

ADVISORY OPINION NO. 89-39

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON DECEMBER 7, 1989

GOVERNMENTAL BODY SEEKING OPINION

A staff attorney in the State Department of Tax and Revenue

OPINION SOUGHT

1. Whether the provisions of West Virginia Code Section 6B-2-5(h) prohibit this individual from seeking employment or being sought for employment by those persons regulated by the Department of Tax and Revenue (that is, with law firms or corporations in West Virginia)?
2. Whether the Commission should grant this individual an exemption under section 6B-2-5((h) of the West Virginia Code?
3. Whether the provisions of West Virginia Code Section 6B-2-5(g) prohibiting representation before the Department of Tax and Revenue for a period of six months after termination of employment applies to this individual?
4. Whether this individual should be granted an exemption by the Ethics Commission pursuant to Subsection (5)(g) to allow him to represent clients in application for "Super Credit" project certifications and to practice before the Department of Tax and Revenue's Office of Hearings and Appeals immediately following his termination of employment?

OTHER FACTS RELIED UPON BY THE COMMISSION

This individual is a Staff Attorney in the Tax Department and has the primary duty of drafting tax regulations, drafting opinion letters for questions relating to the Tax Department's Office of Chief Inspector duties of local government oversight, and drafting Technical Assistance Advisories. He has also on occasion represented the Tax Department before its Office of Hearings and Appeals on assessments against particular taxpayers.

This individual was responsible for the initial drafts of the Severance Tax Regulations Title 110 Series 13A and the Solid Waste Assessment Fee Regulations Title 110 Series 6A. These regulations were reviewed by each of his supervisors and finally approved by the Tax Commissioner prior to their being filed with the Secretary of State and submitted to the Legislative Rule-Making Committee.

In these matters, he is a full-time staff attorney, but does not exercise policy-making or rule-making authority without approval of immediate supervisors and ultimately by the Tax Commissioner and the Legislature as a whole. However, he does possess considerable input into policy-making and rule-making functions and his duties cannot be described as merely ministerial. He has recently drafted Municipal Business and Occupation Tax Regulations, which have not yet been filed with the Secretary of State or the Legislative Rule-Making Committee.

The Office of Chief Inspector is in charge of overseeing the fiscal operations of local governmental entities. Typically, this individual will write opinions in answer to questions received by the Department regarding the authority of municipalities to impose their business license or business and occupation tax in given situations. However, these opinions, are not signed by this individual. Other opinion letters and Technical Assistance Advisories regarding general and specific applications of the State's tax statutes to given situations are also prepared and are distributed under other employee's signatures.

The staff attorney's biggest concern relates to the drafting of letters certifying "Super Credit" applications for multiple year and/or multiple participant business investment and job expansion tax credit projects pursuant to West Virginia Code Section 11-13C-4b. These "Super Credit" letters are reviewed by another Staff Attorney in the Legal Division. The letters are then sent out with the signature of the Tax Commissioner or the General Counsel. Occasionally "Super Credit" correspondence is sent out under the signature of the Director of the Legal Division of the Department of Tax and Revenue.

The staff attorney has worked for the Tax Department for approximately three years. Since his graduation from law school, he has had no other legal experience except some opinion drafting while employed as a Claims Investigator for the Crime Victims Compensation Fund administered by the Court of Claims.

The staff attorney believes that the only expertise which transfers to the private sector is his knowledge of the "Super Credit" program and to a lesser extent his experience practicing before any administrative law tribunal, specifically the Office of Hearings and Appeals in the Department of Tax and Revenue. The Office of Hearings and Appeals is a semi-independent branch under the Tax Department. It has independent hearing examiners but cases are assigned and approved by the Tax Commissioner.

The staff attorney would like to seek employment with law firms or corporations located within the state who may be regulated by the tax department.

Under these circumstances, the staff attorney feels he is adversely affected by the limitations and restrictions imposed pursuant to West Virginia Code Sections 6B-2-5(g) and (h), and requests that the West Virginia Ethics Commission waive those provisions pursuant to the authority granted it under West Virginia Code Section 6B-2-5(g)(5) and 6B-2-5(h)(3) respectively.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

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...to be employed by any person who is or may be regulated by the governmental body which he...serves while he... 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 no person regulated by the governmental agency shall offer employment to a full-time public official or 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-2-5(g)(1) states in pertinent part that no... full-time staff attorney...shall, during his...public employment or for a period of six months after the termination of his...public employment with a governmental entity authorized to hear contested cases or promulgate regulations appear, in a representative capacity before the governmental entity in which he...is or was employed in the following matters:

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

(B) To support or oppose a proposed regulation; and

(C) To support or contest the issuance or denial of a license or permit...

West Virginia Code 6B-2-5(g)(5) states in pertinent part that a... full-time staff attorney who would be adversely affected by the provisions of this subsection (g) may apply to the ethics commission for an exemption from the six months prohibition against appearing in a representative capacity, 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-2-5(f) states no present or former ... public employee shall during or after his...public employment...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...period of public service or employment and in which he... personally participated in a decision-making, advisory or staff support capacity.

#### ADVISORY OPINION

1. An analysis of the facts presented and the pertinent statutory provisions follows:

a. The staff attorney is a full time employee who exercises some policy-making and non-ministerial authority as a result of his work in drafting rules, regulations, advisories and opinions.

b. He may not be employed by any person who is or may be regulated by the State Tax Department. It is clear that individuals who would have authority to offer employment to the staff attorney in West Virginia law firms or corporations would be persons within the meaning of the statute who are or may be regulated by the State Tax Department.

Therefore, the staff attorney is prohibited without exemption from seeking employment with these persons (i.e. law firms or corporations) regulated by the Department of Tax and Revenue.

2. Subsection 5(h)(3) of the Act allows a full-time employee who would be adversely affected by the provisions of this subsection to apply to the Ethics Commission for an exemption from this prohibition to seek employment with these regulated persons when the person's education and experience is such that for all practical purposes it would deprive the person of the ability to earn a livelihood in the state outside of the governmental agency.

The Commission finds that, the staff attorney's education and experience is such that for all practical purposes if he were not allowed to seek employment with West Virginia law firms or corporations he would be deprived of the ability to earn a livelihood in the state outside of his employment at the Department of Tax and Revenue.

3. It is the Commission's opinion that subsection 5(g)(1)

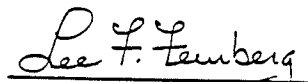
prohibits this staff attorney without exemption from appearing during the time he is employed or six months after termination in a representative capacity before the Department of Tax and Revenue in a contested case involving an administrative sanction, action or refusal to act or to support or contest the issuance or denial of a permit or as otherwise set out in subsections 5(g)(1)(A) through (E).

The term "represent" is defined in subsection 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...

4. Subsection 5(g)(5) allows a full-time staff employee to apply for exemption when he can demonstrate that the six month prohibition from representing clients after termination of his employment would, for all practical purposes deprive the person of the ability to earn a livelihood in this state outside of the governmental agency.

It is the Commission's opinion that this individual has not made such a showing and the Commission hereby denies his request for an exemption to appear in a representative capacity in the specifically described tax related matters (i.e. certification for "Super Credit" and appearing before the Office of Hearings and Appeals) immediately following his termination of public employment. However, this individual is invited to supply additional information and reapply for an exemption if he can make such a showing.

Additionally, the staff attorney should be mindful of provision 5(f) of the Act which prohibits a present or former employee from acting in a representative capacity in any specific matters which arose during his period of public employment and in which he personally participated in a decision-making, advisory or staff support capacity.

  
Chairman