

**ADVISORY OPINION NO. 96-06**

**ISSUED BY THE**

**WEST VIRGINIA ETHICS COMMISSION**

**ON MARCH 7, 1996**

**PUBLIC SERVANT SEEKING OPINION**

Personnel Director for a Board of Education

**OPINION SOUGHT**

Is it a violation of the Ethics Act for a public servant to solicit business from school personnel?

**FACTS RELIED UPON BY THE COMMISSION**

The requester is presently employed as the Director of Personnel for a County School System. In this position the requester is responsible for recruitment of professional staff. He also interviews all professional applicants and determines whether they meet the qualifications for a specific position. He then creates and provides the files on eligible applicants to the ultimate decision makers along with his recommendation. He has sole authority to make decisions on the hiring of substitute teachers. He also processes all layoffs of professional staff. His job provides him access to the personnel files of all staff within his county and he can determine from those files whether an individual has a tax deferred annuity.

The requester has been offered a part-time position with an insurance company. In this position his responsibilities will consist of marketing "403-B" products (i.e., tax deferred annuities) to assist in retirement plans. The requester has stated that he will not use the resources of his public office to generate leads or perform his private tasks. He will operate from a lead list furnished by the company and work only during his off duty hours.

Representatives of the private insurance company will give product presentations to teachers at meetings held in various locations around the state. Those teachers indicating an interest in learning more about the product will complete a card containing their name, address and phone number. The company will then use these cards to create a "lead list" for the requester. He will contact these individuals personally in order to provide additional information and solicit sales. The company estimates that approximately 80% of the persons contained on the "lead list" will be teachers, but only about 10% of those individuals will work in the requester's county of employment.

**PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code 6B-2-5(b)(1) provides 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...

West Virginia Code 6B-2-5(e) provides in pertinent part that...No present or former public official or public 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 interest of another person.

West Virginia Code 6B-2-5(m) provides that: Except as provided in this section, a person who is a public official or public employee may not solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control. A person who is a public official or public employee may solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise and control when:

- (A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or
- (B) The solicitation is limited to the posting of a notice in a communal work area; or
- (C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling, or
- (D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative.

**ADVISORY OPINION**

**Private Gain**

Pursuant to WV Code 6B-2-5(b)(1) a public servant may not use his public office or the resulting prestige for his own private gain or for the private gain of another. Consequently, the requester may not use his status or influence as the Director of Personnel for the County school system to market retirement plans or to increase, obtain or promote the interests of his private employer.

Further, the Commission's legislative rules on private gain expressly prohibit the use of public time, equipment, materials and resources for private activities. (See 158 CSR 6-5.2 and 6-8) Clearly, the office space, phones, stationary and other items provided to the public servant for use in the performance of his official, public responsibilities may not be used to subsidize a private effort, i.e. marketing retirement plans for a private insurance company.

### **Confidential Information**

West Virginia Code 6B-2-5(e) prohibits public servants from disclosing or using confidential information to further personal interests. Therefore, the requester may not use information obtained in the course of his public position to obtain clients for himself or the private company which employs him on a part-time basis. The requester must be extremely mindful of this provision since his official job responsibilities provide him access to the personnel files of all staff located within his county.

### **Solicitation of Business**

Pursuant to WV Code 6B-2-5(m), a public official or public employee may not solicit private business from a subordinate whom he or she has the authority to direct, supervise or control. The requester's public employment responsibilities include the recruitment of all professional staff, interviewing applicants, certifying applicant qualifications, creating files on eligible applicants and providing such information to the ultimate decision makers, and making hiring recommendations to the decision makers. He also has sole authority to make decisions on the hiring of substitutes and processes all layoffs of professional staff.

In light of the requester's public job responsibilities, the easy access to the personnel files of all staff and the close working relationship required to be established with board professionals within his county, the Personnel Director for a Board of Education would be prohibited from soliciting business from all such school personnel. This prohibition would apply only to those individuals who are employed within his County School System. Nothing in the Ethics Act would prohibit the requester from soliciting business from any individual outside his area of employment.

The Commission notes that WV Code 6B-2-5(m) does contain several exceptions from the prohibition against soliciting business from subordinates including: a general solicitation directed to the public at large through the distribution of printed media, merely posting a notice in a communal work area, or solicitations made at the location of a private business to which the subordinate has come on his own initiative.

However, the specific circumstances of this proposed solicitation do not fall within any of the exemption categories. First, the teachers are presented with a general solicitation by the company at a meeting specifically geared toward teachers. This is not a solicitation directed at the "public at large". Further, although the teachers requested that they be provided with additional information, they had no reason to expect that their Personnel Director would be the company representative who contacts them for a face-to-face solicitation.

For the reasons listed above and based on the specific facts of this opinion, the Commission determines that the requester may be employed by the insurance company and sell tax deferred annuities; however, he may not solicit individuals employed in his County school system or prospective employees.

The requester is also cautioned that he may not approach other school personnel directors from other county school systems to seek leads for sales of tax deferred annuities.

  
Chairman