ADVISORY OPINION NO. 2015-01

Issued on January 8, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A delegate who anticipates being elected as the **presiding officer of a house** of the West Virginia Legislature asks whether he may continue his employment during the Legislative session as an attorney with a company that employs registered lobbyists in West Virginia when the legal services he provides are unrelated to the lobbying activities.

FACTS RELIED UPON BY THE COMMISSION

Requester states that he has been employed as an attorney with a Fortune 500 natural resources company for more than 13 years. The Requester served in the Legislature at the time he was hired by the company, but did not serve in a leadership position. The Requester primarily performs work for one of his employer's pipeline companies which has pipelines in 16 states and the District of Columbia.

Requester states that he works in the commercial division of the company's legal department and works primarily on real estate matters. Each attorney in his section is assigned certain states for which he or she is primarily responsible. The majority of his work involves real estate matters in other states, although he has from time to time worked on issues related to West Virginia. Respondent states that of the 15,000 miles of interstate pipeline maintained by the pipeline company for which he does legal work, approximately 2,526.42 miles are in West Virginia.

The Respondent states that his employer is expected to divide into two separate companies during this calendar year. The portion of the company for which he will likely work would be based in Houston and the Respondent would no longer work on local distribution company issues. Respondent anticipates that his work will relate to the interstate pipeline system and that he would be primarily assigned to perform commercial and real estate legal work in states other than West Virginia.

The Requester states that he and his subordinates at the company are not involved with any lobbying or other legislative activities of his employer in West Virginia or in any other state.

The Requester states that his employer's lobbying efforts in West Virginia are limited and generally involve pipeline safety issues and taxation issues that relate to the company. The primary emphasis of its lobbying efforts is not as much related to legislation as it is to building relationships with legislators and other county and local

officials who may receive calls from constituents about pipeline issues in their communities and need to know who to contact about those issues.

The Requester further explains that his employer's primary presence in West Virginia is its interstate pipeline system, which falls under the federal jurisdiction of the Federal Energy Regulatory Commission and is not primarily regulated by state agencies. One exception to this is that the West Virginia Public Service Commission is essentially the agent of the federal government for purposes of pipeline inspections.

The Requester further states that he has historically taken and will continue to take a leave of absence from his private employment during the Legislative sessions.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code§ 6B-1-2 reads:

> (c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

W. Va. Code § 6B-2-5(b)(1) reads, 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.... 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§ 6B-2-5(i) reads:

> 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.

W. Va. Code § 6B-2-5U) reads:

> (1) Public officials... may not vote on a matter:
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> > (A) In which they... or a **business** with which they... [are] associated have a financial interest. Business with which they are associated means a business of which the person ... is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class. (emphasis added)
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> (II) A public official may vote:
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> > (A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than, any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses; or
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> > (B) If the matter affects a publicly traded company when:
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> > > (i) The public official, or dependent family members individually or jointly own less than five percent of the issued stock in the publically traded company and the value of the stocks individually or jointly owned is less than ten thousand dollars; and,
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> > > (ii) Prior to casting a vote the public official discloses his or her interest in the publically traded company.
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> (3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

W. Va. Code§ 6B-2-5(e), provides:

> 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.

ADVISORY OPINION

The Ethics Commission addressed a similar, but distinguishable, situation in Advisory Opinion 2012-17, in which a presiding officer of a house of the Legislature asked whether he could become employed by an association which actively lobbied the Legislature. The association represents West Virginia public employees in a particular profession. In Advisory Opinion 2012-17, the Requester's proposed job duties included those duties often associated with a "general counsel" position. His job duties would not have included advising the association on legislative matters or its lobbying strategies.

Nonetheless, the Commission found in Advisory Opinion 2012-17 an "inescapable conflict" for the following reasons. The presiding officer's proposed contract required him to "advise and represent the association and its director and their local governing bodies regarding the laws governing political action committees and election law." Further, the Commission was concerned because legislators have access to confidential information, such as positions taken in a closed-party caucus. Last, the Commission stated that the public may perceive that the association hired the Requester because of his unique ability to influence legislation.

