

# **Advisory Opinion 2020-01**

**Issued on February 6, 2020, by**

**The West Virginia Ethics Commission**

## **Opinion Sought**

A **State Agency** asks whether one of its technicians may provide private services after-hours to individuals to whom the employee provides services as part of the employee's public job responsibilities and whether the technician may list his pesticide certification on his work e-mail signature block.

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

The Requester is charged with implementing policy to reduce soil erosion and water pollution caused by sediment. The agency is also charged with working with Conservation Districts to fulfill this purpose. It employs full-time technicians assigned to various Conservation Districts who provide in-the-field technical assistance and recommendations to individuals on how to install best management practices to achieve the agency's mission. The technicians also propose projects for agency approval related to addressing nonpoint source pollution.

Conservation Districts also offer voluntary cost-sharing programs whereby individuals receive certain benefits related to land management. Individuals apply to the Conservation District for financial assistance to implement a certain land management practice. The Conservation District Board would then vote to approve individual applications to participate in the program. For some programs, a technician completes a ranking form for each application before approval. The ranking forms are used by the Conservation District to rank individual applications for selection, based upon available funds. The ranking form for one of the programs contains several "yes" or "no" questions such as whether the applicant has successfully completed an eligibility form, whether the applicant has a completed nutrient management plan, whether a pasture is overgrown or whether the quality of forage exists for current livestock. Applicants receive a score based on the answers to these questions.

The individuals selected are notified of the approved application and are thereafter responsible for implementing the land management practice under the program. Before individuals receive payment from the Conservation District, however, a technician verifies that individuals are implementing the land management practice by ensuring that the relevant work has been completed.

One of the Requester's technicians operates an after-hours pesticide application business and seeks to provide technical assistance/consulting services for water quality issues in the future. These services are not related to the technician's public job

responsibilities. The employee includes his certification as a “Licensed Pesticide Applicator”, which he paid for himself, on his work e-mail signature block.

The technician states that he does not solicit customers or carry business cards while carrying out his public job duties. Any time he is approached by a customer while he is carrying out his public duties, he asks the customer to contact him after working hours on his personal phone. The employee neither uses any state-owned equipment for his private business nor performs any private work during his public working hours.

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

W. Va. Code § 6B-2-5(b)(1) states:

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 states:

5.1. Removal - Public officials and public employees may not remove government property from the workplace for their private benefit or that of another person.

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 R. § 158-6-8 states:

Full-time appointed public officials and part-time and full-time public employees may not receive private compensation for performing private work during public work hours. This section does not apply to de minimis private work.

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

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding 12 months; or

(B) 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.

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

(i) Drafting bid specifications or requests for proposals;

(ii) Recommending selection of the vendor;

(iii) Conducting inspections or investigations;

(iv) Approving the method or manner of payment to the vendor;

(v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or

(vi) Taking other nonministerial action which may affect the financial interests of the vendor.

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

....

(6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

## **Advisory Opinion**

### **Employment**

Pursuant to W. Va. Code § 6B-2-5(h)(1), full-time public employees may not seek employment with or be employed by certain persons. For purposes of this provision,

“the term ‘employment’ includes professional services and other services rendered by . . . the public employee, whether rendered as employee or as an independent contractor . . . .” W. Va. Code § 6B-2-5(h)(2). The persons by which a public employee may not be employed include those who have had a matter on which the public employee, or a subordinate, is known to have taken, regulatory action within the preceding 12 months. W. Va. Code § 6B-2-5(h)(1)(A). These persons also include those who currently have a matter before the agency on which the employee is working, or a subordinate is known by the employee to be working. W. Va. Code § 6B-2-5(h)(1)(B).

For W. Va. Code § 6B-2-5(h)(1)(A) to be triggered, a public employee must have taken regulatory action regarding an individual within the past year. In Advisory Opinion 2015-03, the Ethics Commission found that the term “regulate” means “the act or process of controlling by rule or restriction.” The public duties of the requesting agency’s technicians, namely aiding individuals in implementing land management practices and verifying that practices are implemented pursuant to a voluntary cost-sharing program, does not constitute controlling by rule or restriction, i.e., “regulate.” See, e.g., Advisory Opinion 2001-35 (finding that State Foresters regulate individuals regarding the enforcement of the Logging Sediment Control Act, forest fire laws and the ginseng program, but do not regulate forest landowners generally or those to whom they provide forestry management services). **W. Va. Code § 6B-2-5(h)(1)(A) therefore does not preclude the Requester’s technician from providing private services after-hours to individuals because neither the Requester nor its technicians regulate individuals.**

Whether a person has a “matter” on which a public employee is working under W. Va. Code § 6B-2-5(h)(1)(B), however, is a separate question from what constitutes regulatory action. In Advisory Opinion 2019-28, the Ethics Commission considered whether a pre-candidate for Sheriff could continue to operate his residential real estate leasing business under W. Va. Code § 6B-2-5(h). Addressing what constitutes a “matter” under W. Va. Code § 6B-2-5(h)(1)(B), the Commission found: “Some examples of persons who have matters before the Sheriff’s Office that are not regulatory in nature include persons who are under investigation by the Sheriff’s Office or the subject of an outstanding warrant or civil or criminal process.” *Id.* The Commission ultimately held that the Ethics Act permits a Sheriff to continue his business because a Sheriff does not regulate or have ongoing matters with all county residents and taxpayers merely by providing routine police services or by performing the *ministerial* functions of collecting taxes which are not delinquent. *Id.*

**The Ethics Commission similarly holds here that providing routine services in the form of technical assistance and recommendations to individuals on how to install best land management practices does not constitute a “matter” under W. Va. Code § 6B-2-5(h)(1)(B).**

**The Commission holds, however, that individuals whose management practices are being verified for payment pursuant to cost-share programs do constitute “matters” under W. Va. Code § 6B-2-5(h)(1)(B). The Commission also holds that**

**completing program ranking forms that require the technicians to evaluate whether individuals have satisfied various criteria also constitutes “matters” under W. Va. Code § 6B-2-5(h)(1)(B).** The technicians’ duties in this regard are more than just ministerial. The technicians utilize their expertise and judgment in these matters, both of which are utilized by the Conservation District in determining whether individuals will receive funds from the Conservation District. **The Ethics Commission therefore holds that W. Va. Code § 6B-2-5(h)(1)(B) prohibits the technician from providing private services to persons which currently have a matter, as outlined above, on which the technician or a subordinate of the technician is working.**

### **E-mail Signature Block**

The Requester additionally states that while the technician’s public job duties do not include pesticide application, the technician includes his self-paid certification as a pesticide applicator on his work e-mail signature block.

The Ethics Act prohibits a public employee from using public resources for private gain. W. Va. Code § 6B-2-5(b)(1). As a general matter, the Ethics Commission finds that public employees listing their education and certifications in work e-mail signature blocks does not implicate the Ethics Act. **Here, however, the Ethics Commission finds that when the pesticide certification is wholly unrelated to the technician’s job duties and when the technician is seeking to provide pesticide services as part of a private business venture, the certification reading “licensed pesticide applicator” should not be used in the technician’s public e-mail signature block. Such use of a public work e-mail to inform individuals, many of whom are landowners, that the technician may also provide pesticide services constitutes the use of office for private gain and is therefore prohibited by the Ethics Act.** See, e.g., Advisory Opinion 95-13 (finding that a school psychologist may not provide a private business card upon learning from a parent that a child has a phobia but may submit a comprehensive listing of all providers in the area).

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must 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.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission