

ADVISORY OPINION NO. 89-15

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1989

GOVERNMENTAL BODY SEEKING OPINION

A Prosecuting Attorney

OPINION SOUGHT

Will the West Virginia Ethics Act require part-time prosecuting attorneys to reimburse the county for use of county facilities and expenses when not practicing law on behalf of the county?

OTHER FACTS RELIED UPON BY THE COMMISSION

It has been an accepted practice for the part-time prosecutor to practice law in addition to his prosecutorial duties. Sometimes the prosecutors' offices have been located in the Courthouses and others are located elsewhere.

However, in any event the County Commission pays the expenses for utilities, secretarial staff, rent when applicable, and other necessary expenses as required by statute (West Virginia Code Section 7-2-3). Since the part-time prosecutors are allowed to practice law in addition to their employment they are paid a lower salary in return. The current salary for a Class VI Prosecuting Attorney is \$17,000. In the past the State has saved money by allowing the part-time prosecutor to combine his personal practice expenses with county's.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states a public official or public employee may not 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 constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(b)(2) states in part accordingly, the commission is directed, by legislative rule, to establish categories of such public officials and public employees, identifying them generally by the office or employment held, and offering persons who fit within such categories the opportunity to apply for an exemption from the application of the provisions of

this subsection. Such exemptions may be granted by the commission, on a case by case basis, when it is shown that:

(1) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state;

(2) the office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and

(3) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

West Virginia Code Section 6B-2-5(d)(1) states that no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract with the governmental body over which he or she has direct authority or with which he or she is employed: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, However, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body.

West Virginia Code Section 6B-2-5(d)(3) states where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

#### ADVISORY OPINION

West Virginia Code 6B-2-5(b)(1) states that a public official may not use his office, or the prestige thereof, for his own private gain, or for the private gain of any other person. At the same time, however, the Legislature recognized that there may be certain categories of public officials who should be treated differently because they bring to their respective public offices unique personal prestige which inures to the benefit of the State.

In such instances, the Legislature recognized that it would be contrary to the best interests of the State to deny such persons the right to hold public office on the grounds that they would, in

addition to the emoluments of their office, be in a position to benefit financially from the personal prestige which otherwise inheres to them.

Therefore, in order to promote the best interests of the citizens of this State by permitting persons to hold public office who bring to that office their own unique personal prestige, the Legislature directed this Commission, by Legislative Rule, to establish categories of such public officials and to grant exemptions, on a case by case basis, when application is made for exemption and when it is shown that:

1. The public employment held is not such that it would ordinarily be available or offered "to a substantial number of the citizens of this State" (there are approximately 41 elected part-time Prosecuting Attorneys) in this State, and the Commission believes that it is at least arguable that the office is not available to substantial numbers of citizens because only lawyers can hold the office).
2. The office held is such that it normally or specifically requires a person who possesses personal prestige (to be elected as a Prosecuting Attorney, the county's highest law enforcement officer at least implicitly requires that an individual possesses personal prestige).
3. The person's employment contract or letter of appointment provides or "anticipates" that the person will gain financially from activities which are not a part of his or her office or employment (although the Commission has been provided with no employment contract or letter of appointment in connection with this particular request, the Commission believes that past practice and custom at least arguably have led the part-time Prosecuting Attorneys to anticipate that they would be able to use their office facilities and employees in their private practice of law, which necessarily results in the receipt of some financial gain to these Prosecuting Attorneys above and beyond their salary).

For the reasons stated above, the Commission believes it appropriate to grant an exemption to part-time Prosecuting Attorneys to remain in effect until this Commission has had time to consider and establish by Rule the categories of exempt public officials and public employees. Additionally, the Commission will determine by Legislative Rule which, if any, general private practice expenses the part-time prosecuting attorneys or assistant

prosecuting attorneys must reimburse to the counties or pay themselves on a pro rata basis.

West Virginia Code 6B-2-5(d)(1) prohibits a public official from having an interest in the profits or benefits of a public contract with the governmental body with which he is employed. However, the first proviso to Section (d)(1) specifically states that nothing contained in this section shall be construed to prevent or make unlawful the employment of any person with any governmental body.

Based upon past practice, history, and the types of benefits contemplated in the statutory provisions dealing with Prosecuting Attorneys there does not appear to be a violation of subsection (d)(1) because certain "fringe benefits" received by the Prosecuting Attorneys were anticipated in the part-time public officials' elections and compensation schedule.

  
Chairman