

WEST VIRGINIA
SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

FILED

1991 JAN 31 PM 3:05

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Dept. of Admn., WV Ethics Commission TITLE NUMBER: 158

CITE AUTHORITY WV Code Section 6B-2-5(h)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 158-11

TITLE OF RULE BEING PROPOSED: Employment

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.



APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

FILED

AUG -8 PM 3:21

Rule Title: 158-11 Employment

Type of Rule: X Legislative Interpretive Procedural

Dept. of Administration
Agency W V Ethics Commission Address 1207 Quarrier St.
Charleston, WV 25301

1. Effect of Proposed Rule:	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$	\$
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

No additional costs are anticipated

3. Objectives of these rules:

To establish the guidelines concerning employment for persons covered by the WV Governmental Ethics Act.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

NONE

B. Economic Impact on Political Subdivisions; Specific Industries;
Specific groups of citizens.

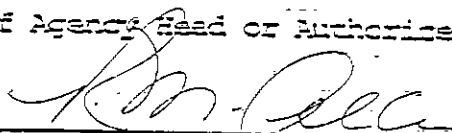
NONE

C. Economic Impact on Citizens/Public at Large.

NONE

Date: 11/30/91

Signature of Agency Head or Authorized Representative



DATE: 1/30/91

FILED

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE
FROM: Richard Alker, Executive Director, WV Ethics Commission
LEGISLATIVE RULE TITLE: Employment 158-11

JAN 31 1991 PM 3:05
WV ETHICS COMMISSION
SECRETARY OF STATE

1. Authorizing statute(s) citation WV Code 6B-2-5(h)
2. a. Date filed in State Register with Notice of Hearing:
August 8, 1990
- b. What other notice, including advertising, did you give of the hearing?
none
- c. Date of hearing (s): Comment period ended Sept. 14, 1990.
- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.
Attached xx No comments received
- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing:
(be exact)
1-30-91
- f. Name and phone number of agency person to contact for additional information:
Richard Alker, Executive Director.
WV Ethics Commission
348--0664

3. Is the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing: _____

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

d. Attach findings and determinations and reasons:

Attached _____

SERIES 11

158-11-1 EMPLOYMENT

1.1 Scope -- These legislative rules establish the guidelines concerning employment for persons covered by the WV Governmental Ethics Act.

1.2 Authority -- WV Code 6B-2-5(h)

1.3 Filing Date --

1.4 Effective Date --

158-11-2 General

2.1 Full-time public employees and officials may not seek employment with or be employed by a person that is or may be regulated by the governmental agency with which they are employed. This prohibition applies only to those employees who exercise policymaking, nonministerial or regulatory authority.

2.2 The prohibition exists only so long as an employee or official is employed by the regulating agency. Such a person is relieved from the prohibition immediately upon terminating his or her employment with the regulating agency. There is no waiting period.

2.3 No regulated person shall offer employment to a full-time employee or official of the regulating agency during their employment with the agency.

2.4 The prohibition does not apply to the activities of employees and officials for or on behalf of charitable or not for profit public service entities from which they derive no pecuniary benefit.

158-11-3 Definitions

3.1 "Seek employment" Any contact with a regulated person, directly or through an intermediary, relating to the availability or conditions of employment in furtherance of obtaining employment. Responding to unsolicited inquiries from a regulated person concerning employment would also constitute seeking employment.

3.2 "Offer employment" Any contact by a regulated person with a full-time employee or official of a regulating governmental agency, directly or through an intermediary, relating to employment constitutes "offering employment".

3.3 "May be regulated" A person is one who "may be regulated" if there is a **reasonable probability** that the person will be regulated. There must be a showing that the person's activities are of the nature and extent ordinarily regulated by the governmental agency.

158-11-4 Requests for Exemption

4.1 Exemptions will not be granted for secondary employment [moonlighting] with regulated persons.

4.2 Persons requesting exemptions will be advised that exemptions are granted **only** upon condition that exempted persons not act or fail to take action in a matter affecting a person with whom they are seeking employment.

4.3 An application of exemption shall contain the following information:

- a. the name, address and phone number of the governmental agency by which the requestor is employed
- b. the requestor's job title and the name of his or her immediate supervisor
- c. "facts" sufficient to support a finding that the prohibition deprives the requestor of " the ability to earn a livelihood in this state outside of the governmental agency"
- d. the names of any persons with whom the requestor intends to seek employment who have matters on which the requestor is currently taking official action
- e. a copy of the requestor's job description
- f. a copy of the requestor's resume, if her or she has one prepared.

4.4 When exempted persons see that they may be required to take official action in regard to a matter affecting a person with whom they are seeking employment, they are responsible to notify their supervisors of the exemption and seek to be relieved from further action in regard to such person.

4.5 Once informed that a subordinate has received an exemption, it is the responsibility of the exempted person's supervisor to insure that:

- a. the exempted subordinate takes no action in regard to persons with whom the exempted subordinate is seeking employment, or, if that is not possible,
- b. the official action of the exempted subordinate is subject to additional review by the supervisor.

4.6 Exempted persons are responsible to notify the Ethics Commission if they are required by their supervisors to take official action on matters relating to persons with whom they are seeking employment. Notice shall be given on disclosure forms provided by the Commission.

