

ADVISORY OPINION NO. 90-146
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON SEPTEMBER 6, 1990

GOVERNMENTAL BODY SEEKING OPINION

Director of a State Department

OPINION SOUGHT

- a. Whether it is a violation of the Ethics Act for a State Department to recommend certain public employees to prospective clients who are conducting private adoptions?
- b. Whether it is a violation of the Ethics Act for a public employee to advertise to offer private adoptive services without listing her public employment or using her position or prestige in any way?

OTHER FACTS RELIED UPON BY THE COMMISSION

A State Department which regulates public adoptions does not offer services such as home studies or post placement supervision for individuals conducting **private adoptions**. Several state department employees who are licensed social workers offer private adoptive services during their off duty hours.

Although the public employees' job responsibilities often include the performing of similar services for individuals using the State system of adoption, independent services are not provided to persons who are proceeding through the private adoption system. Therefore, private adoption services are not provided to persons who are clients of the State agency.

This State Department does not generally regulate private adoption in any way. However, in some instances a Court has directed the State Department to conduct a home study for an independent adoption and they would do so at no charge to that individual. This option is left to the discretion of the Court (whether the State does a home study) and occurs only on rare occasions. It is remotely possible that at some future time the adoptive parents could appear before the State Department on allegations of child abuse or in cases where the adoption is not satisfactory and the adoptive parents wish to relinquish the child.

Telephone Referrals

The first issue arose when a prospective independent adoptive parent called the State Department inquiring as to why she was being charged a fee to have a home study completed by the State Department after she had been told that the State agency would provide this service at no charge. It was explained to this parent that this free service is provided to families pursuing State adoptions, but not private adoptions since these are performed by private agencies.

After investigating the private individual's complaint the supervisor of the State Department found that the prospective adoptive parent had previously called the State Department concerning private adoption services and was referred to a public employee in that Department who was conducting private adoption services after work hours. It was not made clear to the prospective client that her home study was being conducted on a private contractual basis and not by the State Department.

The supervisor for the State Department stated that when the agency receives an independent adoption referral, which is not handled through the State agency the case is assigned to a staff member who is interested in conducting such services outside their normal work hours for a fee. These employees do the independent adoptive studies on their own time and use their own supplies.

Newsletter Advertisement

Another State Department public employee operates a private business during her off duty work hours. The employee has placed advertisements in a local newsletter. She provides home studies for international and domestic adoptions on a private basis. The Commission would note that after reviewing an advertisement which was placed in the adoption newsletter, the public employee did not represent herself as an employee of the State Department and listed only her private home telephone number in the advertisement.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a 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...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(b)(2) states in pertinent part that...offering public employees the opportunity to apply for an exemption from the application of the provisions of this subsection. Such exemptions may be granted by the commission, on a case-by-case basis, when it is shown that: (A) The public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's employment contract provides or anticipates that the person will gain financially from activities which are not a part of his or her or employment.

ADVISORY OPINION

Telephone Referrals

The Commission finds that when certain State public employees are specifically recommended by telephone by other state employees to provide private adoption services this gives the appearance of that employee using her public employment or prestige for private gain. Furthermore, this practice gives the appearance of a State Department promoting or assisting specific employees with their private businesses.

Therefore, it would be a violation of subsection 6B-2-5(b)(1) of the Ethics Act for the State Department to give prospective clients the names of public employees conducting private adoption services and **any such further action is strictly prohibited.**

However, it would not be a violation for the State Department to compile a listing of approved adoptive agencies and all available licensed social workers (without noting their public employment) that could be mailed to all prospective private adoptive clients who telephonically request such services. This would allow the private individual to select which social worker to contact without specifically promoting employees of the State Department.

If the State Department chooses not to compile the suggested list, the affected public employees, as licensed social workers may make application to the Ethics Commission for consideration of an exemption from the provisions of subsection 6B-2-5(b)(1) by allowing them to use their public employment for private gain.

Such exemptions may be granted by the Commission, on a case-by-case basis, when it is shown that: (A) The public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's employment contract provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

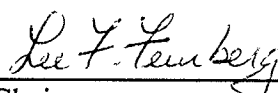
Newspaper Advertisement

The second issue described differs since this public employee is contacted by prospective clients through public newsletter advertisements and does not obtain business or private gain as a result of telephone referrals from the State agency with which she is employed. The employee's private business conducts services which are similar to her public employment responsibilities except that this service is for private, independent adoption procedures.

The Commission would note that the advertisement lists a private telephone number and contains no mention of her State employment position or title.

Although, this advertisement would not be a per se' violation of subsection 6B-2-5(b)(1), the public employee should be mindful not to represent to potential independent adoptive parents that she is a public employee of the State agency in an effort to obtain their business. Further, she may not obtain prospective clients through referrals from the State agency with which she is employed and also, she may not utilize work hours or state supplies to perform adoption services for private clients.

Therefore, it would not be a violation of subsection 6B-2-5-(b)(1) for the public employee to advertise and operate a private adoption service company during her off duty hours as long as she does not refer to her public employment position in establishing her private business.


Chairman