ADVISORY OPINION NO. 2014-26

Issued on January 8, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Sheriff's Tax Deputy** asks whether he may own and operate a business before and after work hours that would provide county taxpayers with the ability to pay their county taxes before they are due.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a full-time employee of a Sheriff's Tax Office.[1] His job duties include assisting taxpayers in paying their taxes, processing county personal and real estate tax payments, processing exoneration requests, filing internal financial reports, and notifying taxpayers by letter of delinquent taxes.

The Requester is not a supervisor or manager in the Sheriff's Tax Office. He does not interact with taxpayers who have requested exonerations. He has no influence upon decisions made by the County Assessor's Office related to assessing property values or reducing or exonerating taxes.

The Requester states that sometimes taxpayers want to pay their taxes for future tax years that are not yet current. For example, some taxpayers want to pay both their 2014 and 2015 taxes at the same time. However, by statute, the County may not accept payment of anticipated future taxes until July 15 of the year they are levied.[2]

The anticipated clients of the Requester's business would submit payment in the amount of the estimated value of the future taxes to his business which, in turn, would submit payment of the taxes to the Sheriff's Tax Office when the taxes become due and payable. Clients could access their account information, make electronic payments, and request electronic refunds of overpayments from the business' website.

Further, the Requester's proposed business would guarantee that timely tax payments were made on behalf of its clients in order for them to receive all available discounts and to avoid all penalties, interest charges, and publication and redemption fees

---

[1] W.Va. Code§ 11A-1-4 states, as follows:
The sheriff, as *ex officio* county treasurer, shall collect all taxes levied in his county.

[2] W.Va. Code §11A-1-6 states, as follows:
The sheriff shall commence collection of current taxes on the fifteenth day of July, or as soon thereafter as he receives copies of the land and personal property books.

associated with late payments.[3] The Requester's business would charge an annual subscription fee for this service. His business would operate in the same county where he is employed and may expand to other counties in West Virginia.

The Requester states that his business would **not** perform any duties of a Tax Deputy, the Sheriff's Tax Office, or the Assessor's Office. The Requester's business would **not** provide tax advice regarding current or future county taxes, advise taxpayers on assessed values for county taxes, file assessment forms on behalf of its clients, be involved in advising clients as to paying delinquent taxes, notify clients if assessment forms have not been filed correctly, challenge current or future assessed values, advise or file documents necessary to redeem delinquent real estate taxes through the West Virginia State Auditor's Office, or provide services related to federal or state income taxes.

The Requester states that he would **not** use resources of the Sheriff's Office to which he has access to only by virtue of his position in the Sheriff's Tax Office. He may avail himself of public information, but not during his public work hours.

CODE PROVISIONS RELIED UPON BY COMMISSION

W.Va. Code § 6B-2-5(b) provides:

> (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

W.Va. Code§ 6B-2-5(h) reads, 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

[3] W.Va. Code § 11A-1-3 states, as follows:

> (a) All current taxes assessed on real and personal property may be paid in two installments. The first installment shall be payable on September first of the year for which the assessment is made, and shall become delinquent on October first; the second installment shall be payable on the first day of the following March and shall become delinquent on April first. Taxes paid on or before the date when they are payable, including both first and second installments, shall be subject to a discount of two and one- half percent. If taxes are not paid on or before the date on which they become delinquent, including both first and second installments, interest at the rate of nine percent per annum shall be added from the date they become delinquent until paid.

(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 .

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor;

(4) A full-time public official or full-time public employee may not take personal regulatory action on a matter affecting a person by whom he or she is employed or with whom he or she is seeking employment or has an agreement concerning future employment.

(6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

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:

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-1-3(g) reads, in relevant part:

"Ministerial functions" means actions or functions performed by an individual under a given state of facts in a prescribed manner in

> accordance with a mandate of legal authority, without regard to, or without the exercise of, the individual's own judgment as to the propriety of the action being taken.

158 W.Va. C.S.R. § 6-8 reads:

> Full-time appointed public officials and part-time and full-time public employees may not receive private compensation for performing private work during public work hours. This section shall not apply to *de minimis* private work.

ADVISORY OPINION

The West Virginia Ethics Act, W.Va. Code§ 6B-2-5(h)(1) and (4), prohibits full-time public officials from being **employed** by persons and businesses which they **regulate.**

Under the definition of "employment" applicable to this subsection of the Ethics Act, the Requester and/or his business would be considered to be employed by taxpayers in the same county because employment includes services rendered as an independent contractor. However, as explained herein, the Requester does not "regulate" taxpayers. Rather, the Requester performs ministerial functions for the Sheriff's Tax Office.