4.7 The Commission will contact supervisors who have been identified in the disclosure forms supplied pursuant to 4.6 above and advise them of their responsibility to closely supervise the work of their exempted subordinates in regard to persons with whom they are seeking employment.

4.8 It is a violation of the Act for any person granted an exemption to take any official action in regard to persons with whom they are seeking employment. If the exempted person has sought and been denied the authorization of his or her supervisor to avoid such action, and has filed notice with the Commission as provided in 4.5 above, there is no violation.

4.9 The Commission shall maintain a record of those persons granted exemptions and, where applicable, the names of those persons with whom they seek employment and have been required by their supervisors to take official action. These records are public records and are available for public examination and copying.



FILED

STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION

1991 JAN 31 PM 3:05

4TH FLOOR — LITTON BUILDING
1207 QUARRIER STREET

CHARLESTON, WEST VIRGINIA 25301
(304) 348-0664

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

RICHARD M. ALKER
EXECUTIVE DIRECTOR

January 30, 1991

Proposed Rule 158-11 — Employment WV Code Section 6B-2-5(h)

1. A comment period was held in lieu of a public hearing. This comment period ended Sept. 14, 1990.
2. Comments by letter were received from the following:
 - (1) John Melton
 - (2) Robert B. Wilson
 - (3) Robert A. Hoffman
 - (4) John E. Montgomery
3. **158-11-4 Requests for Exemption** has been changed. The revised section is attached.
4. The changes will reduce the burden on both the applicants for exemptions and the Ethics Commission by limiting the exempted person's disclosure requirements. The exempted person is required to identify only those persons with whom he or she is seeking employment who have matters on which he or she may be required to take official action.



STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION
4TH FLOOR — LITTON BUILDING
1207 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
(304) 348-0664

RICHARD M. ALKER
EXECUTIVE DIRECTOR

FILED

1991 JAN 31 PM 3:05

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

TO: The Honorable Ken Hechler, Secretary of State
FROM: Richard Alker, Executive Director
DATE: January 30, 1991
SUBJECT: Employment 158-11

A comment period was held on the proposed rule, ending on September 14, 1990. Several comments were received. The proposed rule section 158-11-4 has been changed and is filed for your review.

Enclosures

FILED

1991 JUN 21 AM 9:23



OFFICE OF WEST VIRGINIA
SECRETARY

State of West Virginia 90 SEP 14 P2:06
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

September 13, 1990

Mr. Richard M. Alker,
Executive Director
The West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

Dear Mr. Alker:

This letter is offered for two purposes. First, I am offering written comments concerning proposed administrative rule 158 CSR 11 (1990). Second, I am commenting about the conditions under which my request for exemption from the employment inquiry prohibition was issued.

Rule 158-11.

An exemption request should not be necessary to surmount a hardship situation. The Commission should only rule on whether a person's job is "policy making, nonministerial, or regulatory" in nature and whether persons dealing with the agency are "regulated." Persons judged exempt would also be exempt from the employer and Commission notification process. Persons not exempt would be subject to the rule's notification and possible reassignment provisions. Notification would include consent to make such notification public information. This change may be more appropriate as a statutory amendment.

Concerning the "offering of employment" definition, § 3.2, I suggest that if a prospective employer says to an employee, "File your ethics notice and contact us," and nothing more, that contact should not be ruled a violation.

Request EE 90-20

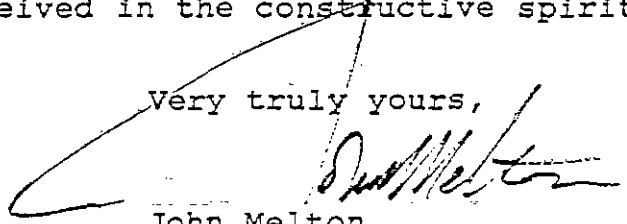
I have signed the Ethics Commission letter dated September 11, 1990. While I accept the precondition for the exemption as my only viable option, I hasten to note the unfairness in being governed by a proposed rule which is not

Mr. Richard Alker
Page 2
September 13, 1990

binding or applicable to current State employees who have heretofore been granted exemptions.

The statute itself is an overly broad reaction to a far more narrow problem, in my opinion. I applaud the efforts of the Commission toward softening the effect somewhat. I hope my comments are received in the constructive spirit in which they are offered.

Very truly yours,

A handwritten signature in dark ink, appearing to read "John Melton", is written over a large, sweeping, handwritten flourish that extends from the left margin towards the center of the page.

John Melton
Assistant Secretary
of Tax and Revenue

pds



COPY

Rich

STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION 90 SEP 14 P2:06
4TH FLOOR - LITTON BUILDING
1207 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
(304) 348-0664

RICHARD M. ALKER
EXECUTIVE DIRECTOR

September 11, 1990

Mr. John Melton
1108 Ivywood Lane
South Charleston, WV 25309

Dear Mr. Melton,

This is to advise you that the Ethics Commission has granted your request number EE 90-20 for an employment exemption, conditioned upon your acceptance of the following procedure.

The Commission's proposed rules and regulations require that an exempted person provide the Commission with a completed employer disclosure statement, acknowledged by his or her supervisor, prior to seeking employment with a regulated person.

