

ADVISORY OPINION NO. 89-23 SUPP.

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON MARCH 1, 1990

GOVERNMENTAL BODY SEEKING OPINION

A Public Employee

OPINION SOUGHT

1. When is a public employee no longer considered "employed" as the term is used in subsection 6B-2-5(h)?
2. How are the phrases "seeking employment" and "offer of employment" defined as used in subsection 6B-2-5?
3. How does the Act define "person" as contemplated in subsection 6B-2-5(h)?
4. Whether it would be a violation of the Act for the public employee to advise an individual who is representing a client in a contested case, license or permit application or other specific matter which arose during the requestor's period of employment and in which he personally participated in a decision making, advisory or staff support capacity?
5. Whether it would be a violation of subsection 6B-2-5(f) for a public employee who works in a particular Division of a Department to act in a representative capacity with respect to those "specific" procurement actions which he personally participated in during his employment, or all procurement matters with respect to the Department Program that the employee oversees?
6. Whether a full-time, policy-making employee who specifically works in one Division of a State Department is prohibited from seeking employment with persons regulated by other Divisions of the State Department?

OTHER FACTS RELIED UPON BY THE COMMISSION

The requestor is a public employee who is involved in the procurement of design engineering and construction for a State Department's specific program. The public employee states that he works in a specific Division of a State Department in a policy-making, nonministerial position. The requestor is paid by the state from a Federal grant dedicated exclusively to the administration of that Division.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(f) states in pertinent part that... No present or former...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 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.

West Virginia Code 6B-2-5(g)(2) states in pertinent part that...As used in this subsection, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person...Provided... Nothing in this subsection shall be construed to prevent a former public official or employee from representing another state, county, municipal or other governmental entity before the governmental entity in which he or she served or was employed within six months after the termination of his or her employment or service in the entity.

West Virginia Code 6B-2-5(h)(1) states in pertinent part that... no full-time public employee who exercises policymaking, nonministerial 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.

West Virginia Code 6B-2-5(h)(2) states in pertinent part that...No person regulated by a governmental agency shall offer employment... to a full-time public employee of the regulating governmental agency during the period of time the public official or employee works or serves in such agency.

West Virginia Code 6B-2-5(h)(3) states in pertinent part that...a 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.

West Virginia Code 6B-3-1(8) states in pertinent part that..."Person" means any individual, partnership, trust, estate, business trust, association, or corporation; any department, commission, board, publicly supported college or university, division, institution, bureau, or any other instrumentality of the state; or any other political subdivision of the state.

#### ADVISORY OPINION

1. A public employee's employment terminates when:

- a. that individual has given written notice of his intention to terminate his employment; and
- b. when he is no longer at the workplace actively handling assignments; and
- c. when the only acts remaining to be concluded are the processing of his termination papers and payment of or "cashing out" of accumulated leave or retirement.

2. There is no statutory definition of the term "seeking employment" in the Act. However, it is the Commission's opinion that the term should be given its plain meaning, to include a public employee approaching a person either directly or indirectly regarding present part-time or future employment.

Regarding offer of employment the term "offer" is defined in Restatement, Second of Contracts as a communication which creates in the offeree the power to form a contract by accepting in an authorized manner. It must be a "manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it".

Thus an "offer of employment" is a manifestation of an intention by an employer to be presently bound to employing an individual at some time subject to that individual's acceptance.

3. Certain full-time public employees (those with regulatory, non-ministerial, or policy-making authority) are prohibited from seeking employment with any person regulated by the governmental body with which they are employed. The term "person" is defined in §6B-3-1(8) to include any individual, partnership...association, or corporation.

It is not necessary to trigger this provision (6B-2-5(h)(1)) that the public employee individually regulate any person. The public employee would not be permitted to seek employment with any individual, partnership, corporation or association regulated by the Department without being given a specific (h)(3) exemption.

4. It would be a violation of subsection 6B-2-5(f) for a public employee during or after his employment to assist in the representation of a client in a contested case, license or permit application or "other specific matter which arose during his employment and in which he personally participated in a decision-making, advisory, staff support capacity". This prohibition does not expire six months after the employee's termination but remains in effect indefinitely.

"Represent" is defined in subsection 6B-2-5(g)(2) as any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person.

However, it would not be a violation for a public employee to assist in the representation of a client in a matter when the employee did not specifically participate in a decision-making, advisory or staff support capacity.

For example, a public employee may have been involved while employed in a decision regarding a license or permit application for Company A in County Z. This participation would not prohibit the employee's representation (or assisting in the representation) of Company A in another matter or a license or permit application in another County.

5. Subsection 6B-2-5(f) prohibits a former public employee from representing a client in certain matters when he or she personally participated in a decision-making, advisory or staff support capacity. The Commission understands from previously supplied information (in its initial Advisory Opinion 89-23 decision) that the public employee acts in a policy-making and staff support capacity to the Commissioner for the entire Department.

As stated in a memorandum from the Department Commissioner when initially seeking such position, the employee's responsibilities include formulating and implementing policy in conjunction with the innovative energy concepts and programs as they relate to the environment and promotion of coal. Also, he is responsible for the development and implementation of policy in procuring funds for the Program and their use within the framework of state and federal law.

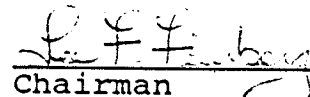
This individual reports directly to the Commissioner. He is responsible for the supervision of day to day operations involving research on the multi-million dollar federal programs and overseeing the implementation of policy-making decisions within his specific program. This employee alerts the Commissioner and Director of any adverse direction of policy in areas governed by a particular federal office.

Therefore, based on the information presented, it is the Commission's opinion that since the employee is personally involved in policy-making for the entire Program he is prohibited from acting in a representative capacity with respect to all procurement matters which arose during the time of his policy-making for that Program and non-ministerial employment with the Department.

6. Subsection (h)(1) prohibits a full-time public employee who exercises policy-making authority from seeking employment with any person (individual, partnership, corporation, association, etc.) regulated by the governmental body which employs the individual.

Therefore, it is the Commission's opinion that the requestor would be prohibited from seeking employment with persons regulated by the State Department that employs him although his Division does not specifically regulate such persons.

However, the Commission would note that subsection (h)(3) allows a public employee to apply for an exemption 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 this governmental agency.

  
Chairman