayor, Recorder and Council Members. The City seeks to amend this ordinance to provide that the Mayor, in addition to the compensation he receives for serving as Mayor, will also be compensated at the rate of $7.25 per hour for time spent overseeing the City's bingo hall operations.[1] The established rates of compensation, including payment to the Mayor for services rendered relating to bingo, would not become effective during the current term of office for the Mayor.

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.

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The Commission has previously ruled that in a strong Mayor form of government, the Mayor may not be employed by the City where he or she serves as an elected Mayor. *See* A.O. 2006-05. The Commission based its holding in A.O. 2006-05, in relevant part, upon the premise that the employment of a Mayor by a City in a strong-mayor form of government results in an inescapable conflict as the Mayor must supervise the City's employees. The Commission noted that its holding did not prohibit the **temporary** (emphasis supplied) employment of a Mayor when an unexpected vacancy or emergency circumstance necessitates this course of action.

[1] The proposed ordinance states that the Mayor shall receive $1,620.00 monthly and $7.25 hourly for time at bingo.

Here, the question presented is different than that addressed in A.O. 2006-05. In particular, the City seeks to amend its ordinance to establish an hourly rate of pay of $7.25 per hour as compensation to the Mayor for performing duties related to the operation of the City's bingo activities. The ordinance does not state that the Mayor is required to oversee the City's bingo operations; instead, it only establishes the rate of pay at which the Mayor is to be compensated when performing this job function. The Commission takes administrative notice that based upon information and belief, overseeing a bingo hall is not a duty traditionally performed by Mayors in carrying out the responsibilities of their positions.

Nevertheless, in regard to the application of the Ethics Act, the Commission finds that there is nothing in the Ethics Act which prohibits a City from adopting or amending an ordinance or charter to establish a rate of pay for compensating the Mayor for performing additional job duties which are not part of his current mayoral duties. Limitations do apply. The rate of pay established by ordinance must be a flat rate of pay, **not** an hourly rate of pay. Here, the proposed ordinance creates an hourly rate of pay with no limitations on how many hours the Mayor may work. For example, as written, he could work 10 hours or 100 hours, or more.

The proposed arrangement, i.e. establishing an hourly rate of pay, in the opinion of the Commission leaves the door open for abuse. The Commission is not stating it has reason to believe that would occur in the present situation. Nevertheless, the Commission seeks to establish a bright line rule of law for compliance with the Ethics Act. Hence, the Commission finds that it does not violate the Ethics Act if a City codifies, via ordinance or charter, that it will compensate its Mayor at a specified flat rate of pay for performing a specific job function which is not statutorily required of the Mayor. Of course such a change to ordinance or charter may only become effective for a new term of office, not the existing term. Hence, the City may comply with the holding in this opinion if it amends the ordinance to establish a flat rate of pay, **not** an hourly rate of pay, as compensation for the City's elected Mayor to perform specified functions.

While an ordinance or statute providing additional compensation for a Mayor for performing job duties which are not part of traditional Mayoral duties is permissible for purposes of the Ethics Act, the Commission is unauthorized to opine whether the proposed arrangement complies with laws governing municipalities and the compensation of its officers. The West Virginia Code provides that a City may fix the salary or compensation of every municipal officer and employee; provided, that the salary of officers may not be increased or diminished during his or her present term. W.Va. Code§ 8-5-12. The code further defines the general power and duties of a Mayor with the proviso that these powers and duties exist when "not otherwise provided by charter provision or general law." W.Va. Code§ 8-10-1.

In this case, if the City adopts the ordinance, arguably it is conferring a requirement on

future mayors that they oversee the bingo hall. This duty does not appear to be a traditional mayoral function and arguably could deter future candidates from seeking the position. Nevertheless, the Commission is without authority to opine on what additional duties a City may impose on an elected officer via ordinance or charter. Instead, this question may only be answered by a Court, the Legislature, or Attorney General, if the Attorney General deems he has jurisdiction to render an opinion on this issue.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *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 § 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/R. Kemp Morton, Chairperson
West Virginia Ethics Commission