This statement informs the exempted person's supervisor of the existence of the exemption and of the persons with whom employment will be sought so that the supervisor can insure that the exempted person does not work on matters relating to such persons. If such contact can not be avoided, it is recommended that the supervisor exercise close supervision of the actions of the exempted person in regard to potential employers.

Since this Commission procedure requires that the employer disclosure statement(s) become a matter of public record, it is necessary for you to indicate below whether you wish to accept the exemption.

Very truly yours,

Richard M. Alker
Richard M. Alker
Executive Director

☐ Yes, I wish to accept the exemption. ☐ No, I do not wish to accept the exemption.

Name: John R. Melton Department: Tax & Revenue

Signature: *John R. Melton* Date: Sept 12, 1990

FILED

1991 JUN 21 AM 9:23

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

WVEC Rec'd LAS
90 SEP 13 PM 2:18

September 13, 1990

Mr. Rick Alker
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

Re: COMMENTS ON PROPOSED EMPLOYMENT RULES
SERIES 158-11

Dear Sir:

I would like to make the following comments regarding the proposed regulations:

1. I suggest a definitive statement as to what constitutes regulation of a nature that would subject an employee to the provisions of W. Va. Code § 6B-2-5(h). This definition should exclude application of the act to agencies which have functions affecting large segments of the population in a very general way as contrasted to those which affect highly specialized businesses which are supervised regarding the conditions of their work places, rates they may charge, and other aspects of their operations which are integral to the very conduct of those businesses.

I am an attorney working for the Legal Division of the Department of Tax and Revenue, and have obtained a waiver to seek employment. In obtaining the Advisory Opinion granting this waiver the Ethics Commission has ruled that the Department of Tax and Revenue regulates every potential employer. Under this ruling and the proposed rules, an attorney would be required to report the fact that he sought a one night a week janitorial job or pizza delivery job. This result is patently absurd.

2. I suggest a definition of the words "policy making," "non-ministerial" or "regulatory authority" which clarifies that persons other than those with final decision making responsibilities do not fall within these definitions. Those who operate under the instructions and orders of their superiors should be excluded from the requirements of W. Va. Code § 6B-2-5(h) when actions being taken by the agency can

not be taken without the final approval of the superior.

West Virginia Code § 6B-1-3(e) provides the following definition of "ministerial functions":

"Ministerial functions" means actions or functions performed by an individual under a given state of facts in a prescribed manner in accordance with a mandate of legal authority, without regard to, or without the exercise of, such individual's own judgment as to the propriety of the action being taken.

This definition leaves open the central question as to whether persons are exercising their own individual judgment as to the propriety of the action being taken when those persons' actions are not final administration actions without a superior having the opportunity to reverse the action.

In the Advisory Opinion request I had discussed my activities in preparation of legislation, regulations and rulings and concluded that I could not say they were merely ministerial because in the initial performance of those duties I had to use my professional judgment regarding the action to be taken. Nevertheless, I am subject to the control of my superiors who may overturn my initial positions and require adoption of a different position. Upon examination of the definition of ministerial in Black's Law Dictionary I find that there are two conflicting standards as to whether my duties would be considered ministerial. Black's provides the following definition:

Ministerial. - That which is done under the authority of a superior; opposed to judicial. That which involves obedience to instructions, but demands no special discretion, judgment, or skill. State Tax Commission of Utah v. Katsis, 90 Utah 406, 62 P.2d 120, 123; Arrow Exp. Forwarding Co. v. Iowa State Commerce Commission, Iowa, 130 N.W.2d 451, 453. Official's duty is "ministerial" when it is absolute, certain and imperative, involving merely execution of a specific duty arising from fixed and designated facts. Long v. Seabrook, 260 S.C. 562, 197 S.E.2d 659, 662.

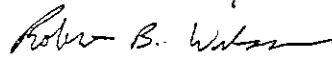
The standard set forth in the South Carolina case seems to look at functions which involve no judgment or assessments of the duty under the facts. The standard set forth in the Utah and Iowa cases seems to look at whether judgments and assessments of the action to be taken are made by a superior. I believe that where the individual's own judgment as to the propriety of the

action being taken is subject to revision by the superior prior to such action being taken, should be considered ministerial and the proposed rule should adopt definitions clearly enunciating such a rule.

3. I would like to make the following observations generally regarding the West Virginia Governmental Ethics Act. It is interesting to note that those with legislative authority including the ultimate decision making role in the creation of statutory and regulatory law have exempted themselves from the provisions of W. Va. Code § 6B-2-5(h). To date I am unaware of any instance of a person without final decision making authority for a particular regulatory function within a governmental agency having been accused of any impropriety in the execution of that function. Yet the papers abound with allegations of legislators engaging in improper activities in the conduct of their government functions. While some legislators have been convicted for actual extortion to obtain favorable votes, no censure is available for those legislators who vote on general legislation or regulations which directly and significantly impact upon businesses in which they have significant interest. Further, although the Ethics Commission has authority to investigate incidents in which there is an actual allegation of improper influence of a legislator's vote by inducements associated with subsequent employment with a business which is directly affected by such a vote, there is no requirement that the legislator comply with the prophylactic provisions of W. Va. Code § 6B-2-5(h). It is therefore highly insulting to the average state employee to have to suffer the indignity and inconvenience of complying with the prohibitory provisions of W. Va. Code § 6B-2-5(h), and the chilling provisions of the proposed rule requiring a list of all potential employers if a waiver has been obtained, when that person has no decision-making responsibility in any matter affecting any of those potential employers the person must report. By properly limiting the scope of its application, W. Va. Code § 6B-2-5(h) can be a valuable safeguard of the bureaucratic regulatory machinery. In attempting to overstep the salubrious functions of its provisions by applying the statute to persons who have no decision-making authority, it is at best insulting and at worst an illegal regulation of the practice of law and in restraint of trade as applied to government attorneys. In practice, many employees of the Department of Tax and Revenue would be reduced to a state of involuntary servitude if rules are not imposed which adequately restrict the application of W. Va. Code § 6B-2-5(h) to those situations where abuse of one's government authority is actually a potential problem.

