

# Advisory Opinion 2022-12

Issued on May 5, 2022, by

The West Virginia Ethics Commission

## Opinion Sought

A former **Deputy Secretary** of a state department asks whether he is subject to any post-employment restrictions in the Ethics Act, including the revolving door provisions.

## Facts Relied Upon by the Commission

The Requester was employed as a full-time deputy secretary of a state department. He was hired by a former secretary and continued in this position under the current secretary. He states that he had no formal job description, but his job was to assist the secretary and support the department leadership in carrying out its various missions. All employees in the department serve at the will and pleasure of the secretary. [W. Va. Code § 5F-2-2\(a\)\(1\)](#). The Requester's former position was not created by law, and the law does not require the employee to take an oath of office. *Id.*

While the deputy secretary position holds significant decision-making authority, the Requester was not the head of an agency, and he did not directly regulate or oversee any specific area. The Requester is not an attorney or accountant. Last, the Requester is not under the direct supervision of the Governor or of a member of the Legislature.

The Requester desires to seek new employment in either the private or public sector and asks whether he is subject to any post-employment restrictions imposed by the Ethics Act.

## Code Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(f) provides, in relevant part:

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.

W. Va. Code § 6B-2-5(g)(1) provides, in relevant part:

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.

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

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

- (A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
- (B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working....

W. Va. Code § 6B-3-2(e) states, in relevant part:

The following public officers or employees may not, during or up to one year after the termination of their public employment or service, be allowed to register as lobbyists:

- (1) Members of the Legislature;
- (2) Members of the Executive Department as referenced in article VII, section one of the Constitution of West Virginia;
- (3) Will and pleasure professional employees of the legislature under the direct supervision of a member of the legislature;
- (4) Will and pleasure professional employees of members of the Executive Department under the direct supervision of the Executive Department officer and who regularly, personally and substantially participates in a decision-making or advisory capacity regarding agency or department policy;
- (5) Members of the Supreme Court of Appeals;

- (6) Any department secretary of an executive branch department created by the provisions of section two, article one, chapter five-f of this code; and,  
(7) Heads of any state departments or agencies.

## **Advisory Opinion**

### *Seeking New Employment*

The Ethics Act, at W. Va. Code § 6B-2-5(h), provides limitations on full-time public employees and officials who are seeking new or additional employment from certain “persons,” such as private companies they have regulated within the past 12 months.<sup>1</sup> Government employees may need to get an employment exemption before communicating with potential private sector employers. This requirement, however, does not apply to former public employees after they leave government service. Advisory Opinion [2012-09](#).

Nor do the limitations in W. Va. Code § 6B-2-5(h) apply to public employees seeking a different public job. In Advisory Opinion 1992-49, the Commission reaffirmed prior Advisory Opinions, holding that since the definition of “persons” in the Ethics Act, at W. Va. Code § 6B-1-3(h)<sup>2</sup>, does not include governmental agencies, the prohibition against seeking employment with regulated persons established in W. Va. Code § 6B-2 5(h)(1) does not apply to seeking employment with other governmental agencies.

**Therefore, the Ethics Act does not prohibit the former deputy secretary from seeking new employment in either the private or public sector.**

While the Ethics Act does not expressly prohibit former public employees or officials from seeking work with a particular private business, limitations may apply. The relevant provisions of the Act will now be addressed.

### *Lobbyist Revolving Door*

The Ethics Act, at W. Va. Code § 6B-3-2(e), prohibits certain categories of officials and employees of state government from registering as a lobbyist “during or up to one year” after the termination of their public employment or service. *Id. at (1)-(8)*. This prohibition is commonly referred to as the “lobbyist revolving door” provision. The Requester clearly does not fall into any of the prohibited categories with the exception of “(7) Heads of any state departments or agencies.”

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<sup>1</sup> § 6B-2-5(h)(1)(A).

<sup>2</sup> This definition states: “Person’ means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.”

In Advisory Opinion [2012-09](#), the Commission held that although a state employee exercised significant decision-making power, the one-year restriction on registering as a lobbyist did not apply to him because he was not the head of an agency. In this case, the Requester asserts that his job was to assist the secretary and support the department leadership in carrying out its various missions. He was not the head of the department or any particular agency.

**Accordingly, the former deputy secretary is not subject to the lobbyist revolving door prohibition set forth in W. Va. Code § 6B-3-2(e).**

#### *Government Department Revolving Door*

There is another revolving door provision in the Act, at W. Va. Code § 6B-2-5(g), which provides a one-year “cooling off” period during which certain public officials and employees may not represent a client before his or her governmental or former governmental entity. This provision applies only to elected or appointed public officials, full-time staff attorneys, and accountants. The Requester is not an attorney or accountant.

In Advisory Opinion [2012-25](#), the Commission reaffirmed a prior Advisory Opinion, [2010-22](#), in which the Commission ruled, “[A]n ‘appointed public official’ for purposes of § 6B-2-5(g) of the Ethics Act, is a person who holds a position which is created by law.”<sup>3</sup> The Commission concluded that the Requester in 2012-25 was not subject to the “(g)” restrictions because his position was not created by law nor did he take an oath of office.”

The Requester’s deputy secretary position was not created by law, and it does not require an oath of office. Therefore, the Requester was not an appointed public official.

**The Commission holds that the deputy secretary is not subject to the one-year cooling off period provided in the Act’s revolving door provision, at W. Va. Code § 6B-2-5(g), as he was not a full-time staff attorney, accountant, or appointed public official.**

#### *Representing Parties in Particular Matters*

The Ethics Act, at W. Va. Code § 6B-2-5(f), prohibits public officials and employees, including the Requester, from post-employment involvement in a “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.” This provision does not, however, apply to legislators or legislative staff.

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<sup>3</sup> The West Virginia Constitution requires persons elected or appointed to any office to take an oath of office. W.Va. Const. Art. 4, § 5.

The deputy secretary presumably was “personally and substantially” involved in “matter[s] 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 . . .” Therefore, there may be instances that would subject him to this provision. For example, he may not represent a person in a license or permit application proceeding if the proceeding is a continuation of a prior proceeding in which he substantially participated as an agency employee.

The Commission encourages the Requester to seek further advice from the staff of the Ethics Commission if this issue arises.

**The Commission holds that the Requester may seek employment in the private and public sectors, register as a lobbyist without waiting one year, and appear before his former agency in a representative capacity, subject to the limitations in W. Va. Code § 6B-2-5(f).**

Finally, the Commission notes that public employees may not knowingly and improperly disclose any confidential information acquired in the course of their official duties, or use such information to further their personal interests or the interests of another person, including the interests of a new employer. W. Va. Code § 6B-2-5(e).

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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.*

  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission