

ADVISORY OPINION NO.90-189
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION
ON FEBRUARY 7, 1991

GOVERNMENTAL BODY SEEKING OPINION

Governmental Affairs Manager of a Lobbying Company

OPINION SOUGHT

- a. What level of policymaking or other "nonministerial functions" is a government officer or employee required to possess before communication with him or her requires the individual to register as a lobbyist?
- b. What degree of promotion, advocacy, opposition or other attempts to "influence" a government officer would activate the lobbyist registration requirements?
- c. Whether Division Managers of a Company may participate in informational dinner discussions with legislators without being required to register as lobbyists?
- d. To what degree can a Company's employees discuss legislative issues with legislators, in or outside the dinner setting, without being required to register as lobbyists?

OTHER FACTS RELIED UPON BY THE COMMISSION

The requestor states that his Company is a large public utility. They generate, transmit and distribute electricity to customers both in and outside the State. In doing so, and as a public utility, the Company is subject to extensive regulation and oversight by a number of State agencies regarding the rate structure, operations, environmental practices, tax liabilities and labor practices.

The nature of the Company's operations, the complexities associated therewith, and the degree to which it is impacted by State governmental activity necessitates ongoing communication with State agencies and employees on a daily basis. Whether it be permit negotiations, disagreements over tax liabilities or other problem areas, Company employees at all levels are regularly involved in meetings and discussions with State officials and employees at various levels with the goal of achieving the best possible results for the Company. The employees routinely act as advocates in State administrative or regulatory matters on behalf of the Company.

The Company is concerned that the normal day-to-day dealings between its employees and State agency representatives might inadvertently constitute lobbying and require Company employees to register as lobbyists.

Each year the Company holds a series of informational dinners for legislators in each of the five operating Divisions of the State. The Vice President for State operations and the State Governmental Affairs Manager, both of whom are registered lobbyists, oversee the dinners and discussions with legislators on issues impacting Company operations. Also in attendance are the

Division Managers who are not registered lobbyists and who do not normally maintain ongoing contact with legislators.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-3-1(4) states in pertinent part that "government officer or employee" means a member of the Legislature, a legislative employee, the governor and other members of the board of public works, heads of executive departments, and any other public officer or public employee under the legislative or executive branch of State government who is empowered or authorized to make **policy** and **perform non-ministerial functions**.

West Virginia Code Section 6B-3-1(6) states in pertinent part that..."lobbying" or "lobbying activity" means the act of communication with a government officer or employee to promote, advocate or oppose or otherwise attempt to influence:

(i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the legislature or this state; or

(ii) The adoption or rejection of any rule, regulation, legislative rule, standard, rate, fee or other delegated legislative or quasi-legislative action to be taken or withheld by any executive department.

West Virginia Code Section 6B-3-1(7)(A) states in pertinent part that..."lobbyist" means a person who, through communication with a government officer or employee, promotes, advocates or opposes or otherwise attempts to influence:

(i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the legislature or this state; or

(ii) The adoption or rejection of any rule, regulation, legislative rule, standard, rate, fee or other delegated legislative or quasi-legislative action to be taken or withheld by any executive department.

West Virginia Code Section 6B-3-1(7)(B) states in pertinent part that...the term "lobbyist" shall not include the following persons, who shall be exempt from the registration and reporting requirements set forth in this article, unless such persons engage in activities which would otherwise subject them to the registration and reporting requirements:

(i) persons who limit their lobbying activities to appearing before public sessions of committees of the legislature, or public hearings of state agencies, are exempt...

(iii) Persons who lobby without compensation or other consideration for acting as lobbyists, when such persons make no expenditure for on behalf of any government officer or employee in connection with such lobbying, are exempt...

West Virginia Code Section 6B-3-2 states in pertinent part that...before engaging in any lobbying activity...a lobbyist shall register with the Ethics Commission by filing a lobbyist registration statement...

ADVISORY OPINION

a. Provision 6B-3-1(4) of the Ethics Act makes lobbyist registration necessary only if an individual attempts to influence government officers or employees who are empowered or authorized to make quasi-legislative policy and perform nonministerial functions. Theoretically,

if an individual confined his lobbying activities to officers or employees who lacked the requisite authority, registration with the Ethics Commission would not be required.

It is not reasonable to expect members of the general public to postpone contact with government representatives until they make a legal determination of the representative's level of authority.

However, people are responsible for their intended actions. Thus, if a person **intends to attempt to influence** legislation or certain types of executive department action he or she must register as a lobbyist.

It would be impossible for the Ethics Commission to determine in advance which governmental officers or employees fit in the category established in 6B-3-1(4) and can only do so on a case-by-case basis.

By way of example, permit negotiations and discussions with officials or employees aimed at resolving disagreements over tax liabilities would not be considered a lobbying activity. Therefore, those routine activities of the Company's employees, which are not attempts to influence the adoption or rejection of rules, regulations, rates, fees or other quasi-legislative functions would not require Company employees to register.

b. The Ethics Act clearly establishes that it is the **attempt to influence** which triggers the lobbyist registration requirements. The Act does not contemplate the degree of influence which is permitted without having to register. It is merely the status of engaging in the attempt to influence legislation or other executive department action as set out in 6B-3-1(b). There is no "degree" of influence exerted before registration is required.

c. The Commission finds that business, labor and other associations invite members of the Legislature to receptions, dinners and other similar events as a result of a widely held belief that their attendance will further the legislative agenda of the sponsoring organization. Since the association's hospitality to the Legislators is, in the final analysis, intended to influence legislation, the event is a "lobbying activity".

The Act provides that persons who are compensated for their lobbying activities are required to register with the Ethics Commission. In this instance, the Division Managers would be attending a dinner at the direction of their employer, in furtherance of the Company's legislative agenda. Attendance is part of the job for which they are being compensated and their attendance at the dinner constitutes a lobbying activity.

However, the Commission finds that the Legislature in drafting the Ethics Act did not intend to require persons whose sole lobbying activity occurs at such a dinner or group function to register and report as a lobbyist. Such planned functions provide an efficient and convenient forum for the exchange of information between constituents and their legislative representatives.

Therefore, the Commission has determined that persons who limit their lobbying activities to attending such planned group functions and make no individual expenditures for or on behalf of any government official are exempt from the registration requirements. However, expenditures incurred by the Association on behalf of invited legislative guests are lobbying expenditures and must be reported by the Association.

d. The Commission's ruling in response (c) to the lobbyist registration requirements is limited

to employees who attend planned group functions such as dinners and receptions.

Outside the group function setting, any employee who undertakes to discuss with legislators the legislative concerns of his or her employer is participating in a lobbying activity.

Such lobbying, done at the direction of the employer and in furtherance of the employer's legislative agenda would require the employee to register as a lobbyist, if the employee is compensated by the employer, in the form of salary or otherwise. If such lobbying is done "on company time", it seems clear that the employee is being compensated for lobbying.

Therefore, except for planned group functions, employees who participate in lobbying activity (1) at the direction of their employers and (2) in furtherance of their employer's legislative agenda are required to register as lobbyists, if they are compensated by their employers.

Chairman