Please advise me as to the date and time of the Legislative Rule-Making Review Committee hearing on this matter.

Sincerely,



Robert B. Wilson, Esq.
7-A Webster Terrace
Charleston, WV 25301

ks



FILED

1991 JUN 21 AM 9:55 State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Charleston 25305

Mailed Sept. 14

CHARLES O. LORENSEN
SECRETARY

90 SEP 17 P2:23

September 14, 1990

Mr. Richard M. Alker
Executive Director
West Virginia Ethics Commission
4th Floor, Litton Building
1207 Quarrier Street
Charleston, West Virginia 25301

Dear Mr. Alker:

Please consider this letter a comment on the proposed legislative rules establishing guidelines concerning employment for persons covered by the West Virginia Governmental Ethics Act. (West Virginia Code § 60-2-5(h) Draft, Series 2, 158-11-1 Employment.)

I am an employee of the West Virginia Department of Tax and Revenue and have been an active member of the West Virginia State Bar since 1975. I have recently been granted an exemption, conditioned upon the proposed rules.

I wish to offer the following observations and comments with regard to the proposed rules. The proposed rules substantially retard the ability of an individual to better their financial, personal, or physical well being by burdensome restrictions under the guise of protecting the integrity of governmental service. In particular, the requirement that approval for subsequent employment opportunities be at the whim of one's immediate supervisor is unconscionable. While the premise of this proposed rule contemplates persons acting reasonably, there is no requirement that one's immediate supervisor will cooperate in a timely manner. Further, it is likely that in many instances one's supervisor may not be available, or priorities are such that attention cannot be given to the completed employer disclosure statement.

Mr. Richard M. Alker
September 14, 1990
Page 2

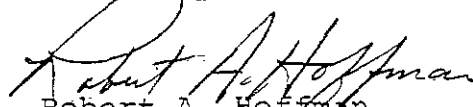
In addition to the above comment, one can speculate that personalities may also come to bear. It is not far fetched to consider an immediate supervisor looking at this circumstance as an opportunity for retribution or mischief in retarding their employee's ability to seek other employment. In many instances, the reasons for seeking other employment may have nothing to do with one's job satisfaction.

Finally, the Commission's efforts to protect the integrity of government could be satisfied, without unreasonably burdensome requirements on individuals. In many instances, employment opportunities must be acted upon immediately. It would be presumptuous to believe a prospective employer would withhold consideration of individuals until a covered prospective applicant follows the proposed route for approval to seek employment.

I see no reason why covered employees cannot obtain the necessary permission from the Ethics Commission, with applications being matters of public record. Any employer or other interested person wishing to review those requests should be able to do so. It would further be worth considering to simply require the prospective applicant to inform their supervisor that they are seeking employment and with whom. It is the signature approval of the supervisor that I find particularly objectionable.

I understand the very great need for attention to matters dealing with governmental ethics. I also applaud the West Virginia Ethics Commission for their work in breathing life into the West Virginia Governmental Ethics Act. I suggest, however, that in their zeal to pursue the objectives of an overriding interest of governmental ethics, the abilities and rights of the individual so affected can be accommodated in a more tempered way.

Sincerely,


Robert A. Hoffman
Director
Property Tax Division

RAH/psp

Enclosure



214 Brookhaven Drive
West Virginia 25143
September 13, 1990
State of West Virginia
Department of Tax and Revenue

GASTON CAPERTON
GOVERNOR

Charleston 25305

CHARLES O. LORENSEN
SECRETARY

Mr. Rick Alker
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

Re: Proposed Rule On Employment

Dear Mr. Alker:

The purpose of this letter is to comment on the West Virginia Ethics Commission's proposed rule on employment-Series 158-11. While I understand the necessity for a rule, the rule, as written, offends my sense of justice and fair play.

The rule is overly broad in that it contains an inherent presumption that all public employees are employed by a regulating agency and, therefore, are subject to the rule. As a result, regardless of whether a person is subject to the rule, it is necessary for the public employee to request an exemption in order to determine that such employee is not subject to the rule. In so doing, the employee is submitting himself or herself to the jurisdiction of the Ethics Commission.

The rule appears to prohibit any contact for employment purposes between an employee of a regulating agency and a regulated person unless the employee first obtains an exemption or terminates employment. Such a rule is vague because there is no definition of "regulate," "regulated" or "regulating." Additionally, the terms "policy making" and "nonministerial" are utilized within the rule but are also not defined. As a result, a public employee may not easily determine whether it is necessary to obtain an exemption prior to seeking employment elsewhere.