The Ethics Act does not define "regulatory." However, the Ethics Commission adopted the following guideline:

> HOW TO OBTAIN AN EMPLOYEE EXEMPTION FOR A NEW JOB OR A SECOND JOB
>
> What does it mean to regulate?
>
> The term regulate generally refers the act or process of controlling by rule or restriction. Black's Law Dictionary 1398 (9th ed. 2009), defining term "regulatory."
>
> Some examples of persons who regulate include an employee of a local public health department who inspects restaurants. At the State level it may be a person who has authority to approve or deny a license or permit, or one who inspects facilities to ensure compliance with State or Federal laws.
>
> The term is broad. If you have any questions concerning whether you exercise regulatory authority, you should contact the Ethics Commission.

In considering prior Advisory Opinions which relate to this issue, it is noted that in Advisory Opinion 2013-05, the Commission determined that an elected Assessor takes

regulatory action on all taxpayers in his county. The assessor had asked whether it was permissible to work for a photography firm located in the county where he serves. Businesses are required to pay county taxes on the assessed value of personal property/equipment owned by the business, and the Assessor's Office is responsible for assessing the value of such equipment. The Commission held, "For purposes of the limitations in § 6B-2-5(h), the Assessor exercises regulatory control over the photography firm. Hence, the Commission finds that he may not be employed by the photography firm."

In reaching its holding in Advisory Opinion 2013-05, the Commission considered its earlier opinions in Advisory Opinions 1996-52 and 2011-14. These opinions also held that an elected Assessor exercises regulatory authority over all property owners in the county where he or she serves since Assessors are responsible for assessing the value of all real or personal property in the county.

Here, the Requester Tax Deputy does not exercise regulatory control over the taxpayers of the county. His job duties include assisting taxpayers in paying their taxes, processing county personal and real estate tax payments and exoneration requests, filing internal financial reports, and notifying taxpayers by letter of delinquent taxes. These job duties are "ministerial," which is defined by the Act as "actions or functions performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, the individual's own judgment as to the propriety of the action being taken." W.Va. Code§ 6B-1-3(g). Therefore, a Sheriff's Tax Deputy does not regulate taxpayers within the meaning of the prohibitions in W.Va. Code§ 6B-2-5(h)(1) and (4).

The Commission also must consider W.Va. Code§ 6B-2-5(h)(6), which prohibits the Requester from receiving private compensation for providing information or services that he is required to provide in carrying out his public job responsibilities. The Requester states that he and his private business would not provide information or services that he is required to provide in his public capacity.

In addition, the Commission must consider whether W.Va. Code§ 6B-2-5(f) prohibits the Requester's private service. He is prohibited from providing any service, representing a client or acting in a representative capacity on behalf of any taxpayer in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter which arose during his period of public employment and in which he personally and substantially participated in a decision-making, advisory, or staff support capacity. Nothing in the Requester's public or private job duties implicate this subsection of the Ethics Act.

The Requester and his proposed business are subject to limitations, however. The Ethics Act prohibits public employees from using their public office or the prestige of their office for their own private gain. W.Va. Code§ 6B-2-5(b). *See* Advisory Opinion 2014-06, which states, "The notice and solicitation must not be made from the

workplace to the public at large. For instance, an employee may not leave an Avon catalog in the general waiting area. This would be a prohibited use of public office for private gain." In this instance, the Requester is prohibited from soliciting business including communicating with taxpayers in any way while he is working as a Tax Deputy that his business can assist them in pre-paying future taxes.

In addition, the Requester needs to be mindful that, "A public servant may never coerce a co-worker to purchase goods or services. Additionally, the Ethics Act prohibits public servants from using more than *de minimis* amount of public time and resources to conduct non-agency related activities." Advisory Opinion 2014-06.

Finally, the Requester is reminded that *W.Va. Code* § 6B-2-5(e) prohibits him from knowingly and improperly disclosing any confidential information which he acquired in the course of his official duties or from using this information to further his private interests or the interests of another person.

Therefore, the Commission holds that under the Ethics Act, the Respondent Sheriff's Tax Deputy is permitted, subject to the above limitations, to operate his proposed business because his public job duties are ministerial rather than regulatory in nature and because his proposed business would not offer information or services that he is required to provide in carrying out his public job responsibilities.

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 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 *§ 68-1-1, 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 other public agencies unless and until it is amended, revoked or the law is changed.*

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