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Joseph P. Christian, Jr., President  
West Virginia Board of Embalmers and  
Funeral Directors  
507 South Street  
Charles Town, West Virginia 25414

Dear Mr. Christian:

You have requested an opinion of the Attorney General on the issue of whether the simultaneous employment of a single person as both Director of Pread Funeral Services (presently organized as part of the Consumer Protection Division of the Attorney General's office), and Executive Secretary of the West Virginia Board of Embalmers and Funeral Directors, creates a conflict of interest. The legal issues raised by your request require a discussion of the terms "conflict of interest" and "incompatibility of employment." We will also discuss possible application of the West Virginia Governmental Ethics Act.

A conflict of interest in the public sector may exist when a public employee is subjected to a conflict between his public position and some private or non-governmental interest. The term "incompatibility," on the other hand, has been used to describe situations where the competing interest is itself governmental, in the form of another public position held simultaneously by the same employee. Incompatibility thus involves a conflict between the duties of two offices held by one person at the same time, when the duties of the two positions are inconsistent. Conflict of interest generally involves an adverse effect on the discharge of one's duties due to an outside influence, whether in the form of one's own or another's interest. See 63A Am. Jur. 2d Public Officers and Employees § 79 (1984).

The doctrine of incompatibility is a common law creation which has been incorporated into statute in many states. The West Virginia Constitution addresses dual office holding in several provisions, and a number of West Virginia statutes prohibit the holding of dual offices in enumerated cases. However, no statute applies specifically to the factual situation presented by your opinion request.

Article VI, Section 13, of the West Virginia Constitution provides:

No person holding a lucrative office under the state, the United States, or any foreign government; no member of congress; no person who is a salaried officer of any railroad company, or who is sheriff, constable, or clerk of any court, shall be eligible to a seat in the legislature.

Section 15 of the same article prohibits senators and delegates from holding a second office during their elected terms. Article VII, Section 4, of the Constitution declares that:

None of the executive officers mentioned in this article shall hold any other office during the term of his service. The Governor shall not be eligible to said office for the four years next succeeding the term for which he was elected.

As you can see, none of these constitutional provisions applies to the situation about which you inquire. Article IV, Section 8, of the Constitution provides:

The Legislature, in cases not provided for in this Constitution, shall prescribe, by general laws, the terms of office, powers, duties and compensation of all public officers and agents, and the manner in which they shall be elected, appointed and removed.

Pursuant to this provision, the legislature has enacted various statutes prohibiting dual office-holding. Examples include a statute prohibiting the State Road Commissioner from employing a public official or member of a political party's executive committee, W. Va. Code § 17-2a-5, and statutes prohibiting the Commissioner of Welfare, W. Va. Code § 9-3-8, and the Workers' Compensation Commissioner, W. Va. Code § 23-1-1, from holding any other office. In the absence of a statute directly on point in the situation about which you inquire, the common law doctrine of incompatibility controls our analysis.

In order to complete that analysis, a brief discussion of the distinction between a public officer and a public employee is in order. The Supreme Court of Appeals has defined a "public office" as "a position created by law with duties cast upon the incumbent which involve an exercise of some portion of sovereign power and

in which the public is concerned." State v. Bond, 94 W.Va. 255, 260, 118 S.E. 276, 279 (1923); State v. Millsap, 138 W.Va. 599, 609, 76 S.E.2d 737, 742 (1953). Previous Attorney General opinions have defined the term "officer" consistent with the above definition.

The Preneed Burial Contracts Act, West Virginia Code §§ 47-14-1 through -14 (1986 and Supp. 1989), does not create or describe a position of Director of Preneed Funeral Services. Rather, the Act describes various functions to be performed by the Attorney General's office, such as: receiving, processing, and awarding applications for individuals wishing to provide preneed funeral contracts; collecting fees for such applications; and providing for the administration and enforcement of the article's provisions. All such functions are vested in the office of the Attorney General. W.Va. Code § 47-14-2(5).

W.Va. Code, §§ 30-6-1 through -16 provide for the W.Va. Board of Embalmers and Funeral Directors. Under § 30-6-3, the Board has the authority to:

employ an executive secretary and such clerks, inspectors and assistants as it shall deem necessary to discharge the duties imposed by the provisions of this article and duly promulgated rules of the board and to effect its purposes, and the board shall determine the duties and fix the compensation of such executive secretary, clerks, inspectors and assistants, subject to the general laws of the state.

In your letter requesting our opinion, you said the following regarding John McDowell's duties as executive secretary:

Mr. McDowell basically has no decision making authority in this position. His duties consist of operating and maintaining the Board office located 812 Quarrier St., Charleston, WV; registering all mail and correspondence, and answering any questions pertaining to the West Virginia Rules and Regulations on Funeral Service.

Mr. McDowell's office handles all moneys for License Fees from Funeral Directors and Embalmers as well as all Funeral Establishments.

Also, he sets up Board meetings, takes minutes at all scheduled meetings, also helps to administer the Funeral Service Examinations for licensee's.

