

ADVISORY OPINION NO. 2006-06

Issued on August 3, 2006 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

- (1) A **Legislator** inquires whether she may request or influence legislative appropriations for a nonprofit by which she may be employed.
- (2) A **Legislator** inquires whether she may vote on approving a State budget which contains appropriations for a nonprofit by which she may be employed.
- (3) A **Legislator** seeks guidance on receiving compensation from a private employer, a nonprofit corporation, during the Legislative Session.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected member of the West Virginia Legislature. She is considering taking a position with a nonprofit corporation that has the mission of supporting, promoting and facilitating regional economic development. Due to the corporation's mission, it has at times worked with the Legislature to promote legislation which impacts economic development. At times the corporation has also received State funding from Legislative appropriations. If the Requester is hired by the nonprofit corporation, she will have significant management responsibilities.

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.

W.Va. Code §6B-2-5(i) reads:

Members of Legislature required to vote. — 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 are not guilty of any violations of ethics under the provisions of this section for a vote so cast.

ADVISORY OPINION

Using position to influence appropriations

No provision in the Ethics Act prohibits a Legislator, a part-time elected official, from accepting any particular employment position.¹ Instead, as previously recognized by this Commission, “The Ethics Act acknowledges the potential for conflict involved in balancing public and private responsibilities and directs that part-time public servants avoid such conflicts by not taking official action on matters in which they have a personal interest.” A.O. 96-55.

The issue of whether a member of the Legislature may use his or her position to influence the appropriation of budget funds for his or her private nonprofit employer has never directly been addressed by the Commission. The Commission has considered a similar situation in A.O. 99-34 wherein the Commission ruled that a County Commissioner could accept employment with a Community Service Organization to which the County Commission provided some financial support. The opinion provided, however, that the County Commissioner should not vote on the Commission’s budgetary allocation to his employer.

The Commission finds that a Legislator should not use his or her position to influence the appropriation of monies to a nonprofit by which he or she is employed. The Ethics Act prohibits the use of office for private gain. If a Legislator uses his or her position to influence appropriations to his or her particular employer, even if the employer is a nonprofit corporation, then it creates the appearance of impropriety. The public may perceive that the Legislator has been hired by the nonprofit, and is being compensated by the nonprofit, due to the Legislator’s perceived ability to

¹ There are State Constitutional provisions which restrict a member of the Legislature from being employed by the State of West Virginia.

influence Legislative appropriations. Further, nonprofit corporations who do not employ a Legislator may believe that they are at a disadvantage in seeking budget funds.

One of the main purposes of the Ethics Act is to uphold the integrity and impartiality of government decision makers. The Commission recognizes that some Legislators may have historically requested funding for private nonprofit employers by which they are employed. When the Ethics Act was enacted in 1989, there was no language in the Act which directly addressed this issue, nor does it appear that it was an issue of public concern. However, since that time both public officials and nonprofit corporations have come under an increased level of scrutiny due to both real and perceived abuses of public officials using their office to direct public monies to nonprofit organizations by which either they or their family members are employed.

The Ethics Commission is statutorily charged with the responsibility of interpreting the Ethics Act. The Commission believes that the rule established in this opinion is consistent with the plain language and the spirit and intent of the Ethics Act. This opinion is also consistent with A.O. 2003-14 where the Commission held that a Legislator could not sponsor legislation authorizing a county referendum on an issue which would benefit the company by which he was employed. While the Legislation would have benefitted his constituents, his employer would have been one of the principal beneficiaries of the legislation.

This opinion is not intended to impose liability under the Ethics Act on public officials who have previously influenced the appropriation of budget funds to their nonprofit employers. Consistent with the principles of due process, this opinion is prospective only. However, in accordance with this opinion, all public officials who are also employed by a nonprofit corporation should henceforth not use their position to influence the appropriation of public funds to their nonprofit employer.

Further, this opinion should not be construed as prohibiting the Requester from sponsoring or supporting legislation which promotes economic development in the State of West Virginia. Instead, the Legislator would only be prohibited from supporting or promoting legislation or appropriations which benefit her nonprofit employer directly, as opposed to benefitting it as a member of a class of businesses, either for profit or nonprofit, which promote economic development.

Voting

Previously the majority of Legislative appropriations for nonprofit organizations were made through the Budget Digest. At the present, appropriations are made through line items in the Budget. The Budget is approved by the Legislature through the Budget Bill.

