

ADVISORY OPINION NO 9 0-127

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON SEPTEMBER 6, 1990

GOVERNMENTAL BODY SEEKING OPINION

The Administrator of a Division of a State Department

OPINION SOUGHT

- a. Whether it is a violation of the Act for an employee of a State Department Division which provides free assistance to area forest landowners, to consult for a fee with landowners during non-work hours?
- b. Whether it is a violation of the Act for employees of a State Department Division to solicit maple trees from the forest industry to use in Arbor Day tree-planting celebrations in elementary schools?

OTHER FACTS RELIED UPON BY THE COMMISSION

A Division of a State Department employs professionals who provide assistance to industry and to forest landowners regarding forest management plans that include, among other things, protection of the forests against fire, insects, and disease.

The professional foresters assist landowners by preparing forest management plans for their property, upon their request. There is a backlog of requests and the waiting period can extend up to one year. Consequently, if a landowner wants more "immediate help" he or she must hire a private consulting forester.

The employees of the Division offer their services for a fee, during their spare time. This practice is never allowed in the County or Counties which comprise the forester's assignment.

The Division has policy manuals for forest management, fire, and utilization, the three main categories in which each employee functions. The employees follow the dictates of these manuals. In instances where they believe a deviation is necessary, they must receive permission from the district forester.

In the requestor's opinion this Division is not a regulatory agency although it does enforce the forest fire laws. However, the requestor agrees they do regulate incidental burning to certain hours of the day and they establish the seasons for the digging of ginseng. Also, the Division will play a role in the new property tax law, since they have been designated to settle certain property questions.

The Division employees solicit maple trees from the forest industry to use in Arbor Day tree-planting celebrations in elementary schools around the State. The planting of the maple trees is a charity. They are provided free in celebration of Arbor Day, which is one step in the development of a conservation effort among the citizens of the State.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a 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. The performance of usual and customary duties associated with the office or position...does not constitute the use of prestige of office for private gain.

West Virginia Code Section 6B-2-5(c)(1)states in pertinent part that...a public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: **Provided**, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position as such is subordinate to the soliciting official or employee...No official or employee may knowingly accept any gift, directly or indirectly, from any person whom the official or employee knows or has reason to know:

- (A) Is doing or seeking to do business of any kind with his or her agency;
- (B) Is engaged in activities which are regulated or controlled by his or her agency; or
- (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

West Virginia Code Section 6B-2-5(h)(1) states in pertinent part that...no full-time public official or 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.

ADVISORY OPINION

Private Gain

a. The Commission notes that pursuant to subsection 6B-2-5(b)(1) of the Ethics Act a public employee may not use his office for his own private gain.

In this instance the employees of the State Department Division are required to provide free assistance during work hours to forest area landowners. Because of their backlog of requests, obtaining this assistance can take up to one year.

It is part of the employees' state job responsibilities to provide this service at no cost to the private landowner. The Ethics Act specifically allows a public employee to perform usual and customary duties associated with his position without compensation. However, here the employee is receiving compensation in the form of a fee for performing services which should be provided during a forester's work day. Therefore, it is a violation of subsection 6B-2-5(b)(1) of the Act for these employees to privately contract with the landowners for a fee to provide the same service which they are employed by the State Division to provide.

"Moonlighting"

Also relevant to this issue is an analysis of subsection 6B-2-5(h)(1) which prohibits a full-time employee with policy-making, nonministerial or regulatory authority from being employed by any person who is or may be regulated by the governmental body with which he or she is employed.

The term "regulate" is not defined within the Act. However, the common definition given is "to control or direct according to a rule", or "to adjust in conformity to a specification or requirement".

By the requestor's own description the Division does regulate the landowners as meant by the definition since the agency does have some discretion in enforcing the forest fire laws including regulating incidental burning and establishing the seasons for the digging of ginseng. Also, as previously noted the Division will play a role in the new property tax law, since they have been designated to settle certain property questions.

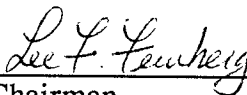
Therefore, the Commission finds that it would be a violation of subsection 6B-2-5(h)(1) for foresters who are full-time employees with non-ministerial and regulatory authority, to be employed on a part-time basis during non-work hours for a fee to provide landowners with a forest management plan since the forest landowners are regulated by the State Division.

NOTE: this opinion is limited to the specific facts and public employees set forth in this advisory opinion.

b. Pursuant to subsection 6B-2-5(c)(1) of the Ethics Act, a public official or employee may solicit a gift for a **charitable purpose** as long as there is no resulting direct pecuniary benefit conferred upon the public official or employee.

In this instance, the solicitation of the maple trees from certain industries for Arbor day celebrations is considered a charitable purpose, with the benefit of such solicitation going to the State.

The Commission finds that it would not be a violation of subsection 6B-2-5(c)(1) of the Ethics Act for the public employees of a State Department Division to solicit maple trees from certain industries to use in Arbor Day tree-planting celebrations for elementary schools, since it is for a charitable purpose.


Chairman