

Form #3

OFFICE WEST VIRGINIA
SECRETARY OF STATE

Authorized Signature _____

STATEMENT OF CIRCUMSTANCES
Title 158, Series 11, Employment Exemptions

The Ethics Act was amended during the 2008 Regular Legislative Session through the passage of H. B. 4524. This new rule is intended to implement the provisions relating to limitations on seeking employment with vendors if a public servant exercises control over a contract with the vendor.

BRIEF SUMMARY OF PROPOSED RULE
Title 158, Series 11, Employment Exemptions

During the 2008 Legislative Session, the Ethics Act was amended to add a provision which places limitations upon public officials or employees working or seeking employment with vendors over whom they exercise control. These employees may seek employment with the vendors in question, but must first seek an employment exemption from the Ethics Commission. This same requirement and procedure already exists for public officials or employees who exercise regulatory authority.

The amendment sets forth the exemption process. Essentially, exemptions are automatically granted. The purpose of the exemption requirement is not to interject a third party decision-maker into the process of deciding where a public employee may seek employment; instead, it implements safeguards to ensure that the process is transparent and that employees who are seeking employment are removed from the decision-making process in regards to vendors over whom they exercise control.

The Rule has also been cleaned-up to make it consistent with Ethics Commission practice in regards to granting exemptions. When the Rule was promulgated in 1992, it contained the requirement that the employee set forth in his or her exemption request “facts sufficient to support a finding that the prohibition for all practical purposes deprives the applicant of ‘the ability to earn a livelihood in this state outside of the governmental agency.’” This standard was initially incorporated into the Ethics Act and then later removed; presumably because it impermissibly and impracticably limited a public employee’s ability to seek work in the private sector. Nonetheless, reference to this standard remained in the Rule. The proposed amendment

seeks to remove this outdated and erroneous statement of the applicable law.

Last, for informational purposes, there are still restrictions in the Ethics Act on elected officials, appointed public officials, attorneys and accountants appearing back before their agency for a 1 year period. W.Va. Code § 6B-2-5(g). Moreover, all public officials and employees are limited in regards to working on matters in the private sector when they personally and substantially participated in a decision-making capacity through their public employment. W.Va. Code § 6B-2-5(f). The Rule does not seek to clarify or modify these provisions.

TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION

FILED

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SERIES 11
EMPLOYMENT EXEMPTIONS

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§ 158-11-1. General.

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

1.2. Authority. -- W. Va. Code §6B-2-5(h)

1.3. Filing Date. -- ~~April 29, 1992~~

1.4. Effective Date. -- ~~June 1, 1992~~

§ 158-11-2. General Prohibitions.

~~2.1.a. For the purpose of this section "employment" does not include 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.~~

~~-----b. 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.~~

~~-----c. 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.~~

~~-----2.2. No regulated person shall offer employment to a full-time employee or official of the regulating agency during their employment with the agency.~~

2.1. Full-time public employees and officials who exercise policymaking, nonministerial or regulatory authority may not seek employment with or be employed by a person that they regulate unless they seek and receive an exemption from the

Ethics Commission. A person is considered to be regulated for purposes of this limitation when:

a. The person had a matter on which he or she took, or a subordinate is known to have taken regulatory action within the preceding twelve months; or,

b. The person has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

2.2. Full-time public officials or full-time public employees who exercise control over public contracts, as set forth in W.Va. Code § 6B-2-5(h)(1)(c) may not seek employment with a vendor or potential vendor unless they seek and receive an exemption from the Ethics Commission.

2.3. For the purpose of this section "employment" does not include 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.

2.4. The prohibitions on seeking employment, and the requirement that an exemption be obtained, apply only to employees or officials who are currently employed by a public agency, not those who have already terminated their employment with an agency.

2.5 Once a person has either obtained an exemption or terminated his or her employment, then there is no waiting period for seeking employment; Provided, That public officials and employees are still subject to the limitations imposed by W.Va. Code § 6B-2-5(f) in regards to representing clients in matters in which they substantially participated as a public employee; Provided, Further, That elected or appointed public officials, full-time staff attorneys and full-time accountants must wait for one year before appearing back before their agency in accordance with W.Va. Code § 6B-2-5(g).

