

ADVISORY OPINION NO. 2005-22

Issued On January 5, 2006 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Former Public Official** seeks guidance on appearing in a representative capacity before certain governmental agencies with which he was previously affiliated.

FACTS RELIED UPON BY THE COMMISSION

The requester recently retired after a lengthy and accomplished career as a public servant. From 1989 until his retirement in October 2005, the requestor served as General Counsel to a Cabinet Secretary. During his tenure as General Counsel, he was appointed in July 2004 to serve as Acting Director of the legal staff for one of the Divisions in the Department under the general organizational supervision of the Cabinet Secretary. Shortly thereafter, he was additionally appointed to serve as Acting Commissioner of that same Division.

The requester continued serving as Acting Commissioner of the Division until a new Commissioner was appointed by the Governor in January 2005. He continued serving as Acting Director of that Department's Legal Division until a new Director began serving in that position on July 1, 2005. Notwithstanding these additional responsibilities, he remained General Counsel to the Department at all times until his retirement.

The requester seeks to determine which, if any, of the dozen divisions administered by this Department he may appear before in a representative capacity, and whether these limitations extend for six months or one year.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(g) provides as follows:

- (1) 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 one year after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate or propose rules, 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 rule;
 - (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.

(2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person: *Provided*, That nothing contained in this subsection shall prohibit, during any period, a former public official or employee from being retained by or employed to represent, assist or act in a representative capacity on behalf of the public agency by which he or she was employed or in which he or she served. Nothing in this subsection shall be construed to prevent a former public official or employee from representing another state, county, municipal or other governmental entity before the governmental entity in which he or she served or was employed within one year after the termination of his or her employment or service in the entity.

(3) A present or former public official or employee may appear at any time in a representative capacity before the Legislature, a county commission, city or town council or county school board in relation to the consideration of a statute, budget, ordinance, rule, resolution or enactment.

(4) Members and former members of the Legislature and professional employees and former professional employees of the Legislature shall be permitted to appear in a representative capacity on behalf of clients before any governmental agency of the state or of county or municipal governments, including county school boards.

(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the six months prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

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W. Va. Code § 6B-2-5(g) provides that a former public official, staff attorney or staff accountant may not appear in a representative capacity before his former agency in certain types of cases. This "revolving door" provision is intended to prohibit a public servant from exploiting the personal prestige he may have established as a former official in an agency. This type of rule is primarily focused on avoiding the appearance of impropriety as opposed to any actual conflict of interest. Public servants who hold these particular positions are allowed to return and appear before their former agency in a representative capacity after a specified "cooling off" period has elapsed. In the 2005 Special Legislative Session, the Legislature amended this provision, extending this "cooling off" period from six months to one year, effective July 1, 2005.

In Advisory Opinion 93-39, the Commission determined that the limitation on returning before a former agency in a representative capacity begins to run once the public servant terminates his service in a covered capacity. According to the facts presented, the requester was replaced as Acting

Commissioner of the Division in January 2005 and a new Director of the Division's legal staff took over on July 1, 2005.

Inasmuch as the requester ceased to function in these specific covered positions prior to July 1, 2005, the limitation is governed by the six month limitation in effect under the statute at that time. Accordingly, the limitation on appearing in a representative capacity based on service as Acting Commissioner ended in July 2005, six months after the requester was replaced by a new Acting Commissioner. Likewise, the limitation generated by service as the Acting Director of the Division's legal staff expired at the end of December 2005.

The requester retired from state service as General Counsel to a Department headed by a Cabinet Secretary in October of 2005. Therefore, any limitation on appearing in a representative capacity which flows from holding this position applies for a full year. As General Counsel, the requester was a full-time staff attorney to the Department. There are a variety of governmental entities with authority to hear contested cases or promulgate or propose rules which are assigned to the Department where the requester served as General Counsel. The Commission must determine whether the requester was employed by these separate entities within the meaning and intent of the Act.