In Advisory Opinion 2012-17, the Commission explained:

> Indeed, the Presiding Officer of a house of the West Virginia Legislature has an even higher duty [than other Legislators] to all citizens of the State, and to the efficient operation of the house. The duties of the Presiding Officer are legion and include, without limitation, presiding over the house during its proceedings, appointing standing committees, designating committee chairpersons, referring bills to committees, and certifying (with the Clerk) the official record or journal of the house. Additionally, the Presiding Officers, as chairs of their respective Rules Committee, wield more power than chairs of most other legislative committees. By virtue of his position as Presiding Officer, the Requester has far more power than all but one other Member of the Legislature. As a consequence of his additional duties and responsibilities, he earns more compensation than the other Members of the Legislature. See W. Va. Code § 4-2A-4.
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> Thus, the situation presented here is different from the previously cited opinions because the Requester is not just a part-time Member of the Legislature, but a Presiding Officer thereof. As a result, he is not similarly situated to other Members of the Legislature, and must, therefore, be held to a higher standard to preserve the integrity of the legislative process. Neither strict compliance with the voting rules, nor advance disclosure of

> conflicts of interest minimize the conflict that arises from the Requester's situation, given the position that he holds.

The Requester's situation is distinguishable from the situation in Advisory Opinion 2012-17 in several ways. First, the Requester does not advise his employer of "the laws governing political action committees and election law." As such, he is not involved in the legislative or political activities of his private employer.

Second, the Requester is not considering prospective employment, but has held his private job for more than 13 years. Therefore, the public should not perceive that the company would have hired the Requester because of his unique ability to influence legislation. The Commission again recognizes, as it did in Advisory Opinion 2012-23 (holding that a Legislator may simultaneously serve as a town recorder), the following:

> While the Ethics Act places employment limitations on full-time public servant, a different standard applies to part-time public servants, most of whom must balance their public responsibilities with the need to make a living and support their families. *See* A.O. 2012-19 reaffirming prior decisions of the Commission citing this principle ....

Third, the association in Advisory Opinion 2012-17 exists only in West Virginia, and its mission includes advocating for the interests and working conditions of its members. Here, the Requester's employer is not primarily located in West Virginia, and most of the Requester's private work involves land transactions outside of West Virginia.

In Advisory Opinion 2012-17, the Commission recognized that it has issued opinions authorizing certain outside employment for various members of the Legislature. *See* generally Advisory Opinions 93-02, 96-55, 99-23, 2001-20, 2003-14 and 2006-06. The Commission concluded: "This opinion does not adversely impact or overrule any of the foregoing opinions."

Of course, the Requester is subject to **strict limitations.**

First, the Requester must follow the relevant Ethics Act provisions concerning **voting** and recusal, *supra,* and legislative voting rules. For example, West Virginia Senate Rule 43 is entitled "Excused from voting" and provided:

> Every member within the Senate Chamber, when a question is put, shall vote unless he or she is immediately and particularly interested therein, meaning an interest that affects the member directly and not as one of a class, or the Senate excuses him or her. All motions to excuse a member from voting must be made by the member requesting to be excused before the Senate divides, or before the call of the yeas and nays is commenced, and it shall be decided without debate, except that the member making the motion to be excused from voting may briefly state the reason why it ought to be adopted.

West Virginia House of Delegates Rule 49, "When Members Not to Vote," provides:

> When a question is put, any member having a direct personal or pecuniary interest therein should announce this fact and request to be excused from voting. The disqualifying interest must be such as affects the member directly and not as one of a class.

A class shall consist of not fewer than five similarly situated persons or businesses.

The second limitation was well stated in Advisory Opinion 93-02: "It would ... be a violation for him to use his ... position to influence legislation which would uniquely benefit his private company - legislation designed to benefit only his particular business interest to the exclusion of others of that class."

Specifically, the Requester may not use the influence of his Legislative position to engage in any of the following activities: attempt to enhance his contractual benefits; introduce, sponsor or advocate legislation to directly benefit his employer as opposed to benefitting it as a member of a class of businesses; influence either the State's distribution of federal grant money or State funds to his employer for any purpose not those related only to his employment, or to influence the appropriation of public funds to the unique benefit of his employer in any way. See Advisory Opinions 2006-06 and 2012-19 for similar limitations.

Third, the Requester may not disclose confidential information which is prohibited in W. Va. Code§ 6B-2-5(e), *supra.*

Therefore, the Commission holds that under the Ethics Act, the Respondent is permitted to continue his employment subject to the above limitations.

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 § 68-2-3, 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