The Ethics Commission, in Advisory Opinion No. 89-39, in essence stated that the Department of Tax and Revenue regulated every law firm and every corporation in West Virginia. Such a determination is in my opinion totally incorrect. The Tax Division of the Department of Tax and Revenue equally and uniformly administers and enforces the tax laws of West Virginia. It does not regulate law firms and corporations because it does not direct the activities of those professions and businesses. The collection of taxes cannot be equated to the regulation of businesses and professional activities. Therefore, an employee of the Tax Division cannot be considered as being employed by a regulating agency. However, even if the Tax Division is a regulating agency, the scope of the rule is so broad as to cover supervisory personnel who are

not involved with taxpayers, who don't make policy or who perform nonministerial duties. The Ethics Commission determination is but one example of why the term "regulate" should be defined and such definition should be distinguished from "administer" and "enforce." Additionally, the terms "nonministerial" and "policy making" must also be defined.

Section 158-11-4.2 of the proposed rule requires an employee to give to the Ethics Commission and the employee's immediate supervisor the names and addresses of all regulated persons with whom employment is sought. Aside from the fact that it is impossible to discern who may be a regulated person, it is ludicrous to require the filing of such information. Public employees have not given up their respective rights of citizenship merely by being public employees. Such a tawdry display of "big brother" attitudes is not acceptable.

Under Section 158-11-4.4c of the proposed rule, the application for an exemption must contain "'facts' sufficient to support a finding that the prohibition deprives the requestor of 'the ability to earn a livelihood in this State outside of the governmental agency'." The term "livelihood" should be defined. Once again, there is the inherent presumption that the employee is subject to the prohibition and then that the prohibition does not prevent the employee from earning a livelihood outside of State government. As the rule is currently written, anyone who is covered by the prohibition is automatically prevented from earning a livelihood outside of the governmental agency until such time as an exemption is obtained or employment is terminated. Therefore, it is absurd that an employee be required to show that he or she cannot earn a livelihood in the area in which trained in order to gain an exemption from a very questionable prohibition.

Section 158-11-4.2 in essence states that a public employee who is granted an exemption will be required to provide prior written notice of the names and addresses of all regulated persons with whom they seek employment. The very fact that an employer's name will be on record in this manner for employment purposes may harm the employment prospects of certain types of public employees. Additionally, any public employee who merely responds to an advertisement within the newspapers and the response is to a box number will certainly not provide very much information to the Ethics Commission. Such a requirement is, at the very least, inappropriate and may be considered an invasion of privacy.

Section 158-11-4.4f requires that the public employee requesting an exemption must provide the Ethics Commission with a copy of the person's resume. This also appears to be another vague, overly broad requirement, the necessity of which is doubtful at best.

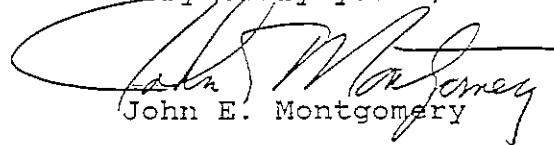
Section 158-11-4.5 provides that the requestor will be notified if the Ethics Commission denies the exemption request. However, there are no provisions within the rule relating to the requestor's

appeal rights in the event that the exemption is denied. Does this therefore mean that such an individual may not appeal the decision of the Ethics Commission and, in the case of a denial of the request, would be required to first terminate government employment before seeking other employment? Surely, such an absurd result is not intended. In essence, to require a person to terminate employment before seeking other employment or to continue unhappily in their current government employment would be tantamount to involuntary servitude.

The rule prohibits "any contact with a regulated person" relating to the availability or conditions of employment. It would appear that such a prohibition may be considered to infringe upon individual freedoms of speech and association.

In conclusion, as was indicated previously, there is a necessity for such a rule. However, this rule is overly broad and far reaching in its effect.

Very truly yours,



John E. Montgomery

ss

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

ROBERT E. WILKINSON
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

Telephone: (304) 345-4000
Corporations: 342-8000



STATE OF WEST VIRGINIA

SECRETARY OF STATE

Charleston 25305

WILLIAM H. HARRINGTON
Chief of Staff

JUDY COOPER
Director, Administrative Law

DONALD R. WILKES
Director, Corporations

SHEREE COHEN
Special Assistant

(Plus all the volunteer
help we can get)

October 3, 1990

Mr. Richard Alker, Executive Director
West Virginia Ethics Commission
Fourth Floor, Litton Building
1207 Quarrier Street
Charleston, West Virginia 25301

Dear Mr. Alker:

Today I received a letter from you to John E. Montgomery who had requested an exemption from the employment provisions of the ethics law (See Attachment A). In this letter you say the terms of your proposed legislative rules on employment provide certain conditions that must be met before his request can be granted. I have included a copy of the rules in question as Attachment B. The provisions of §6B-2-5(h) clearly envision standards for granting an exemption, but the Ethics Commission will not be able to enforce these guidelines as long as they are part of a legislative rule that has not been passed by the Legislature and adopted by the Commission. See West Virginia Code §29A-3-9 to 13. Because your letter seeks to enforce the provisions of a proposed legislative rule and a proposed legislative rule does not have any force or affect at law, I must advise you that your letter misrepresents the status of these rules under the Administrative Procedures Act. Additionally, I am requesting that you renounce all efforts to enforce the provisions of proposed Series 11. If the Ethics Commission should continue its efforts to enforce rules that are not validly promulgated under the Administrative Procedures Act, it will be facing potential liability for illegally interfering with the privacy and property rights of state employees.

