

## **Advisory Opinion 2023-09**

**Issued on September 7, 2023, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **State Community and Technical College employee** asks whether he may serve in the West Virginia Legislature while being employed by the College as a professor.

### **Facts Relied Upon by the Commission**

The Requester is employed by a West Virginia community and technical college as a full-time assistant professor. He is considering seeking election to either the West Virginia House of Delegates or Senate.

The Requester states that he works under an annually renewable, nine-month contract with the community and technical college in his full-time faculty member position. The Requester states that he may also contract with the community and technical college for additional compensation to teach summer courses or other courses not covered under his nine-month employment contract.

### **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-1-3(h) states:

“Person” means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.

W. Va. Code § 6B-2-5(b) states, in relevant part:

A public official or 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W. Va. Code R. § 158-6-5 (2022) states, in relevant part:

5.2. Improper Use- Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

W. Va. Code § 6B-2-5(l) states, in relevant part:

*Certain compensation prohibited.* -- (1) A public employee may not receive additional compensation from another publicly-funded state, county, or municipal office or employment for working the same hours, unless:

(A) The public employee's compensation from one public employer is reduced by the amount of compensation received from the other public employer;

(B) The public employee's compensation from one public employer is reduced on a pro rata basis for any work time missed to perform duties for the other public employer;

(C) The public employee uses earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment;  
or

....

W. Va. Code § 6B-2-5(i) states:

Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the presiding officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

### **Advisory Opinion**

The Requester asks whether he may continue his employment with a state community and technical college if he becomes a member of the West Virginia Legislature. The Ethics Commission has previously held that a member of the West Virginia Legislature may be employed by a state college as a part-time instructor. [Advisory Opinion 1990-65](#). The Commission also held that a member of the Legislature may serve as a municipal recorder. [Advisory Opinion 2012-23](#). The Ethics Commission has also held that an elected county commissioner may be employed by a community and technical

college and that a full-time state employee may be a part-time elected mayor. [Advisory Opinion 2021-18](#) and [Advisory Opinion 2019-21](#).<sup>1</sup>

Based on the plain language in the Ethics Act and its prior Advisory Opinions, the Ethics Commission finds that the Ethics Act does not prohibit a West Virginia Legislator from being employed by a state community and technical college. **Therefore, the Ethics Commission holds that a state community and technical college employee may serve as an elected member of the West Virginia Legislature subject to the other restrictions in the Act.**

While nothing in the Ethics Act prohibits a community and technical college employee or other public employees from serving in the West Virginia Legislature, other laws may prohibit it. Public employees should also consult with their agency's attorney to ensure that no state or federal laws or their agency's policies restrict their candidacy for or service in the West Virginia Legislature. A community and technical college or state employee may also be subject to Article 6, Section 13, of the West Virginia Constitution, which states that "[n]o person holding any other lucrative office or employment under this State, the United States or any foreign government . . . shall be eligible to a seat in the Legislature."<sup>2</sup>

If other laws or policies do not prohibit the Requester from serving in the Legislature while being employed by a community and technical college, he must comply with the provisions of the Ethics Act. The Ethics Act prohibits state employees and officials from performing campaign activities during public work hours and using public resources to subsidize an election campaign. See W. Va. Code § 6B-2-5(b); see *also* W. Va. Code R. §§ 158-6-4 through 158-6-8 (2022). The Requester must perform his elected office duties on his own time and not during his college work hours unless he takes annual or unpaid leave in accordance with W. Va. Code § 6B-2-5(l).<sup>3</sup>

Finally, the Requester asks for guidance on recusing himself from voting on matters concerning his college employer. The Ethics Act expressly states:

Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the presiding officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

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<sup>1</sup> See *also* [Advisory Opinion 1990-87](#) (a city council candidate may accept temporary employment with a state park).

<sup>2</sup> In [Advisory Opinion 1999-12](#), the Commission held that it had no authority to determine if a legislator's service on a state board is consistent with Article 6, Section 13, of the West Virginia Constitution.

<sup>3</sup> The Ethics Commission's Legislative Rule, W. Va. Code R. §§ 158-14-1 through 158-14-6 (2009), requires public employees who have other public employment or hold a public office to maintain and file verified time records with the Ethics Commission if they miss work to perform the duties of their public office or other public job and make up the missed hours in lieu of taking leave.

W. Va. Code § 6B-2-5(i). Hence, whether the Requester may vote on a matter is a question to be answered by the presiding officer of the house in which he serves. W. Va. Code § 6B-2-5(i).

While the presiding officer of the house in which the Requester may serve determines whether the Requester may vote on any matter, under the Ethics Act, the Requester may not use his legislative position to enhance his contractual benefits with his college employer. [Advisory Opinion 2012-19](#). Advisory Opinion 2012-19 also held that a Legislator may not use his or her legislative position to do the following:

- introduce, sponsor, or advocate for legislation uniquely benefitting the University;
- influence the State's distribution of federal grant money or State funds to the University for any purpose, not just those related to his consulting contract, or
- influence the appropriation of public funds to benefit the University.

The Ethics Act, however, does not require the Requester to recuse himself from votes or matters regarding legislation or the appropriation of money to his college employer. To the extent that Advisory Opinion 2012-19 and [Advisory Opinion 2012-23](#), which adopted the same restrictions, conflict with the Ethics Commission's holding today, this Opinion controls.

The Ethics Commission finds that the reasoning in Advisory Opinion 2012-19 and 2012-23 was flawed. As the Ethics Commission found in [Advisory Opinion 2021-08](#), it is the duty of the Ethics Commission to apply the plain language in the Ethics Act when the statute is clear and unambiguous. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their position for their own *private* gain or the *private* gain of another *person*. W. Va. Code 6B-2-5(b) (emphasis added). W. Va. Code § 6B-2-5(b) prohibits public officials from using their public positions to benefit private businesses or nonprofit entities that employ them. The Ethics Act does not, however, prohibit public employees or public officials from using their positions to benefit their public employer because a public employer or public agency is not a "person" for purposes of the private gain restrictions in the Act. This conclusion is consistent with [Advisory Opinion 1992-30](#) in which the Commission expressly held that the term "person" in the Act does not include public agencies.

The instant situation is similar to the Ethics Commission's holding in [Advisory Opinion 2014-14](#) in which the Commission held that a city council member who was also a city employee may vote on the city's budget and on general issues affecting the city's employees such as better working conditions and raises so long as there are more than five municipal employees. Advisory Opinion 2014-14 further held that the city council member may vote on issues directly affecting other departments which do not employ him.

**Therefore, the Ethics Commission holds that the Ethics Act does not require the Requester to recuse himself from voting on legislation or appropriations that benefit his college employer.**

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
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Terry L. Walker, Acting Chairperson  
West Virginia Ethics Commission