

ADVISORY OPINION NO. 95-48

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 7, 1995

PUBLIC SERVANT SEEKING OPINION

A State Official

OPINION SOUGHT

Is it a violation of the Ethics Act for a State Official to invest in a private business enterprise in this State?

FACTS RELIED UPON BY THE COMMISSION

A State Official has been asked by a friend he has known since college to invest in a business venture. The requester first learned of this venture in 1993 when his friend sought information on any governmental requirements to establish the business.

The friend invited the requester to accompany him on a trip to Canada to examine a similar operation. The requester discussed this matter with his supervisor and, since the project appeared to have potential for economic development in West Virginia, he was authorized to accompany his friend on the trip to determine what, if any, state involvement in the project may be appropriate.

After the trip, the determination was made that this was a promising economic development project and the State should assist as it could.

The only other actions taken by the requester relating to the venture were to put the company in contact with the appropriate agency person with regulatory authority over the venture and to refer the company to the Jobs Investment Trust for possible financing assistance.

The company's first operation has been running for some time and a new facility is planned. The requester's friend has asked him if he would like to invest in the next facility being planned. The requester has had no involvement in the proposed new venture.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals

or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

West Virginia Code 6B-2-5(e) states that 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.

West Virginia Code 6B-2-5(g)(1) provides in pertinent part that... 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 six months after the termination of his or her public service or public employment with a governmental entity authorized to hear contested cases or promulgate regulations, 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 regulation;
- (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.

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

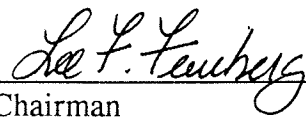
West Virginia Code 6B-2-5(b)(1) prohibits public servants from using their positions for their own private gain or the private gain of another. In an earlier advisory opinion, A.O. No. 91-74, the Ethics Commission held that use of information acquired through one's public position for personal benefit fell within the purview of this provision of the Ethics Act.

In A.O. No. 91-74 a public servant wanted to invest in a company that sought financing assistance from the State. In the course of his public employment as an analyzer of financial statements and business plans of fledgling companies, the requester had access to information regarding a particular company that interested him for purposes of personal investment. The information he had access to was technically available to the public as well.

West Virginia Code 6B-2-5(e) prohibits public servants from using confidential information acquired in the course of performing their official duties to further private interests. In A.O. 91-74, the Ethics commission ruled that it would be a violation of the Ethics Act's prohibition against use of confidential information for the person to invest in the company since the requester was relying, at least in part, upon information that he obtained as a direct result of his public employment which was not simultaneously available to the general public.

The same or similar facts exist in this case. Here, the requester is basing his decision to personally invest in the project, at least in part, upon information regarding the industry which he acquired during a trip he took, at state expense, to learn more about the viability of such a business venture. Therefore, it would be a violation of WV Code 6B-2-5(e) for the requester to invest in the business venture.

The Commission commends the requester for his sensitivity to the ethical issues arising from this situation and his prompt action in seeking this advisory opinion prior to taking any action.


Chairman