ADVISORY OPINION NO. 2014-18

Issued On May 1, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Retired State Employee** asks if the Ethics Act permits him to accept a job with a firm that contracts with his previous employer, and if so, what limitations apply.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that he retired from his public employment as an engineer with a state agency earlier this year. In his previous position, the Requester was responsible for overseeing contractors and consultants to ensure contract compliance. He also oversaw various computer-related projects, drafted contracts, and set design and maintenance standards. Although he had some supervisory authority, he did not have final decision-making authority over contracts.

In his new position, the Requester will work as the Vice President of a consulting firm in another state. The firm is one of many consultants, contractors, and vendors with the Requester's previous state agency. The Requester states that his chief duty with the firm is, "to set the direction and provide oversight for the company as a whole." He also states that he "does not envision any personal contact with the State of West Virginia." Instead, the firm has a project engineer who interacts with the State, who will be his subordinate.

The Requester's previous public position is not created by statute, nor was he appointed by the Governor. He is neither an attorney nor an accountant.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(e) states:

> No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-2-5(f) states, 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) states, 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)(1) states:

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.

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

(i) Drafting bid specifications or requests for proposals;

(ii) Recommending selection of the vendor;

(iii) Conducting inspections or investigations;

(iv) Approving the method or manner of payment to the vendor;

(v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or

(vi) Taking other nonministerial action which may affect the financial interests of the vendor.

ANALYSIS

The Ethics Act prohibits certain public employees from seeking or accepting employment from persons who interact in specific ways with their agencies. Additionally, the Act places limitations on the activities certain former public employees may engage in for their new employer.

Here, the Requester is retired from his public position. Advisory Opinion 2012-09 explains that "[n]o provision in the Ethics Act specifically prohibits public officials from working for a particular business after they leave government service." Indeed, W. Va. Code § 6B-2-5(h) applies only to *current* public employees. Therefore, the Requester may accept the position he describes in his request.

Limitations apply. First, under W. Va. Code§ 6B-2-5(e), the Requester may not improperly disclose confidential information to his new employer, nor may he use that information for his own, or another's, personal interests.

W. Va. Code § 6B-2-5(f) prohibits present and former public employees from acting in a representative capacity:

> on behalf of a 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.

Further, W. Va. Code § 6B-2-5(g) prohibits elected or appointed public officials, as well as full-time staff attorneys and accountants from appearing in front of their previous agency in a representative capacity in specific proceedings for a year after the end of their employment.

In Advisory Opinion 2010-22, the Commission found that "for purposes of being an 'appointed public official' under § 68-2-5(g) of the Ethics Act, the position must be created by law." Here, the Requester's position is not created by law. Accordingly, he is not an elected or appointed official within the scope of the Act. He is also neither an attorney, nor an accountant. Therefore, the "revolving door" restrictions in W. Va. Code § 6B-2-5(g) do not apply to the Requester, and he is not specifically barred from appearing before his previous employer in the matters specified in W. Va. Code§ 6B-2-5(g).

The Requester did, however, previously draft contracts for his public employer, and oversaw contractors and consultants. Since his new employer is a contractor with his previous state agency, and the West Virginia project manager for his new employer will be his subordinate, limitations apply. If a situation would arise where the Requester would need to appear before his former employer on behalf of his current employer in one of the proceedings described under W. Va. Code § 6B-2-5(f), *supra,* he would have to seek permission from his former employer to do so.

Otherwise, nothing in the Ethics Act prohibits the Requester from communicating with his former agency on general matters. While the Requester indicates that he does not expect to have any personal contact with the State, it would be permissible for him to communicate generally if desired.

This advisory opinion is based upon the facts presented. If all material facts have not been provided, or if new facts arise, the Requester should contact the 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, *et seq.,* and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 68-2-3, 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/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson