

ADVISORY OPINION NO. 91-16

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 7, 1991

GOVERNMENTAL BODY SEEKING OPINION

A Solid Waste Authority

OPINION SOUGHT

- a. Whether it is a violation of the Ethics Act for the members of a County Solid Waste Authority to serve on the Board of Directors of a Foundation?
- b. Whether it is a violation of the Ethics Act for a public employee of a Health Department (who is also the Chairman of the Solid Waste Authority) to receive a salary for serving as the Director of the County Solid Waste Authority?

FACTS RELIED UPON BY THE COMMISSION

Foundation

The County Solid Waste Authority would like to form a non-profit Foundation in conjunction with a Landfill Company. The requestor states that the purpose of the Foundation is to provide and channel monies to County projects. Such projects would include schools, charitable organizations, senior citizen organizations, youth organizations, voluntary organizations, non-profit organizations, civic organizations, hospitals, libraries and other entities to promote community growth and development in the areas of education, health, employment, recreation, transportation, safety, welfare and convenience. The Solid Waste Authority members would ~~serve on the Board of Directors~~ of this Foundation without compensation.

Solid Waste Authority Chairman

The Chairman of the Solid Waste Authority is employed by the County Health Department. He is a full-time employee whose job responsibilities require him to inspect properties to insure compliance with State Health code regulations. This would include the inspection of septic systems for private residences and businesses.

The public Health Department employee is the Chairman of the Solid Waste Authority and would also like to serve as the part-time Director for the Solid Waste Authority which is a paid position. The Director of the West Virginia Environmental Health Services states that a County Solid Waste Authority is regulated by the County Commission and is not associated in any way with the Health Department.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(h)(1) states in pertinent part that...no full-time public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official or public employee whether rendered as an employee or as an independent contractor.

ADVISORY OPINION

Foundation

a. Pursuant to subsection 6B-2-5(b)(1) of the Ethics Act, a public official may not use his office or prestige for his own private gain or for the private gain of another. However, the requestor stated that the Foundation's purpose is to provide and channel monies to County projects. Such projects would include schools, charitable organizations, senior citizen organizations, youth organizations, voluntary organizations, non-profit organizations, civic organizations, hospitals, libraries and other establishments to promote community growth and development in the areas of education, health, employment, recreation, transportation, safety, welfare and convenience.

Furthermore, subsection 6B-2-5(b)(1) provides that the performance of usual and customary duties associated with the individual's office or position; or the advancement of public policy goals or constituent services by a public official **without compensation**, does not constitute an improper use of prestige of office for private gain.

Therefore, since the purpose of this Foundation is to advance public policy goals or enhance charitable constituent services it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the members of a Solid Waste Authority to serve without compensation on the Board of Directors of a Foundation created by the Solid Waste Authority and a Landfill Company.

The Authority members should be mindful of subsection 6B-1-2 of the Ethics Act which provides that a public official should seek to be excused from voting or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter that has become "personal to him". The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, is affected in a manner which may influence his vote or would give the appearance of impropriety.

Solid Waste Chairman

b. The second question contained in the request letter relates to the propriety of an employee of the County Health Department (who is the Chairman of the Solid Waste Authority) seeking the position of part-time Director of the Solid Waste Authority. The employee of the Health Department is a full-time employee whose job responsibilities require him to inspect properties to insure compliance with Health code regulations. The Health Department does not regulate the Solid Waste Authority in any way, instead it is regulated by the County Commission.

Subsection 6B-2-5(h) of the Ethics Act only limits a full-time public employee who exercises policymaking, nonministerial or regulatory authority from seeking employment with, or allow himself or herself to be employed by any person **who is or may be regulated** by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. In this instance Subsection 6B-2-5(h) would not apply since the individual while acting as the Solid Waste Chairman would not be a "full-time" employee. Furthermore, although in his capacity as a County Health Department employee he would be a full-time employee with regulatory or non-ministerial duties, he would not be seeking employment with a person regulated by his Department.

Therefore, it would not be a violation of subsection 6B-2-5(h)(1) of the Ethics Act for an employee of the Health Department to serve as the part-time Director of the Solid Waste Authority, since the Authority is not regulated by the Health Department.

Favoritism

However, subsection 6B-2-5(b)(1) of the Ethics Act states that a public official may not knowingly and intentionally use his office for his own private gain or for that of another person. A prohibition against nepotism is included within this subsection. Nepotism has been defined by the Commission as favoritism shown or patronage granted by persons in high office to relatives or close friends in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. The Commission assumes that the Authority Chairman would be considered a "close friend" of the other Solid Waste Authority Members.

The Commission has established certain guidelines to follow in order to aid public officials in avoiding the appearance of nepotism when they are considering hiring a relative or close friend for a public position:

- a. Provide an adequate and meaningful public notice to all possible applicants.
- b. Remove himself from the decision making process and substitute independent, impartial decision-makers.
- c. Insure that the relative or close friend possesses the qualifications necessary for the position.

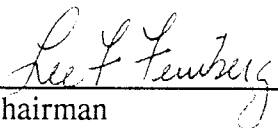
If the County Solid Waste Authority and the Chairman have followed the steps outlined above it would not be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the Chairman to be considered along with the other applicants for the position.

Further, subsection 6B-1-2(c) of the Ethics Act provides that in part-time public service certain conflicts of interest are inherent and when such conflict becomes personal to a particular public official, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

Therefore, a public official is not permitted to vote on or decide a matter that has become "personal" to that individual. The Commission considers a matter to be "personal" when the public official has any pecuniary interest either directly or indirectly in the matter, is affected in a manner which may influence his vote or would give the appearance of impropriety.

Obviously, the matter of considering who to hire when a Board Member is a candidate for a position would be personal and requires the recusal of that member. For a public official's recusal to be effective, it is necessary for the official to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period.

Therefore, based on the facts presented it would not be a violation of subsection 6B-2-5(b)(1) if the steps outlined were followed, for the County Solid Waste Authority to consider employing the Chairman as the Director of the Authority. The Commission would note that the public employee may not serve as the Chairman of the Solid Waste Authority and the Executive Director of the Solid Waste Authority simultaneously.


Chairman