

ADVISORY OPINION NO. 2006-08

**Issued On August 3, 2006 By The
WEST VIRGINIA ETHICS COMMISSION**

OPINION SOUGHT

The requester, a **Retired State Employee**, seeks a waiver from the prohibition against appearing before his former agency in a representative capacity for one year following his departure from public service.

FACTS RELIED UPON BY THE COMMISSION

The requester retired from employment with a State Agency at the end of 2005. During the last year of his employment he held the position of Utilities Analyst Manager, supervising four to five Utilities Analysts. The requester is a Certified Public Accountant. Although he reviewed the prepared testimony of subordinate Utilities Analysts who appeared as witnesses in contested cases, he did not personally participate in any meetings or hearings regarding contested matters.

He is seeking the waiver so that he may testify before an Administrative Law Judge, should that become necessary, regarding a natural gas utility which he is assisting in filing and processing a rate change request. He had no personal involvement with this particular utility at anytime during his previous State employment.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(g), limitation on practice before a board, agency, commission or department, provides, in pertinent part, as follows:

(1) 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.

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(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

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(5) An elected or appointed public official, full-time staff attorney or accountant who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the six months (*sic*) 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. The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption or reducing the time period, but shall decide each application on a case-by-case basis.

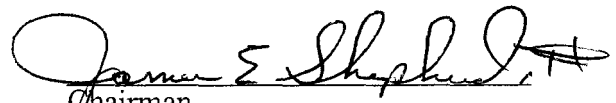
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Section 2-5(g) of the Ethics Act provides that a former public official, staff attorney or staff accountant may not appear in a representative capacity before his former agency in certain types of cases. This "revolving door" provision is intended to prohibit a public servant from exploiting the personal prestige he may have established as a former official in an agency. This type of rule is primarily focused on avoiding the appearance of impropriety as opposed to any actual conflict of interest. Public servants who hold these particular positions are allowed to return and appear before their former agency in a representative capacity after a specified "cooling off" period has elapsed. In the 2005 Special Legislative Session, the Legislature amended this provision, extending this "cooling off" period from six months to one year, effective July 1, 2005.

The Legislature authorized this Commission to waive the one year limitation on returning to a former agency to appear in a representative capacity in circumstances where the requester would, for all practical purposes, be deprived of the ability to earn a livelihood in West Virginia outside of his governmental agency. This statutory standard requires a requester to make a substantial showing of hardship on obtaining gainful employment.

The requester has explained that he is a licensed CPA and that he has been practicing to a limited extent since his retirement. There is no substantiation of a hardship to justify a waiver of the established prohibition. The requester will be free to appear before his former agency in a representative capacity on or after January 1, 2007, so long as he does not appear in regard to a particular matter in which he was personally and substantially involved while employed by that agency, unless the government agency, after consultation, consents to such representation. W. Va. Code § 6B-2-5(f).

Inasmuch as W. Va. Code § 6B-2-5(g) requires waivers to be decided on a case-by-case basis, this opinion is limited to the specific facts and circumstances presented herein and may not be relied upon as precedent.


Chairman