In March 1977, this office issued an opinion on whether a state legislator could serve as a member of a County Airport Authority Board. The opinion described the distinction between an office and employment as being dependent on:

"Whether the position was created by law; whether the position was designated as an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign." State ex rel. Carson v. Wood, 154 W.Va. 397, 175 S.E.2d 482 (1970), Syllabus Point 5.

57 Op. Att'y Gen. 136, 137 (1977). Based on the description of the Executive Secretary's duties which you have provided, we conclude that the Executive Secretary of the Board of Embalmers and Funeral Directors is a public employee and not a public officer.

Similarly (and even more clearly in view of the absence of a statute creating the Director of Preneed position), we conclude that the Preneed position likewise involves a public employee rather than a public officer. The Attorney General's office is the repository of the powers and duties created by the Preneed statute, and the director position is purely a creation of the Attorney General, who could presumably choose to exercise the powers himself, should he so choose. The position of director thus does not appear to involve the "exercise of sovereign power." We therefore conclude that neither position is a "public office" which is covered by the doctrine of incompatibility.

[T]he same person may occupy both public offices simultaneously and be paid for his services performed in each office; the same is also quite true as to positions of employment as public employees, for the doctrine of incompatibility does not apply to public employees.

52 Op. Att'y Gen. 39, 43 (1966) (emphasis added).

Although the doctrine thus appears not to apply, we also point out that nothing in your description of the Executive Secretary's duties, nor in the Preneed Burial Contracts Act, would suggest incompatibility in any event. Nor does there appear any evidence of a conflict of interest between the duties of the Executive Secretary of the Board of Funeral Directors and Embalmers, and the Director of Preneed Funeral Services. Although the persons regulated are in both cases members of the funeral profession and may in fact be largely the same population, nothing in that circumstance alone would suggest the existence of a conflict in the sense described above.

The West Virginia Governmental Ethics Act, W.Va. Code §§ 6B-1-1 to -3-13 (1990) established ethical standards to govern the conduct of the public's business by its officers and employees. For purposes of this opinion, the primary thrust of the Act is its effort to prevent the conduct of the public's business from being affected by personal, private, or non-governmental interests. The Act also requires financial disclosure and regulates lobbying activities, neither of which is implicated by your opinion request. In the absence of some evidence suggesting a conflict of interest, which we have not found, the provisions of the Ethics Act appear not to be implicated by the simultaneous holding of the two positions described above. The Act provides:

It is the purpose of this chapter to maintain confidence in the integrity and impartiality of the governmental process in the State of West Virginia and its political subdivisions and to aid public officials and public employees in the exercise of their official duties and employment; to define and establish minimum ethical standards for elected and appointed public officials and public employees; to eliminate actual conflicts of interest; to provide a means to define ethical standards; to provide a means of investigating and resolving ethical violations; to provide administrative and criminal penalties for specific ethical violations herein found to be unlawful.

W. Va. Code § 6B-1-2(b) (1990).

The Act does not specifically address the question of dual employment. It focuses instead on such issues as the unethical receipt of things of value for the performance of one's official

duties, § 6B-2-5(b); personal or family interests in public contracts, § 6B-2-5(d); confidential information, § 6B-2-5(e); and prohibited representation, § 6B-2-5(f). The only provision which appears to us to have possible relevance to the situation you describe is § 6B-2-5(e), which provides:

No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

It seems unlikely that the Ethics Act would be construed to prohibit the exchange of confidential information between two government agencies, both of which are performing regulatory functions, particularly since the section just quoted appears again to focus instead on private or personal use of confidential information. In any event, you have not called to our attention any instances of confidential information which might raise a question under this section. The existence of such instances would not in any event create a conflict of interest, but might require that appropriate measures be taken to comply with the statute. We thus advise you to deal with any such circumstances accordingly, or to seek an advisory opinion from the Commission, as discussed below.

The balance of the Ethics Act's provisions relate clearly to conflicts between public and private interests. Such conflicts are simply not raised merely by the simultaneous holding of two different public positions by the same person. Consequently, other than the possibility described above, we do not find a potential Ethics Act violation under the facts presented.

The Ethics Act provides in § 6B-2-3 for the issuance of advisory opinions as to whether various actions or situations might violate the act. Although we have not identified a potential Ethics Act violation, you are free to seek an advisory opinion directly from the Commission, which is the only way of obtaining a definitive resolution of any concern under that statute.

It is therefore the opinion of this office that dual public employment as Director of Preneed Funeral Services in the Attorney General's office, and as Executive Secretary to the Board of

Embalmers and Funeral Directors, does not violate the common law doctrines of incompatibility or conflict of interest, nor the West Virginia Governmental Ethics Act. However, to be assured of the immunity from prosecution provided by § 6B-2-3, you may wish to request an opinion from the West Virginia Ethics Commission regarding the applicability of the Act to this specific situation.

Very truly yours,

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ATTORNEY GENERAL

By

  
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