The pertinent authority of a Cabinet Secretary is set forth in W. Va. Code § 5F-2-2 as follows:

(a) Notwithstanding any other provision of this code to the contrary, the secretary of each department shall have plenary power and authority within and for the department to:

- (1) Employ and discharge within the office of the secretary such employees as may be necessary to carry out the functions of the secretary, which employees shall serve at the will and pleasure of the secretary;
- (2) Cause the various agencies and boards to be operated effectively, efficiently and economically, and develop goals, objectives, policies and plans that are necessary or desirable for the effective, efficient and economical operation of the department;
- (3) Eliminate or consolidate positions, other than positions of administrators or positions of board members, and name a person to fill more than one position;
- (4) Delegate, assign, transfer or combine responsibilities or duties to or among employees, other than administrators or board members;
- (5) Reorganize internal functions or operations;
- (6) Formulate comprehensive budgets for consideration by the governor, and transfer within the department funds appropriated to the various agencies of the department which are not expended due to cost savings resulting from the implementation of the provisions of this chapter: *Provided*, That no more than twenty-five percent of the funds appropriated to any one agency or board may be transferred

to other agencies or boards within the department: *Provided, however,* That no funds may be transferred from a special revenue account, dedicated account, capital expenditure account or any other account or funds specifically exempted by the Legislature from transfer, except that the use of appropriations from the state road fund transferred to the office of the secretary of the department of transportation is not a use other than the purpose for which such funds were dedicated and is permitted: *Provided further,* That if the Legislature by subsequent enactment consolidates agencies, boards or functions, the secretary may transfer the funds formerly appropriated to such agency, board or function in order to implement such consolidation. The authority to transfer funds under this section shall expire on the thirtieth day of June, one thousand nine hundred eighty-nine;

(7) Enter into contracts or agreements requiring the expenditure of public funds, and authorize the expenditure or obligating of public funds as authorized by law: *Provided,* That the powers granted to the secretary to enter into contracts or agreements and to make expenditures or obligations of public funds under this provision shall not exceed or be interpreted as authority to exceed the powers heretofore granted by the Legislature to the various commissioners, directors or board members of the various departments, agencies or boards that comprise and are incorporated into each secretary's department under this chapter;

(8) Acquire by lease or purchase property of whatever kind or character, and convey or dispose of any property of whatever kind or character as authorized by law: *Provided,* That the powers granted to the secretary to lease, purchase, convey or dispose of such property shall not exceed or be interpreted as authority to exceed the powers heretofore granted by the Legislature to the various commissioners, directors or board members of the various departments, agencies or boards that comprise and are incorporated into each secretary's department under this chapter;

(9) Conduct internal audits;

(10) Supervise internal management;

(11) Promulgate rules, as defined in section two, article one, chapter twenty-nine-a of this code, to implement and make effective the powers, authority and duties granted and imposed by the provisions of this chapter, such promulgation to be in accordance with the provisions of chapter twenty-nine-a of this code;

(12) Grant or withhold written consent to the proposal of any rule, as defined in section two, article one, chapter twenty-nine-a of this code, by any administrator, agency or board within the department, without which written consent no proposal of a rule shall have any force or effect;

(13) Delegate to administrators such duties of the secretary as the

secretary may deem appropriate from time to time to facilitate execution of the powers, authority and duties delegated to the secretary; and

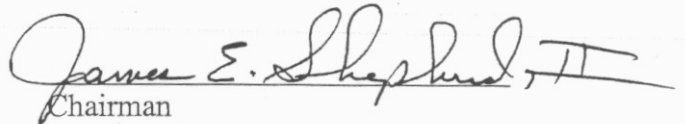
(14) Take any other action involving or relating to internal management not otherwise prohibited by law.

(b) The secretaries of the departments hereby created shall engage in a comprehensive review of the practices, policies and operations of the agencies and boards within their departments to determine the feasibility of cost reductions and increased efficiency which may be achieved therein, including, but not limited to, the following:

- (1) The elimination, reduction and restrictions in the use of the state's vehicle or other transportation fleet;
- (2) The elimination, reduction and restrictions in the preparation of state government publications, including annual reports, informational materials and promotional materials;
- (3) The termination or rectification of terms contained in lease agreements between the state and private sector for offices, equipment and services;
- (4) The adoption of appropriate systems for accounting, including consideration of an accrual basis financial accounting and reporting system;
- (5) The adoption of revised procurement practices to facilitate cost effective purchasing procedures, including consideration of means by which domestic businesses may be assisted to compete for state government purchases; and
- (6) The computerization of the functions of the state agencies and boards.

Having considered the authority extended to a Cabinet Secretary under the foregoing reorganization provisions, the Commission finds that a full-time staff attorney serving as General Counsel to a Department is not employed by the separate agencies that operate within the Department, unless he or she is assigned to provide legal services to that particular division or entity.

Accordingly, the requester is barred for one year following his retirement from appearing in a representative capacity before the Cabinet Secretary or the Secretary's staff in regard to those matters controlled by the restrictions in (g). Otherwise, the requester is not prohibited from appearing in a representative capacity before a separate governmental entity within the Department, unless he provided legal services to that entity after July 1, 2005.


Chairman