

ADVISORY OPINION NO. 92-02

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 5, 1992

GOVERNMENTAL BODY SEEKING OPINION

Legal Counsel for a State Division's Employees

OPINION SOUGHT

Is it a violation of the Ethics Act for employees of a State Division to belong to a Mine Rescue Association as either team members/trainees or as trainers of the team members?

FACTS RELIED UPON BY THE COMMISSION

State law requires that all coal companies develop and maintain a mine rescue team. Smaller companies have combined their resources to form single rescue teams referred to as the Mine Rescue Association. The Association is sponsored and totally funded by the participating coal companies. This was done in response to a decision by the State to withdraw its financial and technical support to what were formerly State sponsored mine rescue teams. There are now several mine rescue associations in various regions of the State.

Each rescue Association meets for training on weekends and after work hours in order to comply with State certification standards. State employees would be paid by the Association to either provide the training or to participate as team members. Payment for attendance and participation in the training course is made to the team members and trainers by the Association from dues collected from participating coal companies.

A newly formed State Division employs mine inspectors and trainers whose primary function is to conduct inspections of coal mines located throughout the State. Several of these State mine inspectors and trainers would like to participate as trainers and/or rescue team members of the Mine Rescue Associations. As such, they would receive approximately \$150 from the Association for each session.

Currently there are two individuals who are certified as trainers and approximately seven other individuals who are rescue team members. In order to participate on a rescue team and meet State certification requirements, each individual must attend the monthly training sessions.

When a mine emergency occurs, the State inspectors and trainers who respond to the crisis as members of a rescue team are paid by the State and not the Association or the coal companies.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(h)(1) states in pertinent part that...no full-time public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself or herself to be employed by any person who is or may be regulated by the governmental body which he or she serves while he or she is employed or serves in the governmental agency. The term "employment" within the meaning of this section includes professional services and other services rendered by the public employee whether rendered as an employee or as an independent contractor.

West Virginia Code §6B-2-5(h)(3) states that a full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition against seeking employment with a person who is or may be regulated...The Ethics Commission shall...decide upon each application on a case-by-case basis.

ADVISORY OPINION

Employees of a State Division would like to be trainers for local mine rescue associations. These Associations meet for training on weekends and after work hours. Members and trainers are paid to attend each four hour session. The Commission considers this a form of secondary employment since attendance and participation in the mine rescue sessions is not considered part of the official job responsibilities for the Division employees.

WV Code §6B-2-5(h)(1) prohibits a full-time public employee with policy-making, nonministerial or regulatory authority from being employed by any person who is or may be regulated by the governmental agency with which he or she is employed. "Person" is broadly defined in the Ethics Act to include associations.

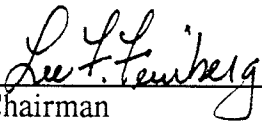
Although the term "regulate" is not defined within the Ethics Act, the common definition given is "to control or direct according to a rule", or "to adjust in conformity to a specification or requirement".

The employees referred to in this request exercise some regulatory or nonministerial authority since their primary function is to conduct inspections of coal mines located throughout the State. Therefore, the employees in question would fall within the category prohibited from seeking employment with or being employed by regulated persons.

The State Division which employs these State workers regulates the activities of the mine rescue associations since the Division is responsible for promulgating rules and regulations establishing the standards for all mine safety programs that must be used by the coal operators and Associations. The Division is also responsible for evaluating and approving the mine safety program utilized by all coal operators and the Associations. These responsibilities, by necessity, require the State Division to "regulate" the operators of the Association.

Therefore, it would be a violation of WV Code §6B-2-5(h)(1) for the employees of a State Division to be employed by Mine Rescue Associations as trainers or rescue team members since the Associations are regulated by the State Division.

Pursuant to WV Code §6B-2-5(h)(3), individual public employees, on a case by case basis, may apply to the Ethics Commission for an exemption from the prohibition against seeking employment with a person who is or may be regulated by his governmental agency. However, the requestors should consult the laws and regulations applicable to their own public employment before making such a request.


Chairman