As set forth above, a Legislator should not use his or her position to “work behind the scenes” to influence the appropriation of funds to his or her private employer. However, the Ethics Commission does not have jurisdiction to determine whether voting on approving a budget which contains a line item appropriation for a nonprofit by which a Legislator is employed constitutes a conflict of interest. Instead, the decision regarding whether members of the Legislature are required to vote is governed by the rules of the particular house. If members of the Legislature ask to be excused from voting on a particular matter, then they are immune from administrative prosecution for any Complaints filed with the Ethics Act relating to the matter on which they seek to be recused in accordance with W.Va. Code §6B-2-5(i). Accordingly, the Commission defers to the ruling of each house of the Legislature in regards to whether a member of the Legislature is required to vote.

The Commission recommends that members of the Legislature who are employed by nonprofit employers which receive State funding discuss with the leadership of their respective houses whether it would be appropriate for them to be recognized at the beginning of each regular session for the purpose of disclosing both their employment relationship with the particular nonprofit, and the fact that the nonprofit is in part funded with State money. Likewise, they could discuss with the Leadership and the respective Chairpersons of the Committees on which they serve if a similar initial disclosure should be made before the Committees that directly address areas of interest to the mission of a nonprofit by which a member of the Legislature is employed, or if the Committee has some role in determining whether appropriations should be made to the nonprofit. If members of the Legislature elect to make the outlined initial disclosure, then it may serve to bolster the public’s confidence that the affected members are making a good faith effort to avoid using their offices for the benefit of their nonprofit employers. Of course, as with voting, the determination of whether an initial “general disclosure” of such a relationship is practicable, would be of benefit to the public and is consistent with the applicable rules of each house must be determined by the respective houses of the Legislature.

The Commission elects to take this opportunity to provide guidance on voting in these circumstances to public officials who are either elected or appointed members of a governing body and are also employed by a nonprofit which may receive funding from the governing body on which they serve. The Commission finds that if the governing body is considering a budget for which there is a line item appropriation to a nonprofit corporation by which an elected or appointed member of a governing body is employed, then the elected or appointed member should not be precluded from voting on the entire budget. However, before casting a vote the elected or appointed member should first disclose his or her employment by the nonprofit organization in order that the general public is aware of the interest. If the governing body is specifically addressing whether an appropriation should be included for the nonprofit corporation, then the public official should physically remove him or herself from the room during that portion of the discussion. The Commission finds that disclosure of the employment by a nonprofit organization promotes transparency in government to which the public is entitled while at the same time allowing the public official to fulfill his or her responsibility of voting on whether a budget should be accepted or rejected.

Compensation during legislative session

The requester also seeks guidance regarding whether she may receive any compensation from her private employer, a nonprofit corporation, during the Legislative session. Legislators in West Virginia, for purposes of the Ethics Act, are part-time officials. When the Legislature is in session, a Legislator may have continuing job responsibilities with his or her private employer.


The Commission has previously held that a Legislator could receive a salary from his or her employer, minus his or her legislative salary, during a leave of absence while performing Legislative duties. (A.O. 91-06 and A.O. 91-78). The term leave of absence is somewhat misleading as during the Legislative Session a Legislator may be at the State Capitol for a portion of the day and then still report to his or her place of work. This practice appears particularly common with Legislators who reside in or near the State Capitol. Further, with technological advances, many Legislators may be able to perform their employer's work via telephone, computers and electronic communications.

Legislators may receive compensation from their employer during sessions of the Legislature; Provided, that they are not receiving "[p]rivate compensation for providing information or services that he or she is required to provide in carrying out his or her job responsibilities." W.Va. Code §6B-2-5(h)(5). Any salary which a Legislator receives from his or her private employer while the Legislature is in session, should be commensurate with the Legislator's actual job responsibilities. To avoid the appearance of impropriety, the Legislator and his or her employer should document the Legislator's private job responsibilities and compensation when the Legislature is in session. There is no specific rule which can be established regarding whether a Legislator may accept his or her full salary or only a portion thereof. Instead, the amount of salary a Legislator receives from his or her employer is dependent upon his or her job responsibilities and the number of hours actually worked.

Legislators who are employed by a local government should make sure they comply with the requirements of W.Va. Code §6B-2-5(k) and WV CSR § 158-14-1 *et. seq.* This code provision and related Legislative Rule essentially set forth that if public officials are also employed by another public employer, when they are tending to the duties of his or her elected position, they need to have their salary reduced by the amount of compensation from the other employer on a pro rata basis for time worked. In the alternative, they may take vacation or compensatory days. If they have a regular work schedule, but are working an adjusted work schedule where they are making up hours, they then need to file verified time records with the Commission.

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 public servants and other persons unless and until it is amended or revoked, or the law is changed.


Chairman