

**ADVISORY OPINION NO. 91-14**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON MARCH 7, 1991**

**GOVERNMENTAL BODY SEEKING OPINION**

A Former Public Official

**OPINION SOUGHT**

- a. Whether the phrase "other specific matter" as used in subsection 6B-2-5(f) means only specific administrative decisions or rulings on matters where administrative or evidentiary records are required by statute (i.e. an environmental permit) and therefore, does not include general agency policymaking for which an evidentiary record is not created?
- b. Whether the prohibition contained in subsection 6B-2-5(f) of the Ethics Act applies only to a former public official acting in a representative capacity before that official's former agency?
- c. Whether the prohibition contained in subsection 6B-2-5(f) relating to the filing of a "regulation" permits a former public official to act in a representative capacity to advocate the modification of the same regulation after final approval by the Legislature?
- d. Whether the prohibition contained in subsection 6B-2-5(f) of the Ethics Act permits a former public official to act in a representative capacity to advocate the modification of a regulation after it is promulgated by the agency but before it receives final approval by the Legislature?
- e. Whether the provisions of subsection 6B-2-5(g)(3) of the Ethics Act supersede the provisions of subsection 6B-2-5(f) and 6B-2-5(g)(1) and thereby permit a former public official to appear in a representative capacity before the Legislature, and other specified governmental agencies, relating to a "statute, budget, ordinance, rule, resolution or enactment" in which he personally participated on behalf of his former agency?
- f. What is the nature of activities contemplated by the term "representative capacity" as used in subsection 6B-2-5(f) of the Ethics Act?

### FACTS RELIED UPON BY THE COMMISSION

The requestor was appointed as the Deputy Director of State Division in 1989 and served in that position until his appointment in June 1990 as the Commissioner of a State Division. On November 7, 1990 the requestor was transferred to the Office of the Secretary of a State Department as the Deputy Secretary. This State Department is comprised of several agencies and Divisions. On November 14, 1991 the requestor submitted his resignation from that position.

The purpose of his request is to assure that his short service as the Deputy Secretary does not prohibit the requestor from acting in a representative capacity before other agencies within the State Department for which he served as the Deputy Secretary.

The requestor has been asked to act in both a legal and technical consulting capacity concerning the selection of a route for a proposed interstate highway. Such highway construction requires a Section 404 permit from the U.S. Army Corps of Engineers to fill wetlands. Pursuant to Section 401 of the Federal Clean Water Act, the State Department may approve, deny or waive state certification of this federal permit. The requestor did not have any personal involvement in such certification decisions for the proposed interstate highway. However, he did participate in the reviewing of Department policy for the selection of the interstate highway route.

Second, the requestor has been asked to act in both a legal and technical consulting capacity concerning land use planning issues affecting a County and, more specifically, the establishment of a Wildlife Refuge. In his position as Deputy Director of a State Division, the requestor advised the Director concerning general agency policy for a moratorium and/or special conditions for state water pollution control permits in the area now being considered for the Wildlife Refuge. However, the requestor did not personally participate in specific permit decisions.

Further, the requestor also advised the Division Director and represented the agency publicly concerning the establishment of a Wildlife Refuge. Establishment of the Wildlife Refuge requires Congressional approval and the State Division acts only in an advisory capacity to Congress and other Federal agencies.

Finally, the requestor has been asked to act in a representative capacity before the Legislature and Congress concerning a wide range of State and Federal Legislation and appropriations in which he advised the Sate Division Director or personally participated as the State Division Commissioner.

### PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code section 6B-2-5(f) states in pertinent part that...no former appointed public official...shall during or after his...public service...act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other specific matter which arose during his...period of public service...in which he... personally participated in a decision-making, advisory or staff support capacity.

West Virginia Code section 6B-2-5(g) states in pertinent part that...No appointed public official...shall, during his... public service or public employment 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 the governmental entity in which he...serves or served...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 section 6B-2-5(g)(3) states in pertinent part that...a present or former public official...may appear at anytime in a representative capacity before the Legislature...in relation to the consideration of a statute, budget, ordinance, rule resolution or enactment.

### ADVISORY OPINION

a. Pursuant to subsection 6B-2-5(f) of the Ethics Act a former public official may not act in a representative capacity on any specific matter which arose during his period of public service and in which he personally participated in a decision-making, advisory or staff support capacity. The "specific matters" would not be limited to those occasions where evidentiary or administrative records were made but would also include general agency policymaking.

b. Subsection 6B-2-5(f) of the Ethics Act prohibits a former public official from appearing in a representative capacity on any specific matter which arose during his period of public service and in which he personally participated. This prohibition is not limited to appearing in a representative capacity before his former agency.

This section would prohibit representation on a specific matter in any forum which the public official personally participated in during his public service.

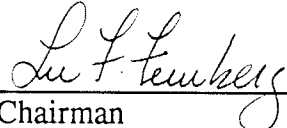
c. Pursuant to subsection 6B-2-5(f) of the Ethics Act a former public official may not act in a representative capacity on any specific matter which arose during his period of public service and in which he personally participated in a decision-making, advisory or staff support capacity. The former public official may **not** act in a representative capacity to advocate the modification of a regulation on which he personally participated in any of the three ways described above.

Therefore, it would be a violation of subsection 6B-2-5(f) of the Ethics Act for the requestor to act in a legal consulting capacity concerning land use planning issues since, in his position as Deputy Director of a State Division, the requestor acted in an advisory or staff support capacity to the Director concerning the general agency policy of a specific matter.

d. Pursuant to subsection 6B-2-5(g)(3) of the Ethics Act, a former public official **may** appear at any time in a representative capacity before the Legislature in relation to the consideration of a statute, budget, ordinance, rule resolution or enactment.

e. Subsection 6B-2-5(g)(3) of the Ethics Act provides that a former public official **may** appear in a representative capacity before the Legislature, a County Commission, City or Town Council or a County School Board in relation to the consideration of a statute, budget, ordinance, rule, resolution or enactment. Therefore, it is the Commission's opinion that a former public official could appear at anytime before the Legislature in a representative capacity in a specific matter in which he personally participated during his public service.

f. The term "representative capacity" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. Certainly, the most logical example would be acting as an attorney for a client.

  
Chairman