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The Honorable Ken Hechler
Secretary of State for the
State of West Virginia
Building 1, Suite 157-K
Charleston, West Virginia 25305

Dear Secretary Hechler:

You have requested the opinion of this office regarding whether a person may serve as both a member of a county commission and a legislator. Cognizant of the fact that each house of the West Virginia Legislature is the sole and exclusive judge of the qualifications of its members, our discussion will be limited to the issue of whether the offices are incompatible.

The term "incompatibility" has been used to describe situations in which a public employee may have a competing interest in the form of another public position held simultaneously by the same employee. See, e.g., 63A Am.Jur.2d Public Officers and Employees § 79 (1984). Incompatibility involves a conflict between the duties of two offices held by one person at the same time, if the responsibilities of one office can in any manner influence the actions of the public officer in the discharge of the duties of the second office. 55 Op. Att'y Gen. 78 (March 28, 1973).

Public policy demands that an officer exercise his best efforts, free from any taint of bias, in the discharge of his duties as a public officer. Therefore, "a public officer cannot hold two incompatible offices at the same time." 63A Am.Jur.2d Public Officers and Employees § 64 (1984).

Both a county commissioner and a legislator are public officials. Therefore, the question becomes whether a person holding both offices at the same time is presented with a conflict making the holding of both offices incompatible. In State ex rel. Thomas v. Wysong, 125 W. Va. 369, 373, 24 S.E.2d 463, 466 (1943), the West Virginia Supreme Court of Appeals announced the standard by which the incompatibility of two offices is measured when it stated:

incompatibility rests not upon physical inability to perform the duties of both offices, but arises from the inconsistent nature of the offices in the relation to

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

An examination of the relationship between the legislature and the county commissions of West Virginia leads us to conclude that these positions are incompatible. The powers and duties of a county commissioner are derived from the West Virginia Constitution and enactments of the West Virginia Legislature. State ex rel. County Court v. Arthur, 150 W. Va. 293, 145 S.E.2d 34 (1965). Compensation for county commissioners is set by the legislature¹ and, in many instances, county commissions may receive money from the State. Therefore, we are of the opinion that a person cannot serve as a county commissioner and a legislator because the positions are incompatible and would contravene public policy.

It may also be argued, and perhaps successfully, that service as both a legislator and a county commissioner is prohibited by Article VI, Section 13 of the West Virginia Constitution which states:

No person holding any other lucrative office or employment under this State, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the legislature.

County commissions and the office of county commissioner are established in Article IX of the West Virginia Constitution. In State ex rel. Damron v. Ferrell, 149 W. Va. 883, 143 S.E.2d 469 (1965), the court held county commissioners to be constitutional officers. Since county commissions and county commissioners receive all of their powers from the West Virginia Constitution and subsequent legislative enactments, it could be argued that a county commissioner holds a "lucrative office . . . under this State." The work "lucrative" is defined by Black's Law Dictionary (5th ed., 1979) at p. 855 as "[y]ielding gain or profit; profitable; bearing or yielding a revenue or salary." The phrase "lucrative office" is defined by the same authority as:

One which yields a revenue (in the form of fees or otherwise) or a fixed salary to the incumbent. According to some authorities, one which yields a compensation

¹See W. Va. Code § 7-1-5a (1990).

supposed to be adequate to the services rendered and in excess of the expenses incidental to the office. One the pay which is affixed to the performance of duties of office.

Because the compensation of county commissioners is set forth in the West Virginia Code as ranging between \$4,200.00 to \$20,000.00 per year, depending upon the population of a particular county, we are of the opinion that the office of county commissioner is a lucrative office.

The more difficult question is whether a county commissioner actually holds an office or is employed "under this State." As previously noted, our Supreme Court of Appeals has held that county commissioners are constitutional officers established by the West Virginia Constitution. In previous opinions, we have discussed the phrase "lucrative office or employment under this State" in the limited terms of whether an individual was or was not a state employee. It may be successfully argued, however, that a constitutional officer holds either an office or employment "under this State." Because we have previously concluded that the offices of legislator and county commissioner are incompatible, we find it unnecessary to address the question of whether a person who serves as a county commissioner enjoys an office or employment under the State.

In conclusion, we are of the opinion that the doctrine of incompatibility would prohibit one person from holding the offices of legislator and county commissioner at the same time.

Very truly yours,

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