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OFFICE WEST VIRGINIA
SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 2004



ENROLLED

COMMITTEE SUBSTITUTE
FOR

House Bill No. 2801

(By Delegates Hrutkay, Amores, Pethel, Pino and Stemple)



Passed March 12, 2004

In Effect Ninety Days from Passage

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H. B. 2801

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[Passed March 12, 2004; in effect ninety days from passage.]

AN ACT to amend and reenact §6B-2-3 and §6B-2-5 of the code of West Virginia, 1931, as amended, clarifying the law relating to the solicitation of donations by a member of the Legislature, and requiring the ethics commission to furnish copies of advisory opinions to the Legislature and the supreme court of appeals.

Be it enacted by the Legislature of West Virginia:

That §6B-2-3 and §6B-2-5 of the code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2. WEST VIRGINIA ETHICS COMMISSION; POWERS AND DUTIES; DISCLOSURE OF FINANCIAL INTEREST BY PUBLIC OFFICIALS AND EMPLOYEES; APPEARANCES BEFORE PUBLIC AGENCIES.

§6B-2-3. Advisory opinions; enforcement; applicability; legislative review; rule making.

1 (a) A person subject to the provisions of this chapter may
2 make application in writing to the ethics commission for an
3 advisory opinion on whether an action or proposed action
4 violates the provisions of this chapter or the provisions of
5 section fifteen, article ten, chapter sixty-one of this code and
6 would thereby expose the person to sanctions by the commis-
7 sion or criminal prosecution. The commission shall respond
8 within thirty days from the receipt of the request by issuing an
9 advisory opinion on the matter raised in the request. All
10 advisory opinions shall be published and indexed in the code of
11 state rules by the secretary of state: *Provided*, That before an
12 advisory opinion is made public, any material which may
13 identify the person who is the subject of the opinion shall, to the
14 fullest extent possible, be deleted and the identity of the person
15 shall not be revealed. A person subject to the provisions of this
16 chapter may rely upon the published guidelines or an advisory
17 opinion of the commission, and any person acting in good faith
18 reliance on any such guideline or opinion shall be immune from
19 the sanctions of this chapter and the sanctions of section fifteen,
20 article ten, chapter sixty-one of this code, and shall have an
21 absolute defense to any criminal prosecution for actions taken
22 in good faith reliance upon any such opinion or guideline in
23 regard to the sanctions of this chapter and the sanctions of
24 section fifteen, article ten, chapter sixty-one of this code.

25 (b) By the first day of the third month of the calendar year,
26 the ethics commission shall annually furnish copies of all
27 advisory opinions issued during the preceding calendar year to
28 the archives and history section of the division of culture and
29 history, the office of the Clerk of the West Virginia House of
30 Delegates, the office of the Clerk of the West Virginia Senate
31 and the West Virginia Supreme Court of Appeals Law Library.
32 Accompanying the initial delivery of the previous calendar
33 year's advisory opinions after the enactment of this subsection,
34 the commission shall supply each of these offices with copies

35 of all advisory opinions issued subsequent to the creation of the
36 commission.

§6B-2-5. Ethical standards for elected and appointed officials and public employees.

1 (a) Persons subject to section.—The provisions of this
2 section apply to all elected and appointed public officials and
3 public employees, whether full or part time, in state, county,
4 municipal governments and their respective boards, agencies,
5 departments and commissions and in any other regional or local
6 governmental agency, including county school boards.

7 (b) Use of public office for private gain.— (1) A public
8 official or public employee may not knowingly and intention-
9 ally use his or her office or the prestige of his or her office for
10 his or her own private gain or that of another person. The
11 performance of usual and customary duties associated with the
12 office or position or the advancement of public policy goals or
13 constituent services, without compensation, does not constitute
14 the use of prestige of office for private gain.