§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 also constitutes 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" upon 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. 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.~~

~~4.2. An application for exemption shall contain the following information:~~

~~a. the name, address and phone number of the governmental agency by which the applicant is employed~~

~~b. the applicant's job title and the name of his or her immediate supervisor~~

~~c. "facts" sufficient to support a finding that the prohibition for all practical purposes deprives the applicant of "the ability to earn a livelihood in this state outside of the governmental agency"~~

~~d. the names of any persons with whom the applicant intends to seek employment who have matters on which the requestor is currently taking official action~~

~~e. a copy of the applicant's job description~~

~~f. a copy of the applicant's resume, if he or she has one prepared.~~

~~4.3. When an exempted person sees that he or she may be required to take official action in regard to a matter affecting a person with whom he or she is seeking employment, he or she is responsible for notifying his or her supervisor of the exemption and seeking to be relieved from further action in regard to such person.~~

~~4.4. 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.~~

~~—— 4.5. The power to grant exemptions pursuant to this rule is hereby delegated to the Commission Chairman and the Commission's Executive Director and either is authorized to grant such exemptions in the name of the Commission as provided by this rule.~~

~~—— 4.6. Requests for exemptions will be decided within ten working days after being received by the Commission, unless additional information is required by the Commission, in which event the request will be decided within five working days after the Commission has received the necessary information.~~

~~—— 4.7. Exemptions granted by the Commission Chairman and the Commission's Executive Director pursuant to this rule are for a period of thirty days. Within that thirty day period the exemption will be submitted to the Commission for ratification.~~

~~—— 4.8. Persons granted exemptions by the Commission Chairman or the Commission's Executive Director will be notified of the Commission's decision on ratification within ten days of the decision.~~

~~—— 4.9. Exemptions ratified by the Commission, or granted by it in the first instance, are subject to no time limit.~~

~~—— 4.10. 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 in regard to whom they have been required by their supervisors to take official action. These records are public records and are available for public examination and copying.~~

4.1. Full-time public officials or employees who are seeking an exemption shall write to the Executive Director of the WV Ethics Commission and ask for an exemption. The exemption request shall contain:

a. the name, address and phone number of the governmental

agency by which the applicant is employed

b. the applicant's job title and the name of his or her immediate supervisor

4.2. The power to grant a temporary 30 day exemption pursuant to this rule is hereby delegated to the Commission Chair, or at the Chair's direction, the Commission's Executive Director. Either is authorized to grant such exemptions in the name of the Commission as provided by this rule. A temporary exemption shall be granted within 10 business days of receipt of the request and ratified by the Ethics Commission within 45 days of receipt.

4.3. In accordance with the Ethics Act, there is no requirement that persons seeking employment show a hardship in order for an exemption to be granted. The purpose of seeking and obtaining an exemption is to ensure transparency in this process and to ensure that the public official or employee cease and desist from taking action on regulatory or contract matters affecting a person with whom the public official or employee is seeking employment. To fulfill the purpose of transparency and fairness, the following restrictions are hereby imposed:

a. Once a temporary exemption or exemption is granted, the public official or employee shall provide a copy of the exemption to his or her supervisor within 2 business days of receiving the exemption.

b. The public official or employee may take no action in regards to a person or persons with whom they are seeking employment, including the exercise of control over public contracts, unless it would create an undue hardship on the agency to prohibit him or her from carrying out his or her public job responsibilities. If this limitation will impose an undue hardship, then the affected public official or employee may take action when authorized by their employing agency's executive director or governing body. These actions shall be subject to additional review by a supervisor or the governing body.

4.4. Exemptions granted by the Commission are subject to no time limits.

4.5. The Commission shall maintain a record of those persons granted exemptions. These records are public records and are available for public examination and copying.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: August 21, 2008

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) WV Ethics Commission, 210 Brooks Street, Suite 300,
Charleston, WV 25301
(304) 558-0664

LEGISLATIVE RULE TITLE: _____
Title 158, Series 11, Employment Exemptions

1. Authorizing statute(s) citation W.Va. Code §6B-2-5(h)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

June 16, 2008

b. What other notice, including advertising, did you give of the hearing?

A copy of the proposed Rule was mailed to all Elected Members of the Board of Public Works and various representative agencies in State Government which exercise regulatory control or purchase over public contracts, or both. A copy was also mailed to the the Association of Counties and the Municipal League. An article about the proposed rule and comment period was published in the July 2008 issue of "The Buyers Network," a monthly newsletter published by the WV Purchasing Division.

c. Date of Public Hearing(s) *or* Public Comment Period ended:

July 18, 2008

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____

No comments received X

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

August 21, 2008

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Theresa M. Kirk, Legal Counsel
210 Brooks Street, Suite 300
Charleston, WV 25301

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If 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.

b. Date of hearing or comment period:

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

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Employment Exemptions

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: WV Ethics Commission

Address: 210 Brooks St., Suite 300
Charleston, WV 25301

Phone Number: 558-0664 Email: theresa.m.kirk@wv.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

This rule will have no fiscal impact.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	Current Increase/Decrease (use "-")	Next Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00		0.00
Personal Services	0.00		0.00
Current Expenses			
Repairs & Alterations	0.00		0.00
Assets			
Other			
2. Estimated Total Revenues	0.00		0.00

Rule Title: _____

Rule Title:

Employment Exemptions

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

There is no fiscal impact. While the Rule will generate more requests from the Commission as it implements the portion of the Ethics Act which places limitations on public servants from seeking employment with vendors over whom they exercise control, these additional responsibilities may be handled by existing Commission staff.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: 8/18/06

Signature of Agency Head or Authorized Representative

Lewis D. Brown