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The Honorable Natalie E. Tennant
West Virginia Secretary of State
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, West Virginia 25305

SECRETARY OF STATE

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Dear Secretary Tennant:

We have received your letter of July 26, 2010, requesting a formal opinion "regarding whether a member of the West Virginia State Election Commission with employment status as a *classified state employee*, receiving a per diem, is considered a "paid public office" as contravened by West Virginia Code § 29-6-20(3)." (Emphasis in original.)

RELEVANT STATUTORY PROVISIONS

§ 29-6-20. Favoritism or discrimination because of political or religious opinions, affiliations or race; political activities prohibited.

....

(e) Notwithstanding any other provision of this code, no employee in the classified service shall:

....

(3) ... hold any paid public office

§ 3-1A-1. Election commission continued; composition; chairperson; per diem; traveling expense.

The "State Election Commission," heretofore created, is continued and is composed of the Secretary of State, and four persons appointed by the Governor, by and with the advice and consent of the Senate. The commission shall from this membership elect a chairman for a term of two years. Each member of the commission shall be reimbursed for all reasonable and necessary expenses actually

paid the per diem and expense reimbursement established for the Legislature in section seven, article two-a, chapter four of this code in the performance of his or her duties as a member of the commission.¹

DISCUSSION

Your question presents two issues for resolution: first, whether membership on the West Virginia State Election Commission (hereinafter "SEC") is a public office as opposed to an employment; and, if so, whether it is a paid public office now that members receive a flat per diem allowance in lieu of reimbursement for actual expenses.

I.

In Syl. Pt. 5 of *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970), and then again in Syl. Pt. 5 of *Fraley v. Civil Service Comm'n*, 177 W. Va. 729, 356 S.E.2d 483 (1987), the Supreme Court of Appeals held that:

Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been

¹§ 4-2A-7. Reimbursement for expenses incurred during any session or interim assignment.

(a) Each member of the Legislature who does not commute daily shall receive the sum of one hundred thirty-one dollars per day as per diem allowance in connection with any regular, extended extraordinary session interim assignment or for any member authorized by the presiding officer. Any member of the Legislature who does commute daily shall receive the sum of fifty-five dollars per day as the per diem allowance and, in addition to the allowance, shall be reimbursed for overnight commuting expenses at the mileage rate equal to the amount paid by the travel management office of the department of administration for the most direct usually traveled route, if travel is by private automobile, or for actual transportation costs for direct route travel, if travel is by public carrier, or for any combination of the means of transportation actually used, plus the costs of necessary taxi or limousine service, tolls and parking fees in connection with the travel: *Provided*, That the total of this per diem allowance plus travel expenses for a daily commuting member may not exceed one hundred thirty-one dollars per day

prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign.

In *Carson*, application of the test led the Court to conclude that the position in question, Director of Office Services of the State Road Commission, was not a political office, as "there did not exist by law any such office" *Carson*, 154 W. Va. at 412, 175 S.E.2d at 497.

In *Frale*y, application of the test led the Court to conclude that the position in question, County Coroner, was a political office, the Court noting that the office is specifically created both by Constitution, W. Va. Const., art. IX, § 2, and by statute, W. Va. Code § 61-12-14.

Turning to the position at issue here, member of the West Virginia State Election Commission, we employ the *Carson/Frale*y test to determine whether the position is an office.

1. Whether the position was created by law. The SEC was created by the Legislature in West Virginia Code § 3-1A-1 *et seq.*, and the qualifications, terms, powers and duties of the SEC's members are specifically set out in the statutes.

2. Whether the position was designated an office. West Virginia Code § 3-1A-2 provides, *inter alia*, that "[n]o member of the commission appointed by the governor shall be a candidate for or hold any public office other than that of membership on the commission" (Emphasis supplied.) This language indicates clearly that membership on the SEC is an office.

3. Whether qualifications for the position are prescribed. West Virginia Code § 3-1A-2 prescribes both qualifications for SEC membership and disqualifying factors.

4. Whether the duties, tenure, salary, bond and oath for the position have been prescribed or required. West Virginia Code §§ 3-1A-3 & 5, respectively, prescribe the terms of office for SEC members and their powers and duties. The position is not salaried; prior to amendment West Virginia Code § 3-1A-1 permitted reimbursement for actual expenses, and it now permits payment of a flat per diem amount. The statute contains no mention of either a bond or an oath.³

³As support for its opinion the Court cited 35 Op. Att'y Gen. 252 (1933), wherein it was stated that "[i]n order that a position be an office and not a mere employment it seems necessary that the position be created by the Legislature."

