

**ADVISORY OPINION NO. 91-02**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON MARCH 7, 1991**

**GOVERNMENTAL BODY SEEKING OPINION**

Director of a Planning and Research Division of a State Department

**OPINION SOUGHT**

- a. Whether it is a violation of the Ethics Act for employees of a Forensic Laboratory who are subpoenaed to testify in civil cases to charge a "professional or expert witness" fee when such testimony is given during their **off duty** hours?
- b. Whether it is a violation of the Ethics Act for public employees to live on properties owned by County Boards of Education free of charge?

**FACTS RELIED UPON BY THE COMMISSION**

Certain public employees may be subpoenaed to testify in civil cases concerning **forensic procedures**, including testing procedures and test instruments. They would provide testimony as experts concerning the "how and why" of forensic analysis. Testifying in this manner would be considered part of their job responsibilities.

**Witness Fee**

These public employees would like to be available to provide expert witness testimony on the **results obtained through the forensic testing**. The public employees would charge a "professional or expert witness" fee. Such testimony would be given **on the employee's time**, (i.e. off duty hours or annual leave.) However, the testimony given would concern the evidentiary results of tests conducted in the State Laboratory by State personnel during State work time.

**County Board of Education Properties**

Certain public employees who are engaged in law enforcement have been offered free rental space for their mobile homes on County Boards of Education properties. The properties are offered absent lot rent or payment of normal utilities. The mobile homes are owned and maintained by the residents. These sites are often adjacent to schools, school bus impound lots or various other County Board of Education properties.

This practice has been permitted and encouraged by County Boards of Education to serve as a deterrent to criminal trespass, destruction of properties, theft and property defacing. The requestor states that the reported savings for the County Boards of Education has been estimated at several thousand dollars.

#### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

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

West Virginia Code Section 6B-2-5(c)(1) states in pertinent part that...No official or employee may knowingly accept any gift, directly or indirectly, from...any person whom the official or employee knows or has reason to know:

- (A) Is doing or seeking to do business of any kind with his or her agency;
- (B) Is engaged in activities which are regulated or controlled by his or her agency; or
- (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

#### **ADVISORY OPINION**

##### **Private Gain**

a. Pursuant to subsection 6B-2-5(b)(1) of the Ethics Act a public employee may not knowingly use his or her office or prestige for private gain. The requestor stated that these public employees may be subpoenaed to testify in civil cases concerning **forensic procedures**, including testing procedures and test instruments. They would provide testimony as experts concerning the "how and why" of forensic analysis.

The public employees would also like to be available to provide expert witness testimony on the **results obtained through forensic testing**. The testimony would consist of the evidentiary results of tests conducted in the State Laboratory, by State personnel, on State time. The employees would charge a professional or expert witness fee since such testimony would be given during the employee's off duty hours or while he or she is on annual leave.

The Commission does not consider the use of general knowledge and experience gained through an employment position to be a use of public office for private as meant by subsection 6B-2-5(b)(1) of the Ethics Act. However, in this instance the public employees would be testifying about the results of tests which were conducted on State time, in State Laboratories, by State personnel.

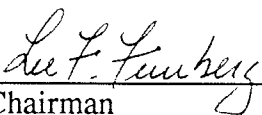
Therefore, it would be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the public employees to testify in civil cases and charge a "professional or expert witness" fee when such testimony is given based on the results of tests which are conducted at the State's expense and the execution of such tests is considered part of the public employees' job responsibilities.

b. Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act a public official or a public employee may not accept a gift from persons who are or may be regulated by the employee's public agency.

The public employees who are offered free use of County Board of Education properties do have the authority to regulate and control every citizen in the State. However, the practice of allowing these public employees to occupy properties owned by County Boards of Education free of charge has been encouraged by the County Boards of Education who believe they and the public are the ultimate receivers of private gain. The presence of these public employees serves as a deterrent to criminal trespass, destruction of properties, theft and property defacing. The County Boards of Education have estimated a savings of several thousand dollars due to this practice.

The Commission understands that as a result of this practice, the public employee will receive free use of County Board of Education properties but considers these benefits to inure to local County systems and taxpayers. The departure from the Ethics Act's prohibition against accepting a gift of more than nominal value is based on the recognition that the general public will benefit significantly from this practice.

Therefore, the Commission finds that it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for the public employees to occupy rent-free certain properties owned by persons who are regulated by their State agency, since the benefit inures to the general public.

  
Chairman