

BEFORE THE STATE OF WEST VIRGINIA
ETHICS COMMISSION

IN RE:

Respondent Roger Wolfe

VCRB 2008-20

ORDER GRANTING ETHICS COMMISSION MOTION TO DISQUALIFY
RESPONDENT'S COUNSEL, SETTING DEADLINE FOR RESPONDENT TO
OBTAIN REPLACEMENT COUNSEL, AND SCHEDULING A STATUS CONFERENCE

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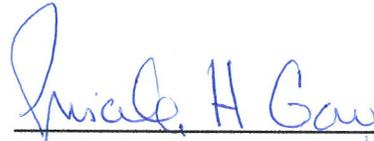
On June 7, 2010, the Ethics Commission moved to disqualify Herbert Hively, II from representing Respondent Roger Wolfe in the above captioned complaint. The reason given was that Hively represented the City of Dunbar at the time Wolfe is alleged to have violated the Ethics Act. While the City is not an adverse party in the ethics proceeding, if the Ethics Commission prevails, Respondent Wolfe will have to repay the City for alleged unauthorized reimbursements. In such circumstances, Hively cannot ethically represent the Respondent.

On June 21, 2010, the Hearing Examiner entered an Order requiring Respondent's Counsel to respond to the Commission's Motion to Disqualify within seven days. No response was received. Accordingly, this matter is ready for decision.

After review of the facts and applicable authorities set forth in the Commission's filing, it is determined that Hively's dual representation of the City of Dunbar and Respondent Wolfe are in conflict and, where a public interest is involved as in this instance, a waiver from the public entity is insufficient to overcome the conflict. "Where the public interest is involved, an attorney may not represent conflicting interests even with the consent of all concerned." Syl. Pt. 2 *State ex rel. Morgan Stanley & Co., Inc. v. MacQueen*, 187 W. Va. 97, 416 S.E.2d 55 (1992).

It's important to note that the question of dual representation was raised early in these proceedings and the Ethics Commission made an effort to resolve this issue prior to filing the Motion at issue. As noted in the Commission's Motion at page 2: "When Respondent Wolfe made his personal appearance before the Ethics Commission's Probable Cause Review Board, Hively stated: 'And at some point, there may come a point to where I may be called as a witness and I wouldn't be able, probably, to represent him [Wolfe] in this matter.' Tr. 8:2-5." Letters were sent to Hively on February 4, and March 4, 2010 addressing the issue. He chose not to reply. A final letter followed on April 1, 2010, with a Withdrawal Appearance form enclosed. "Hively responded: 'Your letter indicates that you are formally advising me that I will be called as a witness; however, I have not been served with any subpoena. I trust that this is not an attempt to have me sign the waiver and then not to call me as a witness . . .'" Motion p. 2. On May 13, 2010, the Commission filed its Witness List and identified Hively as a potential witness and as of the date of filing the Motion Hively had not withdrawn.

Therefore, it is ORDERED that the Ethics Commission's Motion to Disqualify Respondent's Counsel is GRANTED. It is further ORDERED that Respondent Roger Wolfe has thirty days from the date of this ORDER to obtain replacement counsel. Finally, it is ORDERED that a status conference will be scheduled within fourteen days of receipt of the notice of replacement counsel.



Priscilla H. Gay
Hearing Examiner

June 30, 2010

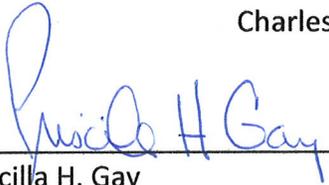
Date Entered

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2010, I sent this ORDER GRANTING ETHICS COMMISSION MOTION TO DISQUALIFY RESPONDENT'S COUNSEL, SETTING DEADLINE FOR RESPONDENT TO OBTAIN REPLACEMENT COUNSEL, AND SCHEDULING A STATUS CONFERENCE, by first class mail to:

Herbert L. Hively, II
Attorney at Law
179 Summers Street, Suite 201
Charleston, WV 25301

C. Joan Parker
General Counsel, WV Ethics Commission
210 Brooks Street Suite 300
Charleston, WV 25301



Priscilla H. Gay
Hearing Examiner