

ADVISORY OPINION NO. 92-23

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 2, 1992

GOVERNMENTAL BODY SEEKING OPINION

Executive Secretary of a State Board

OPINION SOUGHT

- a. Is it a violation of the Ethics Act for a part-time Executive Secretary of a State Board who does not exercise policymaking, regulatory or nonministerial authority to seek secondary employment with persons who are regulated by the State Board?
- b. Is it a violation of the Ethics Act for a full-time Executive Secretary of a State Board who exercises policymaking, regulatory or nonministerial authority to seek secondary employment with persons who are regulated by the State Board?
- c. Who may inspect the facilities of Board Members to insure compliance with guidelines and regulations that are enforced by the Board?

FACTS RELIED UPON BY THE COMMISSION

The requestor is the Executive Secretary of a State Board which is currently a part-time position. As the Executive Secretary the requestor serves at the will and pleasure of the Board members and does not exercise policy-making, regulatory or nonministerial authority. The requestor is also a professional bookkeeper and is currently employed in that capacity by three individuals who are also regulated by the State Board.

Under new rules and regulations, the Board will inspect the facilities of individuals who are regulated by the State Board. The Board is considering directing the requestor to conduct these inspections and at this point the position of Executive Secretary would develop into a full-time employment position with regulatory and nonministerial authority. These inspections would entail the verification of compliance with the guidelines and criteria established by the State Board.

The requestor states that several members of the State Board are actively practicing their profession and would also be inspected to insure compliance with the rules and regulations of the State Board.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a 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)(1) states that no full-time...public employee who exercises policymaking, nonministerial or regulatory authority may seek employment with, or allow himself...to be employed by any person who is or may be regulated by the governmental body which he...serves while he...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 official or 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 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, 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, but shall decide upon each application on a case-by-case basis.

ADVISORY OPINION

a. Pursuant to WV Code §6B-2-5(h)(1) full-time public employees with policymaking, regulatory or nonministerial authority may not seek employment with any person who is or maybe regulated by his or her governmental agency. Clearly this subsection specifically prohibits only **full-time** public employees from seeking employment with regulated persons. Currently, the position of Executive Secretary for the State Board is considered part-time.

Further, WV Code §6B-2-5(h)(1) applies only to public employees who exercise policymaking, nonministerial or regulatory authority as part of their official public employment responsibilities. The requestor has stated that the position of Executive Secretary neither encompasses such responsibilities nor affords such authority. The Commission therefore finds that the requestor does not have the requisite authority contemplated by this subsection of the Ethics Act.

Thus, it would not be a violation of WV Code §6B-2-5(h)(1) for the Executive Secretary of a State Board to seek secondary employment with or be employed by persons who are regulated by the State Board since she is a part-time employee and does not exercise policymaking, regulatory or nonministerial authority.

The Commission reminds the requestor that pursuant to WV Code §6B-2-5(b)(1), a public employee may not use her office or the resulting prestige for her own private gain. Simply, she may not use her public employment position with the State Board to solicit employment with regulated individuals or use her influence to obtain, increase or promote business for her private bookkeeping service. Also, the requestor should consult the Commission's legislative rules on private gain, sections 158-6-5 and 158-6-8, which prohibit more than a de minimis use of public time, equipment and resources for private activities.

b. In conjunction with new rules and regulations, the Board will inspect the facilities of individuals who are regulated by the State Board. These inspections would entail the verification of compliance with the guidelines and criteria established by the State Board. The Board is considering directing the requestor to conduct these inspections. At this point the position of Executive Secretary would develop into a full-time employment position with regulatory and nonministerial authority.

As noted above, 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. Provided the State Board directs the Executive Secretary to perform the required inspections, the requestor would become a full-time employee with regulatory or nonministerial authority since one of her primary responsibilities would be to conduct inspections of regulated individuals to verify compliance with the guidelines and criteria established by the State Board. Consequently, the requestor would fall within the category prohibited from seeking employment with or being employed by regulated persons.

Therefore, it would be a violation of WV Code §6B-2-5(h)(1) for the full-time Executive Secretary of a State Board who exercises policymaking, regulatory or nonministerial authority to seek or hold secondary employment with persons who are regulated by the State Board.

However, 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 regulated by her governmental agency.

c. The criteria for the members of the State Board as well as the power and authority of the Board is established by statute. It is not within the scope of the Commission's authority to dictate the appropriate policies or actions of the Board.

However, the Commission reminds all Board members facing such situations that WV Code §6B-2-5(b)(1) prohibits public officials from using their public office for their own private gain. Simply, a Board member may not use his or her public position to influence or alter the results of inspections, audits or other such examinations.


Chairman