If you have any questions, please feel free to contact me.

Sincerely,

Robert E. Wilkinson
Robert E. Wilkinson
Deputy Secretary of State

Attachments



STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION

4TH FLOOR — LITTON BUILDING
1207 QUARRIER STREET
CHARLESTON, WEST VIRGINIA 25301
(304) 348-0664

RICHARD M. ALKER
EXECUTIVE DIRECTOR

October 9, 1990

Mr. Robert E. Wilkinson
Deputy Secretary of State
State Capitol Building
Charleston, WV 25305

Dear Mr. Wilkinson,

I am responding to your October 3, 1990 letter on behalf of Mr. Alker and the Ethics Commission.

We understand after reading your letter and discussing this matter with you how it may have appeared that we were trying to enforce a legislative rule prior to its enactment and want to assure you that was not the Commission's intention. Whether the individuals accept the conditions attached to receiving an employment exemption is a relevant factor considered by the Ethics Commission in deciding whether to grant the exemption as permitted by subsection 6B-2-5(h)(3). However, we thank you for bringing this matter to our attention.

Therefore, the letter we will be sending to individuals who have requested employment exemptions has been changed to delete any reference or reliance on the Commission's proposed rules and regulations.

Thank you for your assistance and cooperation in this matter.

With warmest regards,

Lyne Ranson,
Legal Counsel for
The Ethics Commission

RLR/mc

cc: Richard M. Alker

214 Brookhaven Drive
Nitro, WV 25143
September 13, 1990

Mr. Lee Feinberg, Chairman
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

Re: Request For Exemption From The Prohibition Against
Seeking Outside Employment

Dear Mr. Feinberg:

The purpose of this correspondence is to request an exemption from the prohibition against seeking private employment as outlined in West Virginia Code § 6B-2-5(h)(3).

My present employment is that of a Tax Counsel III in the Legal Division of the Department of Tax and Revenue. My duties include the drafting of Tax Department regulations, the drafting of legislation, the drafting of taxpayer correspondence for signature by another, the review of correspondence of other attorneys for signature by another, and various and other sundry activities. I do not represent the Department at administrative hearings for the Office of Hearings and Appeals. In essence, my primary activities are those of research and writing.

I am a 1972 graduate of Drake University Law School and I am a member in good standing of both the Oklahoma Bar and the West Virginia Bar. Due to the fact that professional advancement is rather limited within State government, I desire to seek employment elsewhere. As a result, I am concerned with the language contained in West Virginia Code § 6B-2-5(h) which prohibits a full-time public employee from seeking employment with any person who is or may be regulated by the governmental body with which such employee serves.

West Virginia Ethics Commission Advisory Opinion No. 89-39 in essence seems to state that the Department of Tax and Revenue regulates all taxpayers in West Virginia. Even though I am not in agreement with that determination, I feel others may decide that I am prohibited from seeking employment with any law firm or business in this State unless I first quit my employment. Because that is economically unfeasible, I am hereby requesting this waiver. Please be advised that this request is not an admission that I am in any way subject to the provisions of West Virginia Code § 6B-2-1 et seq.

Should you have any questions or need additional information, please contact me at the above address or by telephone at 348-5330.

Very truly yours,

John E. Montgomery

SS



STATE OF WEST VIRGINIA
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 1207 QUARRIER STREET
 CHARLESTON, WEST VIRGINIA 25301
 (304) 348-0664

RICHARD M. ALKER
 EXECUTIVE DIRECTOR

September 26, 1990

Mr. John E. Montgomery
 214 Brookhaven Drive
 Nitro, WV 25143

Dear Mr. Montgomery,

This is to advise you that the Ethics Commission has received your request for an employment exemption and has numbered it EE 90-27. Granting of the exemption is conditioned upon your acceptance of the following procedure.

The Commission's proposed rules and regulations require that an exempted person provide the Commission with a completed employer disclosure statement, acknowledged by his or her supervisor, prior to seeking employment with a regulated person.

This statement informs the exempted person's supervisor of the existence of the exemption and of the persons with whom employment will be sought so that the supervisor can insure that the exempted person does not work on matters relating to such persons. If such contact can not be avoided, it is recommended that the supervisor exercise close supervision of the actions of the exempted person in regard to potential employers.

Since this Commission procedure requires that the employer disclosure statement(s) become a matter of public record, it is necessary for you to indicate below whether you wish to pursue the exemption request.

Very truly yours,

Richard M. Alker
 Executive Director

attachment: rules
 disclosure

☐ Yes, I wish to request the exemption. ☐ No, I do not wish to request the exemption.

