ADVISORY OPINION NO. 2012-09

Issued On March 1, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Employee** who plans on retiring from state government asks what limitations in the Ethics Act apply to him if he takes a job in the private sector.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State employee. While he has significant decision-making authority, he is not the head of an agency, his position is not created by code and he does not take an oath of office.

In his current position, he has oversight responsibilities relating to construction projects in the public school system. In general, his State agency does not contract with construction, architectural or engineering firms for projects in the county school system; however, he and his staff have oversight responsibilities relating to businesses which contract with the county school system.

In regard to his involvement with contracts at the State level, his agency has an agreement with an estimating firm. For this contract, his agency issued the request for quotations (RFQ). He states that his agency handled the RFQ process, including defining the scope of work, to ensure continuity for all project reviews and cost estimates for local projects. His agency has a task order type agreement with this company, but it is the counties which directly contract with and pay the firm for services rendered to the county.

The Requester and his staff frequently interact with the counties. As it relates to this job duty he states "My involvement is wide ranging and can vary from answering simple questions regarding [agency] policy to assisting my staff members with county contract administration when complicated decisions arise. While I act in an advisory capacity with regards to design and construction contracting, it is the [county agencies] that have the ultimate decision-making authority regarding design and construction contract awards and administration."

Upon retirement, the State employee anticipates working for a private architectural firm or construction management firm that contracts with county agencies. Through his position, he may have contact with his former agency. He is also considering employment with the estimating firm. If he works for the firm, his focus would be upon educational planning and school project development which would require him to serve as the liaison to the counties, his former agency, or both.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads in relevant part:

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

W. Va. Code § 6B-2-5(g) reads in relevant part:

> Except as otherwise provided in section three, four or five, article two, chapter eight-a of this code: (1) No elected or appointed public official ... shall, during his or her public service ... with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity in which he or she serves ... in the following matters:
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> (A) A contested case involving an administrative sanction, action or refusal to act;
> (B) To support or oppose a proposed rule;
> (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.

(e) *Confidential information.* -- No present or former public official or 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 interests of another person.

(f) *Prohibited representation.* -- 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 with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public service or employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation. A staff attorney, accountant or other professional employee who has represented a government agency in a particular matter shall not thereafter represent another client in the same or substantially related matter in which that client's interests are materially adverse to the interests of the government agency,

without the consent of the government agency: *Provided,* That this prohibition on representation shall not apply when the client was not directly involved in the particular matter in which the professional employee represented the government agency, but was involved only as a member of a class. The provisions of this subsection shall not apply to legislators who were in office and legislative staff who were employed at the time it originally became effective on the first day of July, one thousand nine hundred eighty-nine, and those who have since become legislators or legislative staff and those who shall serve hereafter as legislators or legislative staff.

§ 68-3-2 reads, in relevant part:

> (e) The following public officers or employees may not, during or up to one year after the termination of their public employment or service, be allowed to register as lobbyists:
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> (4) Will and pleasure professional employees of the Executive Department [commonly referred to as the Board of Public Works] under the direct supervision of the Executive Department officer and who regularly and substantially participates in a decision-making or advisory capacity regarding agency or department policy.
>
> (7) Heads of any state departments or agencies.

W.Va. C.S.R. § 158-11-3.6 reads in relevant part:

> Once a full-time public official or employee has... terminated his or her employment, then there is no waiting period for seeking employment.

ADVISORY OPINION

No provision in the Ethics Act specifically prohibits public officials from working for a particular business after they leave government service. Several opinions of the Commission indicate that there may be limits in regard to being employed in positions funded by grant monies that public servants, through their prior public positions, helped secure. *See* A.O.s. 96-43 and 2001-32. A public servant who has sought to secure a grant should first check with the Ethics Commission before seeking employment funded by the grant. Additionally, public servants who want to begin their job search while they are still employed by their government agency may need an employment exemption before communicating with potential private sector employers. W.Va. C.S.R. § 158-11-1 *et. seq.*

While the Ethics Act does not expressly prohibit public employees or officials from working for a particular private business upon their departure from government, limitations may apply. A general overview of the limitations which apply follows:

First, the Requester may **not** disclose or use confidential information. W.Va. Code§ 6B-2-5(e).

Second, the Requester may, either on his own behalf or on the behalf of his private employer, communicate with his former agency on general matters. The revolving door restrictions in W.Va. Code§ 6B-2-5(g) do not apply to him as he **not** a public official, i.e. one whose position is created by code or who takes an oath of office. *See* A.O. 2010-22. As such, he does not have to wait one (1) before appearing back before his agency.[1]

Third, if the Requester plans on serving as the liaison for his private employer on a contract over which he had oversight responsibility through his public position, then he should seek further guidance from the Ethics Commission. While he is not subject to the limitations in "g", he is subject to the limitations in W.Va. Code § 6B-2-5(f) which prohibits public servants from representing parties in matters in which they were substantially involved. While the Commission has previously ruled that this limitation does not ban all involvement with public contracts which may have been discussed or let during the public servant's employment or service; still, limitations may apply. *See* A.O. 2002-08 (revised). For example, if the Requester's employer wants him to serve as the point of contact with his former public employer on a "change order" or request to modify a contract which was let by his former public employer, then the limitations in this section may be triggered. To further analyze the application of this code provision, the Ethics Commission would need specific facts, including an example of the Requester's anticipated participation therein.

Fourth, while it does not appear that the Requester plans on lobbying, there is no restriction in the Ethics Act which prohibits him from registering as a lobbyist as he is not an agency head nor does he hold any of the other positions in government to which this prohibition applies. W.Va. Code§ 6B-3-4.

In closing, the Commission has provided a general overview of the rules which govern the Requester's post-public service employment. If the Requester has a question about the application of the Ethics Act in regard to a particular job responsibility he may have in the private sector, then he should contact the Commission for further advice.

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[1] If he were subject to these limitations, he could not appear or communicate with his agency for a one (1) year period on the following matters: (A) A contested case involving an administrative sanction, action or refusal to act; (B) To support or oppose a proposed rule; (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.

This advisory opinion is based upon the facts presented. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this advice invalid.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code § 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman