

ADVISORY OPINION NO. 89-19

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1989

GOVERNMENTAL BODY SEEKING OPINION

a Family Law Master

OPINION SOUGHT

1. "Is it a violation of the law for my secretary to perform certain secretarial duties for me in my limited private practice, such as answering my private telephone line, typing, and the like?"
2. "Does it matter if the secretary is compensated by the Family Law Master for any work she may do at such items that she may have available after seeing to her state duties?"

OTHER FACTS RELIED UPON BY THE COMMISSION

This individual is one of the twenty-two West Virginia Family Law Masters. His job is to carry-out those duties and responsibilities in the area of domestic relation law, which are set forth in Chapter 48A of the West Virginia Code. This position is defined as part-time, but he is frequently unable to carry-out his responsibilities without devoting a very substantial portion of his time to his duties as a Family Law Master.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states that 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-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:

(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 the 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 in part...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 a 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.

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 costs, 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 employee 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 employees who should be treated differently because they bring to their respective public employment a 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 employment 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 employment who bring to that office their own unique personal prestige, the Legislature directed this Commission, by Legislative Rule, to establish categories of such public employees 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 22 appointed part-time Family Law Masters) 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 appointed as a Family Law Master, 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 Family Law Masters 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 Family Law Masters above and beyond their salary).

For the reasons stated above, the Commission believes it appropriate to grant an exemption to part-time Family Law Masters 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 Family Law Masters there does not appear to be a violation of subsection (d)(1) because certain "fringe benefits" received by the Family Law Masters were anticipated in the part-time public employee's employment and compensation schedule.

  
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Chairman