Name: _____ Department _____

Signature: _____ Date: _____

WEST VIRGINIA ETHICS COMMISSION

4th Floor Litton Building
1207 Quarrier St.
Charleston WV 25301
304-348-0664

EE 90-27

EMPLOYMENT EXEMPTION DISCLOSURE STATEMENT

Name: _____ Department: _____
(please print)

Part I

EMPLOYEE STATEMENT

I understand that the exemption granted me by the WV Ethics Commission applies only to those persons listed on this or other Disclosure Statements filed by me with the Commission. I understand that I may not seek employment with any such person until they are identified on a Disclosure Statement filed with the Commission. I intend to seek employment with the following persons.

NAME/ADDRESS:

Employee's Signature: _____ Date: _____

Part II

SUPERVISOR'S ACKNOWLEDGEMENT

The WV Governmental Ethics Act prohibits certain full-time public employees and public officials from seeking employment with a person who is or may be regulated by the governmental agency by which they are employed. Your subordinate has been granted an exemption by the WV Ethics Commission to seek employment with such persons.

Provisions of the Ethics Act require that, to the extent possible, your subordinate not work on matters related to persons with whom he or she is seeking employment. If such contact can not be avoided, it is recommended that you closely supervise your subordinate in such matters.

Please note the employers listed on this Statement. Your subordinate's exemption applies only to those employers listed on this or other Disclosure Statements which you have acknowledged.

The Commission will appreciate your cooperation in promptly acknowledging this Statement and in implementing the provisions set out above. If you have any questions please call the Commission at 348-0664.

Printed name of supervisor: _____ Dept. _____

Supervisor's Signature: _____ Date: _____

158-11-1 EMPLOYMENT

1.1 Scope -- These legislative rules establish the guidelines concerning employment for persons covered by the WV Governmental Ethics Act.

1.2 Authority -- WV Code 6B-2-5(h)

1.3 Filing Date --

1.4 Effective Date --

158-11-2 General

2.1 Full-time public employees and officials may not seek employment with or be employed by a person that is or may be regulated by the governmental agency with which they are employed. This prohibition applies only to those employees who exercise policymaking, nonministerial or regulatory authority.

2.2 The prohibition exists only so long as an employee or official is employed by the regulating agency. Such a person is relieved from the prohibition immediately upon terminating his or her employment with the regulating agency. There is no waiting period.

2.3 No regulated person shall offer employment to a full-time employee or official of the regulating agency during their employment with the agency.

2.4 The prohibition does not apply to the activities of employees and officials for or on behalf of charitable or not for profit public service entities from which they derive no pecuniary benefit.

158-11-3 Definitions

3.1 "Seek employment" Any contact with a regulated person, directly or through an intermediary, relating to the availability or conditions of employment in furtherance of obtaining employment. Responding to unsolicited inquiries from a regulated person concerning employment would also constitute seeking employment.

3.2 "Offer employment" Any contact by a regulated person with a full-time employee or official of a regulating governmental agency, directly or through an intermediary, relating to employment constitutes "offering employment".

DRAFT

3.3 "May be regulated" A person is one who "may be regulated" if there is a reasonable probability that the person will be regulated. There must be a showing that the person's activities are of the nature and extent ordinarily regulated by the governmental agency.

158-11-4 Requests for Exemptions

4.1 Exemptions will not be granted for secondary employment [moonlighting] with regulated persons.

4.2 Persons requesting exemptions will be advised that exemptions are granted only upon condition that exempted persons give prior written notice to both their immediate supervisor and the Ethics Commission of the names and addresses of all regulated persons with whom they seek employment.

4.3 The Commission shall maintain a record of those persons granted exemptions and the names and addresses of the regulated persons with whom they seek employment. These records will be available for public examination.

4.4 An application for exemption shall contain the following information:

- a. the name, address and phone number of the governmental agency by which the requestor is employed
- b. the requestor's job title and the name of his or her immediate supervisor
- c. "facts" sufficient to support a finding that the prohibition deprives the requestor of "the ability to earn a livelihood in this state outside of the governmental agency"
- d. the names of the regulated persons with whom the requestor expects to seek employment
- e. a copy of the requestor's job description
- f. a copy of the requestor's resume, if he or she has one prepared.

4.5 If an exemption is granted, the Commission shall notify both the requestor and his or her supervisor. If the Commission denies an exemption request, only the requestor shall be notified.

4.6 Exempted persons are responsible for notifying the Commission of their intention to seek employment with any regulated person. Notice shall be given on disclosure forms provided by the Commission prior to seeking employment with the regulated person.

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4.7 Disclosure forms are to be filed out and signed by the exempted person, acknowledged by his or her supervisor and returned to the Commission. The acknowledgement by the exempted person's supervisor serves as notice to the supervisor that he or she is responsible to limit, to the fullest extent possible, the exempted person's official action on any matter relating to a person with whom the exempted person is seeking employment.

4.8 It is the responsibility of the exempted person's supervisor to insure that:

- a. the exempted person takes no official action on a matter which will have a direct effect on the financial interest of a person with whom the exempted person is seeking employment, or, if that is not possible,
- b. the official action of the exempted person be subjected to additional review by the supervisor.

4.9 It is a violation of the Act for any person granted an exemption to take any official action on a matter which will have a direct effect on the financial interest of a person with whom he or she is seeking employment. If the exempted person has sought and been denied the authorization of his or her supervisor to avoid such action there is no violation.

