ADVISORY OPINION NO. 2014-13

Issued on April 3, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Division Director of a State Agency asks if he is required to file a Financial Disclosure Statement.

FACTS RELIED UPON BY THE COMMISSION

The Requester is one of three Division Directors of a State Agency who reports to the Office Director, who reports to a Deputy Commissioner. The Requester states that although he has some decision making authority, he must seek approval for many types of decisions. The Requester notes that his division is a lower division within the overall organizational scheme of the State Agency.

According to the Requester, he first received a Financial Disclosure Statement from the Ethics Commission in January 2007 when he began serving as Interim Director in his division within the State Agency. He further states that he is now the permanent Division Director, having been named to that position in March 2007. He has continued to file Financial Disclosure Statements since 2007, but as of this date, he has not yet filed one for 2014.

The Requester also states that although he is currently being required to complete the annual Financial Disclosure Statement, others in the same State Agency who hold similar titles or higher positions have not been required to do so. According to the Ethics Commission's records, the Requester's statement is accurate.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-6 provides:

> (a) The financial disclosure statement shall be filed on the first day of February of each calendar year to cover the period of the preceding calendar year, except insofar as may be otherwise provided herein. The following persons must file the Financial Disclosure Statement required by this section with the Ethics Commission:
>
> ***
>
> > (3) Secretaries of departments, commissioners, deputy commissioners, assistant commissioners, directors, deputy directors, assistant directors, department heads, deputy department heads, and assistant department heads.

W. Va. Code§ 6B-2-6(e) states that no person shall fail to file a statement required by this section.

ADVISORY OPINION

The Ethics Act requires certain public servants and certain candidates seeking public office to file a Financial Disclosure Statement (FDS) with the Ethics Commission. The FDS is intended to provide public access to certain information regarding these individuals. These disclosures are intended to reveal any potential conflicts of interest that these public servants and candidates may have, as they are in, or may assume positions in which they have decision making power, with far reaching effects on matters directly affecting the public. The mere requirement of such disclosure discourages any impropriety, and also gives reassurances to the public that no improper conflicts exist. In Advisory Opinion 90-165, the Commission stated:

> The purpose of a public official or employee filing a financial disclosure statement is to allow the public access to such relevant information and to determine whether a conflict of interest exists. The only way to make an accurate determination or investigation as to possible conflicts is when more specific information is included on the financial disclosure statement. Otherwise, the financial disclosure form would be meaningless and of no assistance to the public.

The statutory mandate within W. Va. Code § 68-2-6 has been in place, unchanged, for approximately twenty-five years. Since that time, state government has been reorganized and some agencies have changed their structures and job titles, without corresponding changes in the statute itself. There are certainly job titles in existence now which were not in existence at the inception of the Ethics Act. Furthermore, logic dictates that some job titles which should be included in the statutory list of mandatory filers were inadvertently omitted. For example, W. Va. Code§ 68-2-6(a) lists "deputy commissioner" and "deputy department head", but inexplicably omits the title of "deputy secretary", which is a higher position. Nevertheless, based upon the job titles which are listed, it appears implicit in the statute that those public servants with equivalent leadership roles and corresponding levels of responsibility should also be mandated to file Financial Disclosure Statements, to ensure transparency and accountability.

The Ethics Commission recognizes that job titles and responsibility vary widely among state agencies. For example, in one state agency, a public servant with the title of "director" may be a low level position, with little or no decision making responsibilities; while a "director" in another state agency may be at the highest level, and may be involved in extensive decision making regarding policy, budget, and administration. Upon information and belief, such job titles are created internally by state agencies, or by the State Division of Personnel. Regardless of any differences in job responsibilities, W. Va. Code§ 68-2-6 provides a clear list of **titles** which are mandated to file Financial Disclosure Statements and serves as initial notice to all public servants who hold such titles that they are among those mandated to file a Financial Disclosure Statement.

Based upon the information provided by the Requester, he indeed falls at the fifth organizational tier within his State Agency, a lower level within this large state agency. Upon information and belief, this large state agency employs a multitude of public servants holding the title of "director", including in divisions other than the Requester's.

Nevertheless, the Requester's job title is "Director", which is specifically included in W. Va. Code§ 6B-2-6 as one of the titles mandated to file a Financial Disclosure Statement. It is clear from a plain reading of§ 6B-2-6(a)(3) that public servants holding the title of "director" are covered by this statutory requirement of the Act.

The Commission has previously considered whether the Ethics Act requires public servants to file financial disclosure statements. In Advisory Opinion 90-36, the Commission stated:

> It is the Commission's opinion that the judicial branch Administrative director, Deputy Administrative Director, Director of Financial Management and three Assistant Directors are required to file financial disclosure statements pursuant to Subsection 6B-2-6(a). The provision setting forth the requirements for filing financial disclosure statement does not exempt the judicial branch and limit this requirement to Executive branch employees only. Employees having the titles of Director, Deputy Director and Assistant Director are clearly identified and named in subsection 6B-2-6(a)(3).

This is a clear and concise statutory requirement, which is not open to interpretation.

In light of the perceived job title disparity, the Commission is sympathetic to the Requester's concerns about the requirement, especially since the plain language of the Ethics Act does not require considerably higher ranking positions such as deputy secretary, to file. Nevertheless, the Commission does not have the authority to excuse the Requester from its application. In Advisory Opinion 93-13, the Commission wrote:

> Where the Legislature wished to give the Commission the authority to grant exemptions to certain provisions of the Ethics Act, it did so in explicit language... The Commission has received no such authority to grant exemptions from the filing requirements contained in W. Va. Code§ 6B-2-6. The Commission notes that, pursuant to W. Va. Code§ 6B-2-6 (c), a public official may not continue upon his or her duties or receive compensation from public funds, unless he or she has filed the Financial Disclosure Statement with the Ethics Commission.

Therefore, the Commission hereby finds that the Requester, as a Division Director, is required to file a Financial Disclosure Statement. The Commission does not have the authority to excuse the Requester from the application of W. Va. Code § 6B-2-6(a)(3).

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.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman