

ADVISORY OPINION NO. 2009-13

Issued On January 14, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A Staff Attorney for a State regulatory agency asks whether he may represent himself before his employer agency on a matter that directly affects his private interests as a property owner.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a Staff Attorney for a State regulatory agency. Additionally, he is one of approximately 2,000 customers of a company that has requested permission from the State regulatory agency to increase rates charged to customers. His duties as a Staff Attorney include evaluating requests for rate increases and recommending to his employer agency what position it should take related to the company's request:

adverse or favorable. If the employer agency takes an adverse position, it becomes a party to the case. Although he works for the Legal Division, his supervisor has not assigned the rate increase case to him, but to his co-worker, another Staff Attorney

The Requester seeks to represent himself before his employer agency in a matter that directly affects his private interests as a property owner. To that end, he has filed a *pro se* Petition to Intervene in the rate increase matter presently pending before his employer agency. Although some months earlier he briefly mentioned to his supervisor that he was a customer of the company and was considering intervening, he did not meaningfully consult his supervisor or investigate whether his employer agency has an Internal policy regarding whether Staff Attorneys may participate as parties to agency matters before he filed his Petition to Intervene. The Requester states that this company may have additional matters coming before his agency in the upcoming year and that these matters too may affect his rate.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 68-2-S(b) provides that a public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for private gain.

w.Va. Code § 68-2-S(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 ... full-time staff attorney ... shall, during his or her public employment or for a period of one year after the termination of his or her ... 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:

...
(D) A rate-making proceeding....

(2) As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person

...
(5)[A] ... full-time staff attorney ... who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the one year prohibition against appearing in a representative capacity, when the person's education and experience is such that the prohibition would, for all practical purposes, deprive the person of the ability to earn a livelihood in this state outside of the governmental agency....

ADVISORY OPINION

First, since the Requester has identified his position as a Staff Attorney, the Commission need not analyze whether the provisions of W.Va. Code § 6B-2-5(g) apply to the facts presented. Similarly, it is undisputed that the matter in which the Requester seeks to participate is a rate-making proceeding and therefore subject to the Ethics Act's restrictions.

Next, the Ethics Commission must consider whether the Requesters proposed course of conduct meets the definition of "represent", for purposes of the prohibition

In Advisory Opinion 93-48, the Commission was asked whether a member of a County Board of Education may represent his own child in a Citizen's Appeal without violating the Ethics Act. The Commission correctly noted that W.Va. Code § 6B-2-5(g) prohibits certain public servants from appearing in a representative capacity before their governmental agencies.¹ The Commission further noted that the provision allows

¹ A separate provision of the Ethics Act, W. Va. Code § 68-2-5(k), Imposes specific limitations on licensing and rate-making proceedings. The Commission has examined this subsection and finds that it does not apply the facts presented. Specifically, there are no facts to suggest that the requester owns *or controls* over ten percent of the company which is seeking the proposed rate increase sought. Additionally, the Requested is interested as an individual property owner not as a representative of a business or corporation, and is therefore not subject to the Ethics Act's restrictions contained in W. Va. Code § 6S-2-5(k)

anyone who would be adversely affected by the prohibition to apply for an exemption when ii would effectively "deprive the person of the ability to earn a livelihood in this state outside of the governmental agency. This led the Commission to conclude that the term "representation" "refers to representation of a commercial nature...•

Similarly, here the Requester seeks to represent himself. No fee for service is involved. Appearing *pro se* does not constitute commercial representation.

Although the Commission is concerned about the appearance that the Requester would gain an unfair advantage in the proceeding by representing himself, nothing in the Ethics Act prohibits it. While the Commission *may* disagree with the Act's provisions that authorize the Requester to appear *pro se* before his employer agency, the Commission is limited to interpreting and applying the Ethics Act as written. Based upon the plain language of the Ethics Act, the Commission cannot state that the Legislature Intended to prohibit the Requester from appearing *pro se* before his employer agency. In the absence of such expressed intent, the Commission is reluctant to read into a statute a prohibition that does not appear to be what the Legislature intended. That would be overreaching. Instead, if the Legislature intended to prohibit the Requester from appearing *pro se* before his employer agency, then the Commission behaves that the best way to clarify this intent is through the legislative process.

The Commission notes that the Judicial Investigation Commission (JIC), in a ruling dated September 28, 2001, authorized a judge to appear as a private citizen to express his opposition to a proposed ordinance which would impair his private property interests. The JIC concluded, "Obviously, if any matters related to an ordinance were to end up in the circuit court you would have to recuse yourself from the matter: This Commission recognizes that the JIC's rulings, while helpful in interpreting the Ethics Act, are not binding, the Commission further notes that the position of judge is different from the Requester's position as a Staff Attorney. To that end, the Requester is encouraged to seek an opinion from the West Virginia State Bar's Office of Disciplinary Counsel regarding whether his personal participation in any proceeding before the employer agency complies with the Rules or Professional Conduct.

Thus, the Commission hereby finds that the Requester's representation of himself before his employer agency does not violate the Ethics Act. The Commission further cautions the Requester that he may not use any public resources (including his time on the clock, support staff, and anything else not otherwise available to the general public) during his participation in the case (or cases). Specifically, the Requester shall clock out before performing any personal work on the case (or cases), and must use vacation or other accrued time to attend any hearings on such cases. Further, the Requester must provide a copy of this Opinion to his supervisor and notify hereof his participation in any case in which he personally participates before his employer agency.

Finally, in his dealings with the employer *agency* on any case in which he personally participates, the Requester must not use his position, title or any influence associated therewith to further his cause. The Requester's interest in the final outcome of the case(s) clearly constitutes a conflict of interest

Therefore, other than his representation of himself, he may not participate in any other manner at any level of the proceedings. He should take care not to discuss the case(s) with agency staff, including the administrative law Judge, and agency board or commission members, outside of the proceedings where he appears formally in his *pro se* capacity. Specifically, when the Requester appears before his employer agency in his *pro se* capacity, he shall disclose on the record that he is appearing solely as a private citizen representing his own interests; he shall further state that he's not there as an attorney for the employer agency.

Notwithstanding the ruling herein, the employer agency is free to impose stricter standards, including an outright ban on the Requester's (or any staff attorney's) personal participation in any proceeding before the employer agency. The Commission encourages the employer agency to adopt an internal policy regarding the appearance of Staff Attorneys in a *pro se* representative capacity. As earlier noted, the Requester is one of at least 2,000 other customers who are affected by the company's proposed rate increase. Those customers have a right to petition to intervene in the agency's proceedings.

The Requester is one of many Staff Attorneys at a large agency. A request from an individual who is a small agency's sole Staff Attorney could conceivably result in a different outcome, although the Commission declines to make such a ruling herein. Whether Staff Attorneys may appear *pro se* before their employer agency must be decided on a case by case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent.

/s/ R. Kemp Morton, Chairman
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