15 (2) The Legislature, in enacting this subsection (b), relating
16 to the use of public office or public employment for private
17 gain, recognizes that there may be certain public officials or
18 public employees who bring to their respective offices or
19 employment their own unique personal prestige which is based
20 upon their intelligence, education, experience, skills and
21 abilities, or other personal gifts or traits. In many cases, these
22 persons bring a personal prestige to their office or employment
23 which inures to the benefit of the state and its citizens. Such
24 persons may, in fact, be sought by the state to serve in their
25 office or employment because, through their unusual gifts or
26 traits, they bring stature and recognition to their office or
27 employment and to the state itself. While the office or employ-
28 ment held or to be held by such persons may have its own

29 inherent prestige, it would be unfair to such individuals and
30 against the best interests of the citizens of this state to deny
31 such persons the right to hold public office or be publicly
32 employed on the grounds that they would, in addition to the
33 emoluments of their office or employment, be in a position to
34 benefit financially from the personal prestige which otherwise
35 inheres to them. Accordingly, the commission is directed, by
36 legislative rule, to establish categories of such public officials
37 and public employees, identifying them generally by the office
38 or employment held, and offering persons who fit within such
39 categories the opportunity to apply for an exemption from the
40 application of the provisions of this subsection. Such exemp-
41 tions may be granted by the commission, on a case-by-case
42 basis, when it is shown that: (A) The public office held or the
43 public employment engaged in is not such that it would
44 ordinarily be available or offered to a substantial number of the
45 citizens of this state; (B) the office held or the employment
46 engaged in is such that it normally or specifically requires a
47 person who possesses personal prestige; and (C) the person's
48 employment contract or letter of appointment provides or
49 anticipates that the person will gain financially from activities
50 which are not a part of his or her office or employment.

51 (c) Gifts.—(1) A public official or public employee may
52 not solicit any gift unless the solicitation is for a charitable
53 purpose with no resulting direct pecuniary benefit conferred
54 upon the official or employee or his or her immediate family:
55 *Provided*, That no public official or public employee may
56 solicit for a charitable purpose any gift from any person who is
57 also an official or employee of the state and whose position as
58 such is subordinate to the soliciting official or employee:
59 *Provided, however*, That nothing herein shall prohibit a
60 candidate for public office from soliciting a lawful political
61 contribution. No official or employee may knowingly accept
62 any gift, directly or indirectly, from a lobbyist or from any

63 person whom the official or employee knows or has reason to
64 know:

65 (A) Is doing or seeking to do business of any kind with his
66 or her agency;

67 (B) Is engaged in activities which are regulated or con-
68 trolled by his or her agency; or

69 (C) Has financial interests which may be substantially and
70 materially affected, in a manner distinguishable from the public
71 generally, by the performance or nonperformance of his official
72 duties.

73 (2) Notwithstanding the provisions of subdivision (1) of
74 this subsection, a person who is a public official or public
75 employee may accept a gift described in this subdivision, and
76 there shall be a presumption that the receipt of such gift does
77 not impair the impartiality and independent judgment of the
78 person. This presumption may be rebutted only by direct
79 objective evidence that the gift did impair the impartiality and
80 independent judgment of the person or that the person knew or
81 had reason to know that the gift was offered with the intent to
82 impair his or her impartiality and independent judgment. The
83 provisions of subdivision (1) of this subsection do not apply to:

84 (A) Meals and beverages;

85 (B) Ceremonial gifts or awards which have insignificant
86 monetary value;

87 (C) Unsolicited gifts of nominal value or trivial items of
88 informational value;

89 (D) Reasonable expenses for food, travel and lodging of the
90 official or employee for a meeting at which the official or

91 employee participates in a panel or speaking engagement at the
92 meeting;

93 (E) Gifts of tickets or free admission extended to a public
94 official or public employee to attend charitable, cultural or
95 political events, if the purpose of such gift or admission is a
96 courtesy or ceremony customarily extended to the office;

97 (F) Gifts that are purely private and personal in nature; or

98 (G) Gifts from relatives by blood or marriage, or a member
99 of the same household.

100 (3) The commission shall, through legislative rule promul-
101 gated pursuant to chapter twenty-nine-a of this code, establish
102 guidelines for the acceptance of a reasonable honorarium by
103 public officials and elected officials. The rule promulgated shall
104 be consistent with this section. Any elected public official may
105 accept an honorarium only when: (1) That official is a part-time
106 elected public official; (2) the fee is not related to the official's
107 public position or duties; (3) the fee is for services provided by
108 the public official that are related to the public official's
109 regular, nonpublic trade, profession, occupation, hobby or
110 avocation; and (4) the honorarium is not provided in exchange
111 for any promise or action on the part of the public official.

