ADVISORY OPINION 2015-03

Issued on February 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An employee of a State agency which is charged with oversight of safety and training for a statewide industry asks whether he may privately offer safety classes in that industry to individuals as secondary employment for additional compensation.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that he is employed as a safety instructor by a State agency which employs inspectors, safety instructors and administrative support personnel in regional offices. He reviews industry safety programs offered by employers to employees in employers' facilities and conducts certification examinations for individuals either employed or seeking employment in the industry. He conducts certification examinations for individuals by facilitating computer classes online and verifying results of tests for certification. He also issues certifications. He does not exercise subjective judgment in determining whether an individual who takes a certification examination passes it. Successful certification instead is based on pre-determined objective criteria.

The Requester states although the job description for "safety instructor" on the State agency's website lists "industry training" among examples of a safety instructor's work, this information is not accurate. He states that State inspectors actually perform duties associated with industry training and inspect industry facilities' rescue stations for safety compliance. The Requester, as a safety instructor, processes and issues certificates based upon the inspectors' assessments. The Requester's duties as a safety instructor do not include conducting safety classes for individuals in the industry.

The Requester states that he is certified to teach safety classes to individuals employed in or seeking employment in the industry. He taught such classes prior to his current public employment. After completion of the required hours of classroom training, individuals who are either employed or seeking employment in the industry may then qualify to be tested and earn certifications in their field.

The Requester seeks to offer and teach training classes to individuals as secondary employment to his full-time employment by the State agency. He intends to offer the classes as an individual during evenings and weekends when not performing his public job duties.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b) provides:

> 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.

W.Va. Code§ 6B-2-5(h) reads, 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:
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> (A) 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
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> (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.
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> (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
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> (4) A full-time public official or full-time employee may not take a personal regulatory action on a matter affecting a person by whom he or she is employed or with whom he or she is seeking employment or has an agreement concerning future employment.
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> (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.

W.Va. Code§ 6B-2-5(e) states:

> No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in

the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W.Va. Code§ 6B-1-3(g) reads in relevant part:

> "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, the individual's own judgment as to the propriety of the action taken.

158 W. Va. C.S.R. § 6-8 reads:

> 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 shall not apply to *de minimis* private work.

ADVISORY OPINION

The West Virginia Ethics Act, at W.Va. Code§ 6B-2-5(h)(1) and (4), prohibits full-time public officials from being *employed* by persons and businesses which they *regulate.*

The first question is whether the Requester will be employed as is contemplated by the Ethics Act. The Requester's proposed secondary employment meets the applicable definition of "employment:"

> [t]he term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as an employee or as an independent contractor.

W.Va. Code§ 6B-2-5(h)(2).

The second question is whether the Requester regulates his potential employers. The Ethics Act does not define "regulate" although the term is defined in an Ethics Commission Guideline entitled "How to Obtain an Employee Exemption for a New Job or a Second Job" as "the act or process of controlling by rule or restriction."

Based on the Requester's description of his job duties, he does not "regulate" in his public position. None of the Requester's duties in his public position include controlling by rule or restriction as defined in the above guideline. Therefore, the Requester's proposed secondary employment would not involve him being employed by persons or businesses which he regulates.

Today's conclusion is consistent with Advisory Opinion 2014-26, in which the Commission held that a county tax deputy does not regulate taxpayers. The tax deputy primary assisted taxpayers in paying property taxes, processed tax payments, filed reports, and notified delinquent taxpayers of their status. The Commission determined that the tax deputy did not exercise regulatory control over the taxpayers in a county because his job duties were "ministerial" in nature.

Similarly, the Requester here does not exercise regulatory control over individuals in the industry because his duties are "ministerial." The Requester's job duties include conducting certification examinations for individuals in the industry and issuing the appropriate certifications. The Requester does not use his own judgment to determine the outcome of certification examinations which he conducts, but instead relies on objective scoring.

An analysis of W.Va. Code§ 6B-2-5(h)(6) is also necessary. This provision of the Ethics Act prohibits a State employee from receiving private compensation for providing information or services which he is required to provide in carrying out his public job responsibilities. The Requester states that he would not privately provide information or services which he is required to provide in his public employment. In his public employment, he is not required to teach, and does not teach, safety classes.

The Requester is subject to limitations, however. The Ethics Act, at W.Va. Code§ 6B-2-5(b), prohibits public employees from using their public office or the prestige of their office for their own private gain. Accordingly, the Requester is prohibited from soliciting private business in any manner while performing his public job duties as a safety instructor. He may not seek out or solicit potential customers for his private safety classes while performing his public job duties.

The Ethics Act also prohibits public servants from using more than *de minimis* amount of public time and resources to conduct non-agency related activities. See Advisory Opinion 2014-06. The Requester is cautioned that he must not comingle the time he spends performing his public duties with the time he spends performing his secondary employment duties. He must perform the duties of his secondary employment only during hours in which he is not working in his public position.

Another section of the Ethics Act, W.Va. Code§ 6B-2-5(e), prohibits the Requester from knowingly and improperly disclosing confidential information which he acquired in the course of his official duties or from using this information to further his private interests or the interests of another person. Therefore, the Requester is cautioned not to improperly disclose or use confidential information obtained in his public position for any private interest.

Finally, the Requester is further cautioned against administering a certification test, or issuing certifications, in his public employment as a safety instructor to any individual who previously had been his private student in certification classes.

In summary, the Requester is permitted, subject to the above limitations, to offer independent safety classes through his private business inasmuch as his public job duties are ministerial rather than regulatory in nature and his business will not offer information or services which he is required to provide as part of his public job responsibilities.

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 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 § 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W Va. Code § 68-2-2, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman