

ADVISORY OPINION NO. 93-18

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 3, 1993

PUBLIC SERVANT SEEKING OPINION

An elected State Official

OPINION SOUGHT

Is it a violation of the Ethics Act for an elected state official who is also a member of the State Board of Investments to engage in private employment as a licensed salesperson of mutual funds, stocks, and bonds?

FACTS RELIED UPON BY THE COMMISSION

For many years the requestor was licensed to sell mutual funds, stocks, or bonds with a number of national organizations. When he was elected to state office he severed all relationships with security firms. As a state office holder he also serves on the State Board of Investments but does not participate in its day-to-day investment decisions.

The requestor would now like to become associated with a retail broker-dealer on a straight commission basis. He has stated that if he renews his sales activities, he would not sell to any state agency or political subdivision. This part-time employment, however, would allow him to maintain the various broker licenses he has acquired in prior years.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...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. 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 §6B-5(h)(1) provides in pertinent part that no full-time public official or full-time public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or

serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public official or public employee whether rendered as an employee or as an independent contractor.

West Virginia Code §6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

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Employment

Pursuant to WV Code §6B-2-5(h)(1) a public official with policymaking, nonministerial or regulatory authority may not seek or accept employment with any person who is or may be regulated by his governmental agency.

The requestor's public office, as well as his service on the State Board of Investments, clearly affords him the authority contemplated by WV Code §6B-2-5(h)(1) and makes the restriction against seeking or accepting outside employment applicable. However, the requestor's governmental agency does not regulate retail broker-dealers or the financial services they provide. This regulation is performed in the State by the Auditor's office and nationally by the Securities and Exchange Commission.

Therefore, it would not be a violation of WV Code §6B-2-5(h)(1) for the public official, who is also a member of the State Board of Investments, to engage in private employment as a licensed salesperson of mutual funds, stocks, and bonds.


Private Gain

Pursuant to WV Code §6B-2-5(b)(1) a public official may not use his office or the prestige of his office for his own private gain or for the private gain of another. Therefore, the requestor may not use his public office or his position on the State Investment Board to influence, obtain, increase or promote business for the retail broker-dealer with which he may be employed. The Commission is of the opinion that the requestor must exercise the utmost care to avoid violations of this portion of the code of ethics. This would include refraining from sales to West Virginia citizens or persons conducting business with the State of West Virginia and may limit the activities of any organization with which the requestor is affiliated. Further, the requestor may not use public time, equipment and resources for such private activities.

Voting

Pursuant to WV Code §6B-1-2(c) a public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal". The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

However, the voting prohibition does not apply to actions which involve the creation of laws, rules or regulations which affect the official's financial interests only as a member of a class. Therefore, the requestor should not vote on any matter which comes before the State Board of Investments which may specifically and uniquely affect his employer.


Chairman