

ADVISORY OPINION NO. 97-02

Issued on February 6, 1997 by the

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

An attorney

OPINION SOUGHT

Is it a violation of the Ethics Act for a person to serve in a part-time or full-time State or Federal office while receiving commissions from a former private employer?

FACTS RELIED UPON BY THE COMMISSION

The attorney's client (hereafter "Company") provides investment advisory services to a wide array of businesses and individuals including, from time to time, units or agencies of state or local governments in West Virginia. The Company is considering hiring as an employee an individual who has previously served in part-time elected office in West Virginia.

Although the employee will not be a public servant in West Virginia while employed for the Company, it is possible that individual will again serve, at a subsequent time, in a part-time or full-time West Virginia state office or in a full-time federal office.

The Company's preferred compensation arrangement with the employee would allow him to receive commissions on the Company's sales to the clients he worked with for the Company, even if he left the Company to return to government service.

Under such an arrangement, the employee would receive commissions on the Company's continuing sales, if any, to his former clients for so long as he was in government service. Commissions would be paid pursuant to a fixed formula, but in amounts that may vary according to the amount of business those clients did with the Company.

The Company and the employee may also enter into an agreement whereby the employee is given a leave of absence to serve in State government with the understanding that he would return to the Company after public service. They are concerned to establish that this proposed compensation method will not violate the Ethics Act if the employee returns to public service.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(a) states that the provisions of this section apply to all elected and appointed public officials and public employees, whether full or part time, in state, county municipal governments and their respective boards, agencies, departments, and commissions and

in any other regional or local governmental agency, including county school boards.

West Virginia Code 6B-2-5(b)(1) states in pertinent part that...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.

West Virginia Code 6B-2-5(h) provides, in pertinent part:

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to sell or lease real or personal property to 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 to 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; "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment; and "subordinate" includes only those agency personnel over whom the public servant has supervisory responsibility.

...

(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.

...

West Virginia Code 6B-1-2(c) states in pertinent part that...the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

ADVISORY OPINION

Federal Office

The Ethics Act's code of conduct applies only to public servants affiliated with state, county or local governmental entities in West Virginia. See WV Code 6B-2-5(a). It does not apply to federal office holders. Therefore, the proposed compensation arrangement would not be affected by the Ethics Act if the employee takes a position with the federal government. The requester may wish to consult with the appropriate federal agency charged with administering any ethics rules for federal public servants.

State Office

West Virginia Code 6B-2-5(h)

The Commission finds that a public servant who, while in government service, receives commissions, or other forms of compensation or benefits, from a former employer is not "employed" by the former employer as that term is used in WV Code 6B-2-5(h)(1) if the commissions, compensation or benefits were earned prior to entering public service. This ruling does not cover commissions, compensation or benefits based on subsequent sales or other actions taken by the employer or the clients after the public servant entered government service.

Therefore, it would not be a violation of 6B-2-5(h)(1) for the employee to accept such earned commissions, compensation or benefits while serving full-time in a public position which gave him or his subordinates regulatory authority over his former employer or clients. There would, however, be limitations on his official actions in regard to them as is discussed below.

WV Code 6B-2-5(h)(4)


WV Code 6B-2-5(h)(4) prohibits full-time public servants from taking official action in regard to any person with whom they have an agreement concerning future employment. If the employee's employment contract provides that he will return to the Company upon completion of his public service, he would not be permitted to take any official action in regard to that Company while in full-time government service. This provision would also prohibit him from taking any official action regarding Company clients he served if he expects to resume serving those clients upon his return to the Company.

WV Code 6B-1-2(c) and 6B-2-1(b)

If the employee became a full-time public servant after leaving the Company, he should not take any official action in regard to any former client from whose business he continues to receive

commissions, compensation or benefits under an employment agreement such as the one discussed above. Nor should he take any official action in regard to the Company, if he is receiving such payments. This prohibition only applies to action specifically involving the Company or those clients and would not prevent him from taking official action which affects them only as members of a larger class of similarly affected individuals or entities.

If the employee and employer contemplate entering into a relationship which may allow for the subsequent payment of commissions, compensation or benefits in amounts which would be subject to change based subsequent acts by the clients or the employer, then they should submit another advisory opinion request with more detailed facts.


Chairman