# ADVISORY OPINION NO. 2010-22

**Issued On January 13, 2011 By The**

**WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

A retired **State Employee** asks whether his business may contract with his former agency within one year of his departure from the agency.

## FACTS RELIED UPON BY THE COMMISSION

A State Employee recently retired from a State Agency. His job title was Unit Leader. His direct supervisor was the Section Head. His duties included supervising staff, organizing and prioritizing projects within his unit, overseeing contracts, creating and negotiating scopes of work for surveys and evaluations. His job position is not created by statute nor is he appointed by the Governor.

His former agency contracts with companies on archeological and cultural preservation related matters which may arise on construction projects. The companies submit proposals to the agency to become an approved contractor. As part of the selection process, the companies submit prospectuses and are interviewed. The agency then selects approximately five firms who are placed on a master list and used on an "as needed" basis. When a project arises, the Section Head has responsibility for selecting an approved contractor from the master list. Generally, the selection is done on a rotating basis.

During his employment at the agency, the Requester did not participate in this selection process. However, he did have oversight responsibilities in regard to reviewing the work of the contractors.

The employee, upon his retirement, formed a Limited Liability Corporation (LLC) in his field of expertise. Based upon his area of knowledge, he seeks to submit a proposal in order that he may be considered for selection as a designated contractor. He asks whether he may seek to be included on this list or whether he must wait one year before applying.

## CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 68-1-3 reads in relevant part:

(d) "Employee" means any person in the service of another under any contract of hire, whether express or implied, oral or written, where the employer or an agent of the employer or 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.

U) "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

(k) "Public official" means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) 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.

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

> Except as otherwise provided in section three, four or five, article two, chapter eight-a of this code: (1) No elected or appointed public official ... shall, during his or her public service ... 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 ... in the following matters:
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> (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.

**ADVISORY OPINION**

The Ethics Act contains a one year "cooling off" period which prohibits elected and appointed public officials, full-time staff attorneys and accountants, upon their departure from government, from appearing back before their former agency for a one year period on certain matters. W.Va. Code§ 6B-2-5(g). This provision in the Ethics Act is commonly referred to as the "revolving door" provision. While the Commission has the statutory authority to grant an exemption to these limitations, it never has.

In applying this statute, the Commission must determine whether the Requester was an "appointed public official." In determining which public servants are "appointed public

officials", the Commission is faced with the challenge of reconciling three statutory definitions: employee, public employee and public official.[1] W.Va. Code§ 6B-1-3. As none of the definitions expressly defines who is an "appointed" public official, the Commission finds that weight must be given to the common law definition of public official and the use of the term "appointed".

A public official is normally one who has a fixed tenure of office and takes an oath of office. State ex rel. Key v. Bond, State Auditor, 118 S.E. 276, 277 (W.Va. 1923). *See also,* State ex rel. Ralich v. Millsap, 76 S.E.2d 737 (W.Va. 1953). To be a public officer, his office must be created by law. kl

In State ex rel. Key the Supreme Court found that the Chief Clerk for the Office of the Secretary of State was not a public official as her term of office, powers and duties were not fixed by general law.[2] The Court noted that while she had significant powers, her position was not created by law. Similarly, in Christopher v. City of Fairmont, 280 S.E.2d 284 (W.Va. 1981), for purposes of examining the application of the removal statute to appointed public offices, the Court found that the water transportation and distribution supervisor for the City of Fairmont was not a public officer, but an employee. In reaching its opinion, in part, the Court found that the city charter specifically provides for the offices of councilmember, mayor, city clerk, city manager, city attorney, municipal judge, members of the city planning commission, board of adjustment, and hospital board; however, it did not provide for the office of water transportation and distribution supervisor.

In reliance upon the common law and prior Supreme Court decisions, the Commission finds that for purposes of being an "appointed public official" under § 6B-2-5(g) of the Ethics Act, the position must be created by law.[3] For example, West Virginia Code§ 6-7-2a specifically lists numerous high-ranking positions in State government created by law, including but not limited to, Commissioner of the Division of Highways, Commissioner of the Division of Corrections and the Director of the Division of Natural Resources. This code section specifically states that these individuals are to be appointed by the Governor with the advice and consent of the Senate and hold office until their successors have been appointed and qualified. These positions, and others, created by statute are subject to the limitations in section "g". Moreover, in accordance with the plain language in the Ethics Act, elected public officials, staff attorneys and accountants are subject to the one year cooling off period.

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[1] The Ethics Act defines "public official" as any person who is elected or appointed to any office or position. W.Va. Code 6B-1-3(k).

In this case the Supreme Court was analyzing the nature of the position of "Chief Clerk" for purposes of applying various provisions in the West Virginia Constitution, including Article 6, Section 8 and Article 6, Section 38.

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

In contrast, in applying this analysis to the Requester's former position of Unit Leader, the Commission finds that he is not an appointed public official for purposes of the revolving door provisions in the Ethics Act, § 6B-2-5(g). His position was not created by statute, he was not appointed by the Governor or a governing body, nor was he required to take an oath of office. As such, he may appear before his former agency within one year of his departure from his public employment to seek a contract. However, in accordance with other limitations in the Ethics Act, he may **not** use confidential information or represent a client in a matter in which he was substantially involved. W.Va. Code§§ 6B-2-5(e) and (f).

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code§ 61-10-15, 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
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