

ADVISORY OPINION NO. 89-23

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 2, 1989

GOVERNMENTAL BODY SEEKING OPINION

State Employee

Opinion Sought

1. "Who am I prohibited from seeking employment with, and when am I prohibited from seeking it?"
2. "Who is precluded from offering me employment, and during what time period are they precluded from approaching me regarding employment?"

Other Facts Relied Upon By The Commission

The state employee states that he does not in his present position exercise "policy making, non-ministerial or regulatory authority" over "any person who is or may be regulated" by the governmental body, according to West Virginia Code 6B-2-5(h)(1). The Commission disagrees with the state employee's position on this issue.

Statutory Provisions Relied Upon by the Commission

West Virginia Code Section 6B-1-3(e) states that "ministerial functions" means actions or functions performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, such individual's own judgment as to the propriety of the action being taken.

West Virginia Code Section 6B-2-5(h)(1) states no full-time public official or full-time public employee who exercises policy making, non-ministerial 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 official or public employee whether rendered as an employee or as an independent contractor.

governmental agency during the period of time the public official or employee works or serves in such agency.

West Virginia Case Section 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, 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.

West Virginia Code Section 6B-2-5-(f) states that no present or former elected or appointed public official or public employee shall during or after his or her public employment or service represent a client or act in a representative capacity either 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 or her period of public service or employment and in which he or she personally participated in a decision-making, advisory or staff support capacity.

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The public employee states in his request that he does not exercise "policy making, non-ministerial or regulatory authority" in his current position.

However, a review of his job description indicates otherwise. In part it states that "he is responsible for overseeing the implementation of policy making decisions with strong emphasis on the legal perspective of these operations. Will be involved in legal research, as it relates to the formulation of policy . . .:"

A memo submitted requesting the state employee's position states that this individual will be responsible "for exploring potential reservoirs of funding within the perimeter of a vast federal program. This individual will also be responsible for the development and implementation of policy in the procuring of said funds and their use within the legal framework of state and federal law."

It is evident that the employee does not fit within the definition of 6B-1-3(e) and is in fact a policy making, non-ministerial employee.

Therefore, the provision set out in (h)(1) is applicable, in that the employee may not seek employment with any person who is or may be regulated by his employer as long as the employee is employed there.

Secondly, no person regulated by his employer may offer employment to the employee during the time he is employed there.

The employee may apply to the Commission for exemption from these prohibitions if he can show that his education and experience is such that he would be deprived of the ability to earn a livelihood in this state outside of the governmental agency.

As described in subsection 5(f), the employee may not during or after his employment act in a representative capacity 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 employment and in which he personally participated in a decision-making, advisory or staff support capacity.



CHAIRMAN