³Whether the members of the SEC are required to take an oath pursuant to W. Va. Const., art. IV, § 5, depends on whether said members are public officers for all purposes, an issue beyond the scope of this opinion. Compare *Carr v. Lambert*, 179 W. Va. 277, 367 S.E.2d 225 (1988) (the
(continued...)

5. Whether the individual occupying the position has been constituted a representative of the sovereign. Pursuant to West Virginia Code § 3-1A-1, members of the SEC are appointed by the Governor, by and with the advice and consent of the Senate. Further, pursuant to West Virginia Code § 3-1A-5(c), the SEC is empowered to distribute nonpartisan educational materials in its name, "to inform voters of election laws and procedures, and to inform voters of the effect of any public question, constitutional amendment or bond issue that is to be voted upon by all the voters of the state . . .," and to distribute manuals "to assist county commissions, ballot commissioners, circuit and county clerks and other election officials in the proper performance of their duties in the conduct of elections." Finally, pursuant to West Virginia Code § 3-1A-5(d), the SEC is empowered to promulgate legislative rules both "to standardize and make effective the administration of the provisions of article eight of this chapter . . .," and also "relating to the conduct and administration of elections as the commission may determine to be advisable." In light of these statutory provisions, it is clear that all members of the West Virginia State Election Commission are representatives of the sovereign.

After consideration of the factors set out in *Carson* and *Fraley*, as set forth above, we conclude that membership on the West Virginia State Election Commission is a public office rather than an employment.

II.

The second question for resolution is whether membership on the SEC is a paid public office, now that West Virginia Code § 3-1A-1 has been amended to provide a flat per diem allowance for members rather than reimbursement of actual expenses incurred.⁴

³(...continued)

position of assistant prosecuting attorney is a public office for purposes of the statutory prohibition contained in West Virginia Code § 18-5-1a, against any public officeholder being a member or member elect of any board of education) with *State v. Macri*, 199 W. Va. 696, 487 S.E.2d 891 (1997) (the position of assistant prosecuting attorney is not a public office for purposes of the citizenship requirement contained in W. Va. Const., art. IV, § 4).

⁴At this point we note that the amendment to the statute, as set forth in the Enrolled Committee Substitute for H.B. 4130, contains an obvious drafting error. It is our understanding from the Secretary of State that the intent of the Legislature was to substitute the per diem mechanism of West Virginia Code § 4-2A-7 for the existing provision of West Virginia Code § 3-1A-1 that "[e]ach member of the commission shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of his duties as a member of the commission."

Following passage of H.B. 4301, which amended West Virginia Code § 3-1A-1, the Auditor distributed the following forms to be filled out by the SEC's members:

Form I-9, Employment Eligibility Verification;

Form W-4 (2010), Employee's Withholding Allowance Certificate; and

Form WV/IT-104, Employee's Withholding Exemption Certificate.

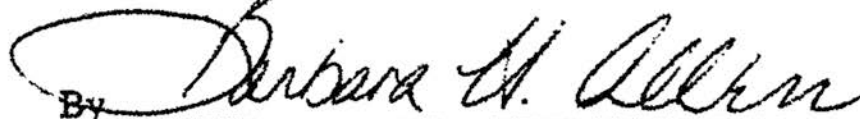
In short, the Auditor's action indicates that the per diem allowance to SEC members will be treated (and reported) as income to the members. In this regard, the Auditor's action appears to be consistent with IRS rules governing the payment of a set per diem allowance in situations where the recipient is not required to substantiate the amount of his or her actual expenses and/or to repay any excess.⁵

We therefore conclude that pursuant to West Virginia Code § 3-1A-1, as amended, a member of the West Virginia State Election Commission holds a paid public office. We further conclude that this is the case whether or not an individual member accepts the statutory per diem allowance; the legal definition of an office is determined by reference to the statute which establishes it, not to the actions of the individual who holds it.

CONCLUSION

As of June 11, 2010, the effective date of the amendment to West Virginia Code § 3-1A-1, membership on the West Virginia State Election Commission (SEC) is a paid public office. Therefore, an employee in the classified service cannot be a member of the SEC, as West Virginia Code § 29-6-20(e)(3) prohibits said employee from holding a paid public office.

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By 

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⁵See generally Revenue Ruling 2006-56.