

ADVISORY OPINION NO. 95-21
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON MAY 4, 1995

PUBLIC SERVANT SEEKING OPINION

Former Assistant to a State Department Head

OPINION SOUGHT

- 1.) Is an Assistant to a State Department Head considered a "public official" as that term is used in the Ethics Act?
- 2.) Is it a violation of the Ethics Act for a former public servant to communicate with staff from his former State Agency?

FACTS RELIED UPON BY THE COMMISSION

The requester was employed by a State Agency for approximately five years. During most of that time he was a member of the Executive Staff of the Agency with the title of Assistant Director and reported directly to the Director of the Agency.

In the course of his public employment, the requester advised and assisted the Director on policy and regulatory matters but had no independent policy-making authority and exercised no authority over the Agency's regulatory programs. Although he worked with the Agency's staff and managers, he did not exercise enforcement authority or permit decision-making authority. Further, he was not involved in day-to-day permitting, inspection, or enforcement actions.

His main area of responsibility was the coordination of State/Federal relations. In that area he recommended policies and actions to the Director. He would draft correspondence to the Federal Agency either for his own signature or for the signature of the Director if the response involved the enunciation of a new policy.

Prior to leaving State government, the requester sought exemptions from the provisions of both WV Code §6B-2-5(g) and (h). He received an exemption under subsection 5(h) but was denied an exemption under subsection 5(g). As a result, the requester was allowed to seek employment with persons who may be regulated by his State Agency but can not represent these persons before that Agency for a period of six months after leaving the Agency.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-3(b) states in pertinent part that "employee" means any person in the service of another under any contract of hire...where...a public official has the right or power to control and direct such person in the material details of how work is to be performed and who is not responsible for the making of policy nor for recommending official action.

West Virginia Code §6B-1-3(i) states that "public official" means any person who is elected or appointed and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to (i) contracting for, or procurement of, goods or services, (ii) administering or monitoring grants or subsidies, (iii) planning or zoning, (iv) inspecting, licensing, regulating or auditing any person, or (v) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person.

WV Code §6B-2-5(f) provides that...No present or former elected or appointed public official or public employee shall, during or after his or her public employment or service, represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation...

West Virginia Code §6B-2-5(g) provides, in pertinent part that ...No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment or for a period of six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations appear, in a representative capacity before the governmental entity in which he or she serves or served or is or was employed in the following matters:

- (A) A contested case involving an administrative sanction, action or refusal to act;
- (B) To support or oppose a proposed regulation;
- (C) To support or contest the issuance or denial of a license or permit;
- (D) A rate-making proceeding; and
- (E) To influence the expenditure of public funds.

West Virginia Code §6B-2-5(g)(2) provides that...as used in this subsection, "represent" includes any formal or informal appearance before, or any oral or written communication with, any public agency on behalf of any person...

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West Virginia Code §6B-2-5(g) prohibits public officials and full-time attorneys and accountants from appearing in a representative capacity before their agency during their period of public employment with that agency and for six (6) months after they leave such agency.

1.) Since the requester is neither an attorney nor an accountant, the preliminary question which must be addressed is whether he was a "public official", as that term is used in W. Va. Code §6B-2-5(g).

West Virginia Code §6B-1-3(b) defines "employee" as "any person in the service of another...who is not responsible for the making of policy nor for recommending official action." In his position with State government the requester reported directly to the Director of the Agency and possessed significant authority in the area of State/Federal relations.

If a new state policy was being formulated vis a vis the Federal government, the requester would counsel and advise the Director and often draft the correspondence or other documents which the Director would sign and transmit to the Federal agency involved. If an established state policy was involved in a particular matter the requester would often draft the relevant documents and send them to the Federal agency under his own signature.

The Commission finds that under these facts the requester, although not responsible for taking official action directly, was certainly responsible for helping make policy and for "recommending official action." Therefore he cannot be considered an "employee" as that term is defined in the Ethics Act. Rather, his role as a close adviser to the Director gave him significant authority in making policy, especially with regard to the federal government. Consequently the Commission finds that the requester was a public official and is subject to the provisions of W. Va. Code §6B-2-5(g).

The Commission would also note that the requester also remains subject to the provisions of WV Code §6B-2-5(f), which prohibits any present or former public servant from acting in a representative capacity regarding any specific matter which arose during his period of public service and in which he personally participated in a decision-making, advisory or staff support capacity, unless the public Agency, after consultation, consents to such representation.

2.) The requester has accepted employment with a business which is regulated by his former State Agency. He anticipates that the position will involve considerable routine day-to-day contact with the regulatory staff and other staff and officials of his former State Agency.

This contact will concern routine inspection and enforcement matters as well as permit activities involving renewals or revisions of existing permits. He may also be called upon to serve as a company representative in discussions, conferences and hearings regarding administrative penalties and sanctions. Finally, although no regulations are currently pending from his former State Agency, it is possible that the Agency may propose new rules and his current employer may instruct him to review and comment on the proposals.

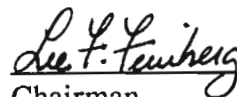
West Virginia Code §6B-2-5(g) provides that a former public official may not appear in a representative capacity before his former agency in certain types of cases. All of the activities the requester describes, as set out in the above two paragraphs, fall within the list of cases that are prohibited.

West Virginia Code §6B-2-5(g)(2) defines "represent" as "any formal or informal appearance before, or any oral or written communication with, any public agency on behalf of any person..." (emphasis added). This definition is extremely broad and would certainly include contact in the field with staff regarding inspections and enforcement actions, serving as the company representative in administrative contested cases, and personally commenting on proposed regulations.

The Commission finds that the purpose of W. Va. Code §6B-2-5(g) is to prohibit a public servant from exploiting the personal prestige he may have established as a former official in an agency. Thus any communication with his former agency, in person or under his signature, would be prohibited.

This provision would not, however, prevent the requester from working in house with other company employees to assist them in preparing for an appearance before his former agency or from drafting written communications that would be submitted to his former agency by another person.

In making this decision the Commission notes that it rejected a request for an exemption from the provisions of W. Va. Code §6B-2-5(g) when the requester was planning to leave state government. Therefore both he and any future private employer should have been aware of the limitations he would face for six (6) months after leaving his State employer.


Chairman