

ADVISORY OPINION NO. 2006-03

Issued on May 4, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An Administrative Law Judge (ALJ) asks if it is a violation of the Ethics Act for him to continue his outside law practice and volunteer activities while maintaining his position as a full time ALJ.

FACTS RELIED UPON BY THE COMMISSION

The requester is a full time ALJ for a state agency. An ALJ with this agency is required to be an attorney, duly licensed to practice law in West Virginia. Such ALJs have the power and authority to hold and conduct hearings, to determine all questions of fact and law presented during the hearing, and to render a final decision on the merits of the complaint, subject to the review of the employing agency.

When the agency hired the requestor, he brought his outside practice and volunteer activity with him. More particularly, he represents disabled clients in proceedings seeking to obtain employment related health and retirement benefits, which is limited to federal administrative and appellate practice. He also provides *pro se* assistance to disabled individuals involving attempts to obtain employment related health and retirement benefits.

The requesting ALJ claims that his past use of agency property or resources has been minimal. The agency's executive director has recently imposed a complete ban on the requesting ALJ's use of any agency property or resources.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

(b) *Use of public office for private gain.* -- (1) 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. ...

158 C.S.R. 6 § 5 (1992), in pertinent part, reads:

5.2 Improper Use - Public officials and public employees shall not use government property for personal projects or activities that result in private gain. This subsection does not apply to the *de minimis* use of government property.

W. Va. Code § 6B-2-5(h), in pertinent part, reads:

(h) *Employment by regulated persons.* -- (1) No full-time official or full-time public employee may seek employment with [or] be employed by ... any person who:

(A) Had a matter on which he or she took...regulatory action within the preceding twelve months; or

(B) Has a matter before the agency to which he or she is working

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; [and] "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment....

(4) A full-time public official or full-time public employee may not take personal regulatory action on a matter affecting a person by whom he or she is employed or with whom he or she is seeking employment or has an agreement concerning future employment.

(5) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

158 C.S.R. 11 § 2 (1992), in pertinent part, reads:

2.1.a. For the purpose of this section "employment" does not include activities of employees and officials for or on behalf of charitable or not for profit public service entities from which they derive no pecuniary benefit.

b. Full-time public employees and officials may not seek employment with or be employed by a person that is or may be regulated by the governmental agency with which they are employed. This prohibition applies only to those employees who exercise policymaking, nonministerial or regulatory authority.

2.2. No regulated person shall offer employment to a full-time employee or official of the regulating agency during their employment with the agency.

158 C.S.R. 11 § 3.3 (1992) defines "May be regulated". "A person is one who 'may be regulated' upon a showing that the person's activities are of the nature and extent ordinarily regulated by the governmental agency."

ADVISORY OPINION

The Commission finds that, with the limitations indicated below, the requestor may continue his outside practice of law and his volunteer activities without violating the Ethics Act.

Private Gain

Pursuant to W. Va. Code § 6B-2-5(b)(1) public officials may not use their offices or the prestige of office for their own private gain or for the private gain of another. Therefore, the requestor may not use his public position as an ALJ to influence, obtain, increase or promote business for his outside practice of law. Further, the requestor may not use public time, equipment and resources for such private activities beyond the incidental use allowed by law.

The Commission has held that the prohibition against using one's public office for private gain bars the acceptance of private payment for providing information or services which are expected

to be provided by the public employee in the course of fulfilling his official duties. Thus, the requestor may not accept referrals of clients with potential claims before that agency.

Employment

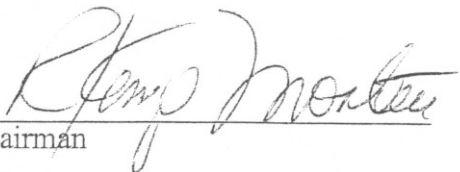
Pursuant to W. Va. Code § 6B-2-5(h)(1) public officials with policymaking, nonministerial or regulatory authority may not seek or accept employment with any person who is or may be regulated by their governmental agencies.

The requestor's position as an ALJ clearly affords him the authority contemplated by W. Va. Code § 6B-2-5(h)(1) and makes the restriction against seeking or accepting outside employment applicable. In his adjudicative role, he exercises discretion and judgment in the performance of his duties. His agency, however, does not ordinarily regulate individuals who are potential clients of the requestor in his private practice. If, however, an individual who within the preceding twelve months appeared before the ALJ subsequently sought the requestor's service to obtain benefits, the requestor would be prohibited from such representation. Additionally, if a present or former client files a complaint with the requestor's agency, the requestor shall recuse himself from hearing such complaint.

VOLUNTEER ACTIVITY

As to the requestor's volunteer activity, the Commission has previously held that government attorneys may, on their own time, provide *pro bono* legal services to low income persons (AO-96-18) and to public service groups or organizations (AO-2001-10). Thus, it is not a violation of the Ethics Act for the requestor to continue his outside volunteer activity, within the constraints earlier set forth related to his outside practice of law.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.*, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked, or the law is changed.


Chairman