ADVISORY OPINION NO. 2006-05

Issued on May 4, 2006 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A newly appointed **Mayor** asks whether she may continue her current employment with the City as a part-time payroll clerk.

FACTS RELIED UPON BY THE COMMISSION

The requester has recently been appointed as Mayor to fill an unexpired term. The requester is also a part-time employee of the City. She held this job prior to her appointment. Her title is "payroll clerk."

The City in question has a strong Mayor form of government. The Mayor is responsible for hiring and firing employees and is the supervisor of all municipal departments.

The City requires the Mayor to work twelve hours a week. The part-time payroll position requires twenty-four hours of work per week.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

(b) *Use of public office for private gain.* -- (1) 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. 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.

W. Va. Code §6B-2-5(d) reads in relevant part:

(d) *Interests in public contracts.* -- (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, 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 which the official or employee may have direct authority to enter into, or over which he or she may have control: *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body...

W. Va. 158 CSR 9 reads:

2.1. A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2. For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety. An interest is not "personal" if the interest of the public official or public employee in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

2.3. For a public official's or public employee's recusal to be effective, it is necessary for the official or employee to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclose his interest, and recuse himself from voting on the issue.

ADVISORY OPINION

The Commission has not issued an advisory opinion on the specific question presented. It has examined this question in cases where the Mayor had limited power over employees. For instance, in A.O. 91-21 the Commission ruled that there was nothing in the Ethics Act which would prohibit a City employee from running for Mayor when the City had a City Manager form of government. Under this form of government, neither the Town Council nor Mayor is responsible for the day to day management of the City; instead this responsibility is delegated to the City Manager. Similarly in A.O. 2003-04, the Commission held that a Mayor could serve as a temporary city manager where the Mayor was elected from among the Council's members and had no more authority than the other members.[1]

The present case is distinguishable from the previous situations considered by the Commission. The requester, as the elected Mayor, has responsibility for hiring and firing employees as well as supervising them. Due to the responsibilities of the Mayor in this governing body, it is necessary to determine whether it presents a conflict of interest for the Mayor to also be a part-time employee.

West Virginia recognizes the doctrine of incompatibility of offices. *State ex. rel. Thomas v. Wysong*, 24 S.E.2d 463 (W.Va. 1943); and, 43 W.Va.Op. Atty. Gen. 338 (1949). This doctrine stands for the proposition that "incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices and their relation to

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[1] The cited cases should not be relied upon by elected and appointed County officials who are subject to the more stringent prohibitions embodied in W.Va. Code § 61-10-15.

each other, rendering it improper, from considerations of public policy for one person to perform the duties of both."*Id.*

While the Ethics Commission is not charged with the responsibility of interpreting this common law doctrine, the principles are explicitly intertwined with the conflict of interest provisions in the Ethics Act. West Virginia Code § 6B-2-5(d) prohibits elected officials from having an interest in a contract over which they exercise control but contains an exception which reads "[N]othing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body." As such this provision standing alone does not prohibit all municipal officials from also being employed by the municipality which they serve. However, the Ethics Act further prohibits the use of public office for private gain. The Commission finds that the spirit and intent of this prohibition would be violated if an elected official is employed by his or her governing body on a permanent basis when the elected official has the power to hire, fire and supervise employees.

Although both positions are part-time and the Mayor would be able to fulfill both job responsibilities during the course of a work week, an inescapable conflict exists as the Mayor must supervise the City's employees. The conflict could not be avoided by the Mayor recusing herself on relevant votes or even delegating management responsibilities over her payroll clerk position. While the requester may be able to balance these job responsibilities and perform her positions in an impartial manner, as a matter of public policy and due to the conflicting nature of the duties and responsibilities, the Ethics Commission finds that the Ethics Act prohibits the Mayor from also being regularly employed by the City.

The Commission qualifies its holding in this opinion with the recognition that there may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities. Likewise there may be times when a Town needs to hire temporary laborers due to an emergency or immediate short term labor need. In those situations it may be appropriate for the Mayor to be employed on a temporary basis and to be compensated for his or her work. However, the Mayor should first seek advice from the Ethics Commission to ensure that the proposed temporary employment is appropriate.

This advisory opinion is limited to questions arising under the Ethics Act, W.Va. Code § 6B-1-1, *et. seq.,* and does not purport to interpret other laws or rules. In accordance with W.Va. Code §6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.

Commission Chairman