

ADVISORY OPINION NO. 95-31

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 6, 1995 (August 3, 1995)

PUBLIC SERVANT SEEKING OPINION

A State Employee

OPINION SOUGHT

Is it a violation of the Ethics Act for a state employee to seek employment with a corporation that has, as a member, a firm which has a regulatory action pending before his agency?

FACTS RELIED UPON BY THE COMMISSION

A state employee is responsible for civil enforcement of certain rules promulgated by his employing State Agency. All residents and businesses in the State are potentially regulated by these rules and the statutes authorizing them.

Recently, nine entities subject to these rules formed a Cooperative in the legal form of a non-profit corporation. The purpose of the Cooperative is to collect, process and market recyclable materials. It will allow the separate entities to pool their resources and volume of solid waste so that they can get the best price for recycled materials while minimizing their need for capital expenditures on equipment. The Cooperative members will each be responsible for transporting their solid waste recyclable materials to a common facility for processing, development, and eventual marketing of the recycled material.

In order to maintain its non-profit status, any surplus funds after expenses and salaries associated with operating the processing facility will be put toward a public education program on recycling, composting, and waste reduction. The financial gain to the individual members of the Cooperative will be realized in a saving of the fees they would have paid to dump these recyclable materials in a landfill if they were not delivered to a processing facility.

The Cooperative, through its temporary acting Director, has asked the requester to apply for the full time position of manager for its proposed facility.

One of the members of the Cooperative is involved in a regulatory matter which was handled personally by the requester. The matter could not be resolved and was referred to the Attorney General's Office approximately one year ago. A hearing on the matter is scheduled for the fall. If the requester remains at the Agency he would testify on procedural matters, such as how proposed fines are calculated, but he would not testify as to the facts of the specific alleged violations in this case. If the requester leaves the Agency prior to the hearing, his supervisor

would testify as to the procedural issues.

The member of the Cooperative who is involved in the regulatory action before the requester's governmental agency is not an officer in the Cooperative. To the best of the requester's knowledge, this member is unaware that the Cooperative has made the offer of employment.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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

(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.

ADVISORY OPINION

West Virginia Code §6B-2-5(h) prohibits a full time public servant from seeking employment with or being employed by any "person" who has a matter currently before that public servant, or his subordinate, or by any "person" who had a matter on which that public servant or a subordinate took official action in the preceding twelve months.

Nine entities which are subject to the regulatory control of the requester's governmental agency have formed a non-profit corporation Cooperative. The Cooperative, through its temporary acting Director, has asked the requester to apply for the full time position of manager for its proposed facility. One of the members of the Cooperative is involved in a regulatory matter which was handled personally by this public employee.

However, in this instance the incorporated Cooperative is the "person" offering employment to the requester. This non-profit corporation is a separate legal entity. The requester represents that neither he nor one of his subordinates has taken regulatory action with regard to the Cooperative in the past twelve months and that the Cooperative does not have a matter currently pending before this governmental agency.

Therefore, it would not be a violation of WV Code §6B-2-5(h) for the requester to discuss, and eventually accept, employment with the Cooperative.

This determination is based upon the understandings that the Cooperative member who has a matter currently pending before the requester's agency did not play a controlling role in the Cooperative's decision to offer the position to the requester; that there is no quid pro quo relating to any regulatory action by the requester's State agency and the employment offer; and that the Cooperative is a truly distinctive separate legal entity and not an alter ego of any single member.

The Commission notes that West Virginia Code 6B-2-5(g) provides in part that no public official shall, during his public service or for a period of six months after the termination of his public service with a governmental entity authorized to hear contested cases or promulgate regulations appear, in a representative capacity before that governmental entity regarding certain matters. This opinion should not be interpreted by the requester as a determination that he falls within the purview of this provision or as advance approval of his ability to appear before his current agency in a representative capacity on behalf of the Cooperative or any individual member of that Cooperative.

Further, the requester should be mindful of WV Code §6B-2-5(e) which prohibits a public servant from using or disclosing confidential information acquired in the course of performing his official duties to further his own interests, the interests of the Cooperative or the interests of the individual members of the Cooperative.

Finally, the Commission notes that this opinion is limited to the precise facts as they are presented in this opinion.


Chairman