

## **Advisory Opinion No. 2009-10**

**Issued On November 5, 2009 By The**

**WEST VIRGINIA ETHICS COMMISSION**

### **OPINION SOUGHT**

A State employee whose employer has oversight of institutions of higher education asks whether he may be compensated for teaching a course at a public university.

### **FACTS RELIED UPON BY THE COMMISSION**

The Requester is employed by a State Agency that has oversight responsibilities in regard to accrediting educator preparation programs offered at institutions of higher education, both public and private. These programs are offered for the benefit of students who want to become certified teachers or to pursue other career opportunities in education.

Public institutions of higher education must receive a recommendation for the accreditation of their educator preparation programs from one of two national organizations.<sup>1</sup> These organizations make on-site visits and take other steps to ascertain whether an institution's educator preparation program satisfies the qualifying criteria for accreditation.

These organizations then make a recommendation to a Review Board established by the State Agency. The State Agency appoints the Review Board members. The Requester is not a member of the Review Board; further, he has no voting rights. The Review Board is responsible for reviewing the national organization's recommendation and then independently determining whether it agrees or disagrees with the recommendation. The Review Board then communicates its recommendation on accreditation to the State Agency's governing body. The State Agency's governing body has the ultimate authority to rule whether a program should or should not receive accreditation. The Requester is not a member of the State Agency's governing body.

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<sup>1</sup> Private colleges may either receive their accreditation through review by one of these two national organizations or through the State Agency. Since the Requester sees compensation from a public university rather than a private college, the difference in the accreditation process is not relevant to the issue before the Commission.

The Requester's job duties include coordinating site visits between the national organizations and the public institutions of higher education. He works with the public universities to ensure that they meet the timelines for submitting documentation and that any reports the universities submit comply with the applicable reporting guidelines. The Requester also assists the national organizations in reviewing documents submitted by the institutions of higher education and serves as a point of contact for the State Agency's Review Board. Further, he does not review the reports submitted by the national organization nor make any recommendations to the Review Board on whether he agrees with the findings in any such report. Although he is physically present at Review Board Meetings, normally his advice is not sought. Instead, he ensures that the Review Board has all the material it needs to make a decision.

In addition to his public employment, the Requester is pursuing a doctoral degree at a public university. The Requester pays his own tuition and related expenses. He does the course work on his own time. As part of his doctoral program, the Requester teaches a class at the same public university where he is enrolled. The State Agency does not require him to be enrolled in a doctoral program. Further, teaching this course or any course is not part of his public job responsibilities.

The Requester teaches a course in his area of expertise, i.e. foreign languages. The public university compensates all students enrolled in this doctoral program for teaching a class. At present, the Requester has declined compensation until and unless the Ethics Commission rules that it is permissible for him to accept the compensation.

The Requester states that he performs all the work related to the class he teaches on his own time and does not use any public resources. The Requester states that due to limited staff availability at the State Agency, it would be impractical to completely remove himself from his job responsibilities related to the public university where he teaches. The Requester further states, however, that his supervisor already reviews all of his work, as a matter of protocol, and that the State Agency's governing body makes the final decision on accreditation.

The Requester has asked his agency's human resources division whether he may be compensated for teaching the course. According to the Requester, the human resources division states that there is nothing in the agency's rules or regulations which prohibit him from being compensated for teaching the course.

## **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

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

A public official or 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.

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

(1) No full-time public employee may be employed by any person who:

(A) Has a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve 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.

(3) A full-time public official or employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibitions.

(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-1-3(h) reads:

“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.

## **ADVISORY OPINION**

The Ethics Act generally prohibits public employees from using their public office (including public resources), for their own private financial gain. This prohibition is generally considered to serve as the cornerstone for the more specific restrictions that follow in the Act. See W. Va. Code § 6B-2-5(b).

In consideration of the question raised, the Ethics Commission must first consider whether W. Va. Code § 6B-2-5(b) prohibits the Requester from receiving compensation. Since the Requester states that he is not using public resources or time in furtherance of his outside employment activities, then the acceptance of compensation does not violate this provision.

Next, the Ethics Act imposes limitations on secondary employment of public servants by regulated entities and vendors over whom the public servants or their subordinates exercise regulatory control. These same limitations apply to the employment of public servants by a vendor over whom the public servants or their subordinates exercise control. See W. Va. Code § 6B-2-5(h)(1).

Since the Requester's agency has regulatory responsibilities relating to the accreditation of educator preparation programs offered by institutions of higher education, including the public university where the Requester is teaching a course, the Commission must determine whether the limitations in W. Va. Code § 6B-2-5(h)(1) apply to the situation presented. This section of the Ethics Act generally permits secondary employment with a regulated person or vendor if the public employee's supervisor approves such employment and the public employee seeks and receives an employment exemption from the Ethics Commission. As part of this process, the employee and agency must demonstrate that the employee's secondary employment will not impede him from impartially and effectively fulfilling his public job responsibilities.

In this case, the Requester has secondary employment with a public university. Thus, the Commission finds, consistent with its past opinions, that the limitations in W. Va. Code § 6B-2-5(h)(1) do not apply. This code section specifically references limitations upon employment with "persons." The Ethics Act defines "person" as 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." Nowhere in this definition is there reference to a public agency or state, county or municipal office. As a result, consistent with its earlier advisory opinions, the Commission finds that the foregoing limitations do not apply to seeking employment or having secondary employment with a government agency. See A.O. 92-49 wherein the Commission sets forth this administrative interpretation and cites past opinions where it reached the same conclusion. Hence, this limitation in the Ethics Act does not prohibit him from teaching the course for compensation at a public, not private, university.<sup>2</sup>

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<sup>2</sup> As this section does not limit the Requester's employment with another public agency/institution, it is not necessary to determine whether the Requester in fact exercises regulatory authority.

Finally, the Ethics Commission must consider whether other provisions in the Ethics Act prohibit the Requester from being compensated for teaching a course. W. Va. Code § 6B-2-5(h)(6), states “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.” The Requester states that teaching courses is not part of his job responsibilities. Moreover, it is not the responsibility of his agency to provide courses at institutions of higher education. Finally, as earlier noted, the Requester prepares for and teaches the course on his own time. As a result, this limitation does not restrict him from being compensated for teaching the course.

Although the Ethics Act does not prohibit the Requester from being compensated for teaching the course, certain limitations apply. To avoid the appearance of impropriety, the Requester should take the following action. First, he should disclose to his supervisor and the Review Board that he is enrolled in the doctoral program at the public university and that he teaches a course there for compensation. Second, although the Requester has indicated that due to staffing shortages it is impossible to remove himself completely from involvement in the accreditation of this public university, he should arrange for his supervisor to review accreditation recommendations, if any, he makes regarding the program at the public university where he teaches. It appears that the Requester has already met this requirement since the Requester states that his supervisor already reviews his work.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, et seq., 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 other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chair  
R. Kemp Morton