

ADVISORY OPINION NO. 2006-02

Issued on April 6, 2006 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

(1) A **State Agency** asks whether it may pay a salary supplement to its employees who take on the additional job responsibilities of producing a national television broadcast of a radio show.

(2) The **State Agency** further asks if there is any prohibition in the Ethics Act against the funds for the salary supplement being provided by a private foundation which has been formed for the charitable purpose of supporting the mission of the agency.

FACTS RELIED UPON BY THE COMMISSION

The requester is a public agency which produces educational programs for broadcast on public radio and television. As part of its programming the agency also produces a radio show which profiles various musicians.

In the past the radio show was taped for a national television broadcast. For that project the agency contracted with an out of state production company.

The private company needed to hire various contract employees to be a part of its production crew. The company discovered that many employees of the public agency had the requisite skills and experience to work on the broadcast. It contracted with those employees to work on the production crew. The employees worked on the project outside of their normal work hours and were paid by the company.

Eventually the public agency elected not to renew its contract with the production company. The public agency further determined that it would produce the television show in-house. Most of the radio shows are broadcast before a live audience on the weekends.

The public agency wants to use many of the same employees who previously contracted with the production company. As it is imposing additional duties upon these employees, it wants to provide each employee with a salary supplement in the form of a lump sum monetary payment per show. The funding source for the salary supplements would be a private foundation which has been formed for the exclusive purpose of providing support to the public agency and its educational mission.

Many of the employees currently work on the agency's television production crew as camera operators. These employees have regular work hours and normally work Monday through Friday. If these employees work more than forty hours per week, then pursuant to applicable laws and regulations they are paid overtime.

If this group of employees is not paid the supplement, they would still be entitled to overtime pay for the additional hours. The proposed salary supplement is a somewhat greater amount than what the employees would receive if they were merely paid overtime.

Historically most of these employees have used their camera skills to contract with television stations or other organizations for free lance work which they perform outside of normal business hours and on the weekends. If the agency requires them to take on the additional job duties, it wants to ensure that the employees are compensated at a level which is commensurate with the additional responsibilities.

The Executive Producer of the radio show would also be paid an additional supplement for each show which he helps produce for television. Likewise an agency employee who has significant management responsibilities related to public television would also receive a salary supplement. The public television portion of the agency historically has not been directly involved with producing the radio show.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

(b) Use of public office for private gain. -- (1) 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 § 6B-2-5(h)(5) reads:


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 job responsibilities.

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The amount of compensation which an employee should receive is a matter which lies in the discretion of a public agency. To provide a salary supplement for taking on additional duties does not violate the Ethics Act. Of course there may be other personnel policies or rules which govern an employee's job classification and salary. The agency should consult with its attorney or personnel division to seek clarification on the applicability of those rules, if any, on the proposed course of action.

The next issue which must be addressed is whether there is any prohibition in the Ethics Act against paying the salary supplement from funds provided by a private foundation. The foundation in question has specifically been formed for the purpose of supporting the agency's mission which is to provide educational programming. Under the facts presented, there is no prohibition in the Ethics Act against using monies provided by the foundation for the purpose of paying the salary supplement. This conclusion is consistent with a previous opinion of the Ethics Commission wherein it held that a school's athletic booster club, a not for profit association, could provide a coach a bonus in recognition of his service to the school's athletic program. (A.O. 99-14).

This opinion is limited to the facts and circumstances of this particular case and may not be relied upon as a precedent by other persons.


Commission Chairman