112 (4) Nothing in this section shall be construed so as to
113 prohibit the giving of a lawful political contribution as defined
114 by law.

115 (5) The governor or his designee may, in the name of the
116 state of West Virginia, accept and receive gifts from any public
117 or private source. Any such gift so obtained shall become the
118 property of the state and shall, within thirty days of the receipt
119 thereof, be registered with the commission and the division of
120 culture and history.

121 (6) Upon prior approval of the joint committee on govern-
122 ment and finance, any member of the Legislature may solicit
123 donations for a regional or national legislative organization
124 conference or other legislative organization function to be held
125 in the state for the purpose of deferring costs to the state for
126 hosting of the conference or function. Legislative organizations
127 are bipartisan regional or national organizations in which the
128 joint committee on government and finance authorizes payment
129 of dues or other membership fees for the Legislature's partici-
130 pation, and which assist this and other state legislatures and
131 their staff through any of the following:

132 (i) Advancing the effectiveness, independence, and integ-
133 rity of legislatures in the states of the United States;

134 (ii) Fostering interstate cooperation and facilitating infor-
135 mation exchange among state legislatures;

136 (iii) Representing the states and their legislatures in the
137 American federal system of government;

138 (iv) Improving the operations and management of state
139 legislatures and the effectiveness of legislators and legislative
140 staff, and to encourage the practice of high standards of conduct
141 by legislators and legislative staff;

142 (v) Promoting cooperation between state legislatures in the
143 United States and legislatures in other countries.

144 The solicitations may only be made in writing. The legisla-
145 tive organization may act as fiscal agent for the conference and
146 receive all donations. In the alternative, a bona fide banking
147 institution may act as the fiscal agent. The official letterhead of
148 the Legislature may not be used by the legislative member in
149 conjunction with the fund raising or solicitation effort. The
150 legislative organization for which solicitations are being made
151 shall file with the joint committee on government and finance

152 and with the secretary of state for publication in the state
153 register as provided in article two of chapter twenty-nine-a of
154 the code, copies of letters, brochures and other solicitation
155 documents, along with a complete list of the names and last
156 known addresses of all donors and the amount of donations
157 received. Any solicitation by a legislative member shall contain
158 the following disclaimer:

159 “This solicitation is endorsed by [name of member]. This
160 endorsement does not imply support of the soliciting organiza-
161 tion, nor of the sponsors who may respond to the solicitation. A
162 copy of all solicitations are on file with the West Virginia
163 Legislature’s Joint Committee on Government and Finance, and
164 with the Secretary of State, and are available for public review.”

165 (d) Interests in public contracts.—(1) In addition to the
166 provisions of section fifteen, article ten, chapter sixty-one of
167 this code, no elected or appointed public official or public
168 employee or member of his or her immediate family or business
169 with which he or she is associated may be a party to or have an
170 interest in the profits or benefits of a contract which such
171 official or employee may have direct authority to enter into, or
172 over which he or she may have control: *Provided*, That nothing
173 herein shall be construed to prevent or make unlawful the
174 employment of any person with any governmental body:
175 *Provided, however*, That nothing herein shall be construed to
176 prohibit a member of the Legislature from entering into a
177 contract with any governmental body, or prohibit a part-time
178 appointed public official from entering into a contract which
179 such part-time appointed public official may have direct
180 authority to enter into or over which he or she may have control
181 when such official has been recused from deciding or evaluat-
182 ing and excused from voting on such contract and has fully
183 disclosed the extent of such interest in the contract.

307 (2) Within the meaning of this section, the term “employ-
308 ment” includes professional services and other services
309 rendered by the public official or public employee, whether
310 rendered as employee or as an independent contractor; “seek
311 employment” includes responding to unsolicited offers of
312 employment as well as any direct or indirect contact with a
313 potential employer relating to the availability or conditions of
314 employment in furtherance of obtaining employment; and
315 “subordinate” includes only those agency personnel over whom
316 the public servant has supervisory responsibility.

317 (3) A full-time public official or full-time public employee
318 who would be adversely affected by the provisions of this
319 subsection may apply to the ethics commission for an exemp-
320 tion from the prohibition contained in subsection (1). The ethics
321 commission shall by legislative rule establish general guidelines
322 or standards for granting an exemption, but shall decide each
323 application on a case-by-case basis.

