

ADVISORY OPINION NO. 90-192

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JANUARY 3, 1991

GOVERNMENTAL BODY SEEKING OPINION

The Administrator of a Division of a State Department

OPINION SOUGHT

- a. Whether it is a violation of the Ethics Act for employees of a State Department to be employed by a professional consulting firm to do work normally performed in their public employment?
- b. Whether the response given by the Ethics Commission in Advisory Opinion No. 90-127 also applies to the "technicians" in the Division?

OTHER FACTS RELIED UPON BY THE COMMISSION

This request is a follow up to previously decided Advisory Opinion No. 90-127. A professional consultant has requested that several employees of a State Division be employed by a private consulting firm on a part-time basis to provide assistance to industry and forest landowners regarding forest management plans that include, among other things, protection of the forests against fire, insects, and disease. The employees would not be directly employed by private landowners that their Division regulates but would be working for professional consultants who are conducting business with the private landowners. Their work would be similar to their public work performed on a daily basis.

The technicians employed by the State Division have a two-year degree in forestry from a technical school. The position requires a certain amount of decision making with regard to all aspects of forestry, the job duties and responsibilities are comparable to that of the foresters addressed in Advisory Opinion #90-127 who were determined to have nonministerial and regulatory authority. These employees have been technically trained for this responsibility. The difference between the two positions (i.e. foresters and technicians) is that one requires a two year degree from a technical school and the other position requires a four year college degree.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(a) states in pertinent part that...the provisions of this section apply to all...public employees, whether full or part time, in state...

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.

West Virginia Code section 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.

ADVISORY OPINION

a. Subsection 6B-2-5(h)(1) prohibits a full-time public employee with policy-making, nonministerial or regulatory authority from being employed by any **person who is or may be regulated** by the governmental agency with which he or she is employed.

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

The Ethics Commission previously determined in Advisory Opinion No.90-127, that certain public employees of this State Department have regulatory authority 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, the Department will play a role in the new property tax law, since they have been designated to settle certain property questions.

The professional consulting firm is not associated in any way with the State Division. Neither the public employees nor their governmental agency regulate or control the actions of this consulting firm.

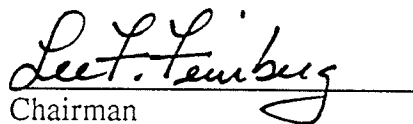
However, the consulting firm would be directly contracting with the landowners. Therefore, the ultimate employer of the public employees would be persons who are regulated by the State agency.

Therefore, it would be a violation of subsection 6B-2-5(h)(1) of the Ethics Act for employees of a State Department to be employed by a professional consulting firm since the ultimate employers would be private landowners who are regulated by the State agency.

b. Pursuant to subsection 6B-2-5(h)(1) of the Ethics Act, a full-time public employee with nonministerial and regulatory authority may not seek employment with any person who is or may be regulated by the governmental body with which he or she is employed.

The technicians are full-time public employees with nonministerial and regulatory authority with a Division which does regulate landowners. The job duties and responsibilities are comparable to that of the foresters addressed in Advisory Opinion #90-127. The only significant difference between the two positions is that one requires a two year degree from a technical school and the other position requires a four year college degree.

Therefore, the response given by the Ethics Commission in Advisory Opinion No. 90-127 also applies to the "technicians" in the Division since they are public employees with nonministerial and regulatory authority employed by a State Department which regulates the landowners.


Chairman