214 Brookhaven Drive
Nitro, WV 25143
October 4, 1990

Mr. Richard M. Alker
Executive Director
West Virginia Ethics Commission
1207 Quarrier Street
Charleston, WV 25301

Re: Request for Exemption from the Prohibition Against
Seeking Outside Employment
EE90-27

Dear Mr. Alker:

This is in response to your letter of September 26, 1990 wherein the exemption requested in my letter of September 13, 1990 was granted but conditioned upon my acceptance of a procedure provided in the Ethics Commission's proposed rules and regulations. Please be advised that after due consideration, I have concluded that I cannot in good conscience agree to such a procedure. Neither the Ethics Act nor the Administrative Procedures Act authorizes the Ethics Commission to make exemptions conditional upon acceptance of mere proposed legislative rules.

At the outset, you have not informed me of the reasons why I am even subject to the prohibition requirements. As previously explained, I do not regulate any persons and while I research and draft policy oriented documents and correspondence, and review the work product of other attorneys, all of the documents, work product and correspondence are ultimately approved by others before appropriate dissemination; therefore, I also am not a policy maker. I am not sure what comprises "non-ministerial authority;" perhaps an appropriate definition could be provided. Suffice it to say that even though a fellow attorney was informed by you that any State Tax Department employee above the level of clerk or secretary is considered a "policy maker," a mere supervisor should not be deemed to be a policy maker or to possess non-ministerial authority sufficient to be subjected to the prohibition requirements solely on the basis of being a supervisor. The prohibition should apply to those employees who are in the position of making decisions respecting specific taxpayers. As a result, I hereby request a

full and complete explanation as to why I am even subject to the prohibition.

Enclosed with your letter of September 26, 1990 was a draft copy of the proposed Ethics Commission rule on employment. The Office of the West Virginia Secretary of State indicated the rule is not in effect. Therefore, the procedures incorporated in the proposed rule have no legal force or effect.

Both the person who supervises my work, Richard E. Boyle, Jr., Director of the Legal Division of the Department of Tax and Revenue, and an attorney whose work I supervise, Robert B. Wilson, have been granted waivers which are not conditioned upon the acceptance of the proposed procedures. To deny me a waiver which is identical to those granted Mr. Boyle and Mr. Wilson is to deny me equal protection of the laws of this State and of the United States. Even an otherwise constitutional law will be held to be unconstitutional when unequally applied. If in fact I am subject to the prohibition, I hereby request the Ethics Commission grant me the same unconditional waiver, or exemption, as that granted Mr. Boyle and Mr. Wilson.

It appears the Ethics Commission is attempting to use fully a proposed rule which not only has no legal force and effect but which also on its face blatantly deprives public employees of their constitutional rights. It is unconstitutionally vague in that key terms are not defined, thus permitting arbitrary and capricious interpretation and application of the law. Because it prohibits any contact between a public employee and a "regulated person" when such contact relates to the availability of employment, the proposed rule violates individual freedom of speech which is protected by the First Amendment to the Constitution of the United States of America. Only if an employee agrees to comply with the procedures in the proposed rule is he permitted to exercise his First Amendment rights. The exercise of First Amendment rights may not be restricted in such a manner.

Integrity in government cannot be secured by squashing individual rights because government is required to protect those rights. It is irrelevant whether the individual whose rights are being restricted is a public employee or an individual in the private sector. Their respective freedoms are identical.

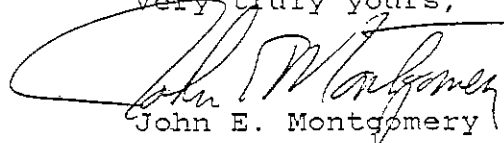
Public employees in general, and I specifically, do not enjoy a financial position which allows termination of employment prior to seeking other employment. However, that action is required of any public employee who refuses to comply with the procedures provided in the proposed rule. Such an economic bar is tantamount to involuntary servitude. Additionally, on a more realistic basis, many supervisors when informed that an employee is seeking employment elsewhere will react in a negative manner and that attitude may very well continue even though the employee does not leave. Such attitudes will certainly have a chilling effect on

those employees who desire to improve their respective economic condition.

The conditions imposed under the proposed rule surpass the restrictions imposed in West Virginia Code § 6B-2-5. However, the statute suffers from the same constitutional infirmities as those which afflict the proposed rule. It is my opinion, as well as that of several other attorneys, that neither statute nor rule could withstand a legal challenge. The exclusive authority to define, regulate and control the practice of law is vested in the West Virginia Supreme Court of Appeals. State ex rel. Frieson v. Isner, W. Va., 285 S.E.2d 641 (1981). Thus, in addition to its many other constitutional defects, the statute and rules thereto violate the separation of powers requirement of Article V, § 1 of the West Virginia Constitution.

If I am subject to the prohibition, I once again request an unconditional exemption from the prohibition. Failure to grant the request for such exemption will leave me no choice but to take appropriate legal action. Due to your failure to provide a valid exemption in a timely manner, I was unable to even contact a prospective employer for the nonlegal position for which I sought the exemption. As a result, my causes of action includes not only numerous constitutional grounds, but economic damage as well.

Very truly yours,



John E. Montgomery

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