324 (4) A full-time public official or full-time public employee
325 may not take personal regulatory action on a matter affecting a
326 person by whom he or she is employed or with whom he or she
327 is seeking employment or has an agreement concerning future
328 employment.

329 (5) A full-time public official or full-time public employee
330 may not receive private compensation for providing informa-
331 tion or services that he or she is required to provide in carrying
332 out his or her public job responsibilities.

333 (i) Members of the Legislature required to vote.—Members
334 of the Legislature who have asked to be excused from voting or
335 who have made inquiry as to whether they should be excused
336 from voting on a particular matter and who are required by the
337 presiding officer of the House of Delegates or Senate of West
338 Virginia to vote under the rules of the particular house shall not

339 be guilty of any violation of ethics under the provisions of this
340 section for a vote so cast.

341 (j) Limitations on participation in licensing and rate-making
342 proceedings.—No public official or employee may participate
343 within the scope of his or her duties as a public official or
344 employee, except through ministerial functions as defined in
345 section three, article one of this chapter, in any license or
346 rate-making proceeding that directly affects the license or rates
347 of any person, partnership, trust, business trust, corporation or
348 association in which the public official or employee or his or
349 her immediate family owns or controls more than ten percent.
350 No public official or public employee may participate within
351 the scope of his or her duties as a public official or public
352 employee, except through ministerial functions as defined in
353 section three, article one of this chapter, in any license or
354 rate-making proceeding that directly affects the license or rates
355 of any person to whom the public official or public employee
356 or his or her immediate family, or a partnership, trust, business
357 trust, corporation or association of which the public official or
358 employee, or his or her immediate family, owns or controls
359 more than ten percent, has sold goods or services totaling more
360 than one thousand dollars during the preceding year, unless the
361 public official or public employee has filed a written statement
362 acknowledging such sale with the public agency and the
363 statement is entered in any public record of the agency's
364 proceedings. This subsection shall not be construed to require
365 the disclosure of clients of attorneys or of patients or clients of
366 persons licensed pursuant to articles three, eight, fourteen,
367 fourteen-a, fifteen, sixteen, twenty, twenty-one or thirty-one,
368 chapter thirty of this code.

369 (k) Certain expenses prohibited.—No public official or
370 public employee shall knowingly request or accept from any
371 governmental entity compensation or reimbursement for any
372 expenses actually paid by a lobbyist and required by the

373 provisions of this chapter to be reported, or actually paid by any
374 other person.

375 (l) Any person who is employed as a member of the faculty
376 or staff of a public institution of higher education and who is
377 engaged in teaching, research, consulting or publication
378 activities in his or her field of expertise with public or private
379 entities and thereby derives private benefits from such activities
380 shall be exempt from the prohibitions contained in subsections
381 (b), (c) and (d) of this section when the activity is approved as
382 a part of an employment contract with the governing board of
383 such institution or has been approved by the employees'
384 department supervisor or the president of the institution by
385 which the faculty or staff member is employed.

386 (m) Except as provided in this section, a person who is a
387 public official or public employee may not solicit private
388 business from a subordinate public official or public employee
389 whom he or she has the authority to direct, supervise or control.
390 A person who is a public official or public employee may
391 solicit private business from a subordinate public official or
392 public employee whom he or she has the authority to direct,
393 supervise or control when:

394 (A) The solicitation is a general solicitation directed to the
395 public at large through the mailing or other means of distribu-
396 tion of a letter, pamphlet, handbill, circular or other written or
397 printed media; or

398 (B) The solicitation is limited to the posting of a notice in
399 a communal work area; or

400 (C) The solicitation is for the sale of property of a kind that
401 the person is not regularly engaged in selling; or

402 (D) The solicitation is made at the location of a private
403 business owned or operated by the person to which the subordi-

404 nate public official or public employee has come on his or her
405 own initiative.

406 (n) The commission by legislative rule promulgated in
407 accordance with chapter twenty-nine-a of this code may define
408 further exemptions from this section as necessary or appropri-
409 ate.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within is approved this the 6th
day of April, 2004.

Governor

PRESENTED TO THE

GOVERNOR

DATE 4-1-04

TIME 4:35 pm