ADVISORY OPINION NO. 2012-25

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Employee** contemplating retirement asks whether he must wait one year before: (1) Appearing back before his former agency; or, (2) Registering as a lobbyist.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by an agency which, among its other duties, regulates water and waste management. His job title is Chief Inspector. His job position is not created by statute nor does he take an oath of office. He is not an accountant or an attorney.

He is contemplating retiring from his State position and taking a position in the private sector or operating a private business, or both. He seeks guidance on the post government service limitations in the Ethics Act in regard to their impact, if any, on his future plans.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-1-3 reads in relevant part:

> (k) "Public official" means any person who is elected or appointed to any state, county or municipal office or position and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods or services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or (5) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest or interests of any person.

W. Va. Code§ 6B-2-5(e) reads:

> (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.

W. Va. Code§ 6B-2-5(f) reads

(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...

W. Va. Code§ 68-2-5(9) 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:

(A) A contested case involving an administrative sanction, action or refusal to act;
(8) 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.

The amendment to W. Va. Code§ 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:

(4) Will and pleasure professional employees of members of the Executive

Department under the direct supervision of the Executive Department officer and who regularly, personally and substantially participates in a decision-making or advisory capacity regarding agency or department policy;

(7) Heads of any state departments or agencies.

ADVISORY OPINION

The Ethics Act contains a one year "cooling off" period which prohibits elected and appointed public officials, full-time staff attorneys and accountants, upon their departure from government, from appearing back before their former agency for a one year period on certain matters. W.Va. Code§ 6B-2-5(g). This provision in the Ethics Act is commonly referred to as the "revolving door" provision. While the Commission has the statutory authority to grant an exemption to these limitations, it has only granted an exemption on one occasion.

In applying this statute, the Commission must determine whether the Requester is an "appointed public official." In A.O. 2010-22 the Commission ruled tt,at an appointed public official for purposes of§ 6B-2-5(g) of the Ethics Act, is a person who holds a position which is created by law.[1]

Here, the Requester's position is not created by law nor does he take an oath of office. Moreover, he is not a full-time staff attorney or accountant. Hence, the Commission finds that he is not subject to the limitations in "(g)". As such, he may represent clients before his former agency upon his departure from government without waiting one year.

Limitations apply. In accordance with W.Va. Code § 6B-2-5(f), he may not represent clients in matters in which he was substantially involved. Moreover, he may not use or reveal confidential information. W.Va. Code§ 6B-2-5(f).

The Requester also asks whether he must wait one year before registering as a lobbyist. The provision in question prohibits certain high-ranking government officials and employees from registering as a lobbyist for one (1) year following their departure from government.

One category of employees which fall within the purview of this limitation is:

Will and pleasure professional employees of members of the Executive Department under the direct supervision of the Executive Department officer and

[1] The West Virginia Constitution requires persons elected or appointed to any office to take an oath of office. W.Va. Const. Art. 4, § 5.

who regularly, personally and substantially participates in a decision-making or advisory capacity regarding agency or department policy." W. Va. Code§ 6B-3-2

The term "Executive Department" refers to those elected public officials who are commonly referred to as the Board of Public Works, i.e. Governor, Attorney General, Treasurer, Auditor, Commissioner of Agriculture, Secretary of State and the Superintendent of Free Schools. W.Va. Code § 5-4-1. The Requester's agency reports to the Governor's Office; however, the Requester does not directly report to the Governor, and he is not under the direct supervision of the Governor or his staff. Instead, he reports directly to an employee of the agency which employs him. Here, the Commission finds that the limitations on registering as a lobbyist do not apply to him as he is not under the direct supervision of a Member of the Executive Department, i.e. the Governor. Hence, he does not have to wait one year before registering as a lobbyist.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.,* 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 similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson