

ADVISORY OPINION NO. 92-45

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON NOVEMBER 5, 1992

GOVERNMENTAL BODY SEEKING OPINION

A State Employee

OPINION SOUGHT

- a.) Is it a violation of the Ethics Act for an employee of a State Division to seek part-time employment with private individuals who are regulated by his governmental agency to provide services which are available through his State Division?
- b.) Is it a violation of the Ethics Act for an employee of a State Division to seek part-time employment with private individuals who are regulated by his governmental agency to provide services which are **not** available through his State Division?

FACTS RELIED UPON BY THE COMMISSION

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

It is part of the public employee's official job responsibilities to assist landowners, upon their request, in the preparation of forest management plans. 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 requestor would like to offer his services privately, for a fee, during his spare time. This practice would not occur in the county or counties which comprise the requestor's assignment area.

The requestor would also like to provide services to landowners, for a fee, which are not provided as part of his official job responsibilities.

The State Division regulates incidental burning, establishes the seasons for the digging of ginseng and enforces sediment control regulations as they relate to timbering operations.

Further, the State Division plays a role in a property tax law. This law enables landowners to pay property tax based on the use value of the property rather than the market value of the property. In order to take advantage of this tax assessment law, landowners are required to certify to the State Division that they will manage their land professionally. This involves the development and implementation of a professional forestry management plan. Each year the

landowner is required to recertify compliance to the Division and report any changes made in the original land management plan. The Division verifies the landowners' representations.

The Division takes this information and forwards it to the Tax Department for an assessment. This assessment is then sent to the County Assessor. The Division is empowered to resolve any disputes which may arise over claims that the landowner is not managing the land pursuant to the professional plan. During the two years since the implementation of the tax law the Division has resolved approximately 50 such disputes.

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...

West Virginia Code §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

a.) Provision of Services offered by the State Division

Private Gain

Pursuant to WV Code §6B-2-5(b)(1) public employees may not use their office or its resulting prestige for private gain. The Commission has ruled that this prohibition bars the acceptance of private payment for providing information or services which are expected to be provided by persons in the course of fulfilling their official job responsibilities.

The requestor would like to contract with private landowners to establish forest management plans for a fee. Since it is part of the requestor's job responsibilities to provide this assistance at no cost to the private landowner, such services would be offered during his spare time and **only** to landowners situated outside the county or counties which comprise the forester's assigned work project area.

Therefore, it would not be a violation of WV Code §6B-2-5(b)(1) for the employee of a State Division to seek part-time employment with private individuals who are regulated by his governmental agency to provide services which are available through his State Division, **provided** the requestor offers these services on a private consulting basis only to individuals **outside** the county or counties which comprise his assigned work project area.

The Commission reminds the requestor that WV Code §6B-2-5(b)(1) prohibits the public employees from using their public employment position to influence, obtain, increase or promote business for their private business or for the private business interest of another person. The requestor must also avoid using public time, equipment and resources for private activities.

Employment

Although the provision of services for private fee **outside** the requestor's geographic area of responsibility would not violate the Act's prohibition against the use of public office for private gain, WV Code §6B-2-5(h)(1) prohibits a full-time public employee with policy-making, nonministerial or regulatory authority from seeking employment with or being employed by any person who is or may be regulated by the governmental body with which he is employed.

The requestor's State Division regulates incidental burning, establishes the seasons for the digging of ginseng and enforces sediment control regulations as they relate to timbering operations. More significantly, the State Division plays a regulatory role in the administration of a property tax law which enables landowners to pay property tax based on the use value of the property rather than the market value of the property. Consequently, the Commission upholds its earlier findings established in Advisory Opinions #90-127 and #90-192 which held that forest landowners are regulated by this State Division.

Therefore, it would be a violation of WV Code §6B-2-5(h)(1) for the requestor to seek part-time employment with the private landowners since such individuals are regulated by his governmental agency. The fact that the public employee will offer such services only to landowners situated outside the county or counties which comprise the forester's individual assigned work project area does not change this result.

b.) Provision of Services not offered by the State Division

Private Gain

Pursuant to WV Code §6B-2-5(b)(1) public employees may not use their office or its resulting prestige for private gain. The Commission has ruled that this prohibition bars the acceptance of private payment for providing information or services which are expected to be provided by persons in the course of fulfilling their official job responsibilities.

It is part of the requestor's state job responsibilities to provide free assistance during work hours to area forest landowners. However, the requestor has stated that he and other similarly situated public employees would like to offer a variety of services which are **not** provided by the State Division on a private consulting basis to individual area landowners.

Therefore, it would not be a violation of WV Code §6B-2-5(b)(1) for the employee of a State Division to offer services for a fee to private individuals who are regulated by his governmental agency since such services are **not** available through his State Division.

Employment

Although the provision of those services which are not part of the requestor's official job responsibilities would not violate the Act's prohibition against the use of public office for private gain, as previously noted, West Virginia Code §6B-2-5(h)(1) prohibits a full-time public employee with policy-making, nonministerial or regulatory authority from seeking employment with or being employed by any person who is or may be regulated by the governmental body with which he is employed.

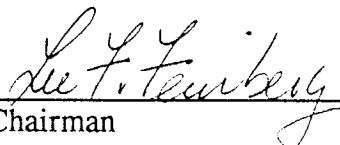
Therefore, it would be a violation of WV Code §6B-2-5(h)(1) for employees of a State Division to contract with private individuals to perform services since such the landowners are regulated by their governmental agency. The fact that such services are not provided by the public employees' State Division does not alter this result.

c. Employment Exemptions

Pursuant to WV Code §6B-2-5(h)(3) a public employee who would be adversely affected by the provisions of subsection (h) may apply to the Ethic Commission for an exemption from its prohibition against seeking employment with a person who is or may be regulated by his governmental agency.

Pursuant to WV Code §6B-2-5(b)(1), the Commission has held that providing, for a fee, services which are part of the public employees' official job responsibilities would violate the Act's prohibition against the use of office for private gain. Therefore, any exemption, if granted, would limit the acceptance of private payment for services offered by the State Division to areas **outside** the public employee's assigned work area.

The Commission notes that this limitation would not apply to services provided by the public employee to private individuals who are regulated by his governmental agency when such services are **not** available through his State Division.


Chairman