

ADVISORY OPINION NO. 92-12

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON APRIL 2, 1992

GOVERNMENTAL BODY SEEKING OPINION

An Attorney on behalf of a State Fund and an Assistant Chief of a State Fund Division

OPINION SOUGHT

Is it a violation of the Ethics Act for an Assistant Chief of a Division of a State Fund (hereafter referred to as "requestor") to appear in a representative capacity before his former governmental agency?

FACTS RELIED UPON BY THE COMMISSION

The State Fund was created to provide accessibility to sufficient long-term mortgage financing for residential housing for occupancy by persons and families of low and moderate income and to assist in the renovation of existing housing. The monies to finance the programs of the Fund are generated through the sale of tax exempt bonds.

The requestor was hired in an entry-level position with the Fund. He was promoted to the position of Director of one of the Fund's Programs and reported to the Deputy Director of the Fund. In 1990, the requestor was promoted to Assistant Chief of a different Fund program and was required to report to another Fund supervisor. Any policy recommendations were reviewed by his supervisor and the Executive Director before presentation to the Board of Directors of the Fund for final approval.

The requestor now plans to establish a private mortgage loan company. The primary function of this business will be to originate loans and process the loan applications. Immediately after the mortgage loan is approved it is presented to various lending institutions for purchase.

Area lenders that participate in the programs of the Fund, including mortgage loan companies, are required to enter into a standard Program Loan Purchase Agreement which specifies the terms and conditions under which the Fund will purchase mortgage loans. The requestor will seek to qualify his company as a participating lender and, if successful, enter into such an agreement.

The Fund anticipates that some of the mortgages originated by the requestor's private business would meet the criteria for the Fund's Programs and that the requestor will present the eligible mortgage applications to the Fund for purchase under the program.

The State Fund has stated that the requestor's presentation of a client's application for a Fund-assisted mortgage would not involve the requestor's use of confidential information gained during his association with the Fund.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(g)(1) states in pertinent part that...no elected or appointed public official...shall...for a period of six months after the termination of his or her public service...with a governmental entity authorized to...promulgate regulations appear, in a representative capacity before the governmental entity in which he or she...served...in the following matters:...

(E) To influence the expenditure of public funds.

West Virginia Code §6B-3-5(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...

West Virginia Code §6B-2-5(g)(5) states in pertinent part that...an elected or appointed public official...who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the six month 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...the ethics commission...shall decide upon each application on a case-by-case basis.

West Virginia Code §6B-1-3(b) states in pertinent part that "**Employee**" means any person in the service of another under any contract of hire...where...a public official has the right or power to control and direct such person in the material details of how work is to be performed and **who is not responsible** for the making of policy nor for **recommending official action**.

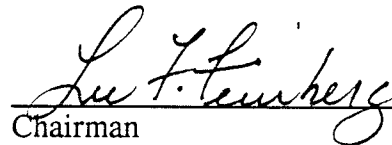
West Virginia Code §6B-1-3(i) states in pertinent part that "**Public Official**" means any person who is **elected or appointed** and who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to ...(ii) administering or monitoring grants or subsidies...(v) any other activity where the official action has an economic impact of greater than a de minimis nature on the interest...of any person.

ADVISORY OPINION

West Virginia Code §6B-2-5(g)(1) bars **elected and appointed public officials** from representing a person before their former public agency for a period of six months after the termination of their public employment. It is clear that the requestor proposes to "represent" a "person" since he will be communicating with the Fund on behalf of his Corporation, which is a legal "person".

In his position as Assistant Chief of a Division of a Fund, the requestor was not responsible for recommending official action. All policy recommendations were reviewed by his supervisors and the Executive Director before presentation to the Board of Directors of the Fund for final approval. Further, the requestor did not take official action on behalf of the Fund. Consequently, the requestor is not a "public official" as defined within the Ethics Act.

Therefore, the Commission finds that the requestor is not subject to the six month prohibition contained in WV Code §6B-2-5(g)(1) and may appear in a representative capacity before the Fund.


Chairman