

ADVISORY OPINION NO. 2006-14

Issued on December 7, 2006 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

(1) Whether a **State Board** may compensate its Part-Time Appointed Board Members at a rate greater than the “per diem” rate established by the West Virginia Code when the Board Members teach continuing education classes at the request of the Board?

(2) Whether **Appointed Part-Time Board Members** may be hired by a third party to teach continuing education courses to members of its profession which are regulated by the Board when the Board establishes the continuing education criteria and approves the course instructors?

FACTS RELIED UPON BY THE COMMISSION

The requester is a State Board which regulates members of a particular profession. The State Board is subject to Chapter 30 of the West Virginia Code. This Chapter governs State boards which regulate members of professions.

One of the responsibilities of the State Board is to “Define by rule continuing education requirements for the renewal of certifications and licenses.” All members of the profession regulated by the Board must receive Board approved training in order to satisfy the continuing education requirements. Pursuant to the Board’s legislative rule, all course providers and instructors must be certified by the Board. Teaching classes is not one of the statutory mandated duties of the Board Members.

The Board consists of members who are appointed by the Governor and approved by the Senate. As required by statute, the Board Members have varying professional backgrounds. By statute, a majority of the Board are not members of the profession which the Board regulates; the remaining members are.

When performing their official duties, the Board Members are compensated at a rate established by the West Virginia Code for all Board members. W.Va. Code § 30-1-11. The present rate is \$ 150.00 per day. This rate is commonly referred to as the “per diem” rate. The Board is funded by the fees it collects from license renewals and providing educational courses.

At present, some of the Board Members, on behalf of the Board, teach some of the continuing education courses. When Board Members teach a class in their official capacity, they are paid the “per diem” rate of \$ 150.00 per day plus reasonable expenses. Board Members are not mandated by statute to teach these courses at the request of the Board.¹

¹ There is a general statutory provision which authorizes the Board Members to perform any other functions and duties necessary to carry out the provisions of the article which establishes the Board. Presumably, the Board derives its powers to use its Board Members as instructors, and

Classes are also available through Board approved providers. At times, Board Members are hired by these providers to serve as instructors. In those circumstances, the Board Member, in accordance with industry standards, normally is paid more than \$ 150.00. As such, a Board Member receives greater compensation if he or she is privately retained to teach a course. The Board Member must be an "approved instructor."

The Board asks if it can pay its Board Members more than the established per diem rate of \$ 150.00 in order that it can continue to directly provide classes, while adequately compensating Board Members who teach the classes. As previously noted, the Board Members are not statutorily required to dedicate their time to teaching classes. In fact, based upon the composition of the Board, many of the members are not qualified to teach as they are not members of the profession which the Board regulates. If the Board hires someone other than a Board Member to teach classes, it would have to pay him/her a wage comparable to that paid by other approved course providers.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads in relevant part... *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(d) reads in relevant part... *Interests in public contracts.* -- (1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control: *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: *Provided, however*, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not

to pay them a per diem rate, from this provision.

participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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ADVISORY OPINION

1. Employment of Part-Time Appointed Board Members by State Board to teach educational courses

Board Members are statutorily compensated at a rate of \$150.00 per day for days spent on Board business. A Board Member may not be compensated at a rate greater than the statutorily established amount for performing his or her Board duties as defined by statute. In this case, the Board members are not statutorily required to provide training, but only to accredit providers.

In certain instances members of a governing body may be compensated at a rate greater than their statutorily prescribed rate if the members are hired as an employee or contract employee to perform duties outside the scope of their statutorily prescribed duties. When hired as an employee or contract employee, their rate of pay would be established by the governing body and would be commensurate with the actual job responsibilities. The Ethics Act does not in all instances prohibit this type of employment relationship but there are limitations. The applicable provisions of the Ethics Act governing such employment were examined by the Ethics Commission in Advisory Opinion 2006-05 wherein a newly appointed Mayor asked whether she could continue her current employment with the City as a part-time payroll clerk. In that opinion, the Commission ultimately concluded that it would be a conflict of interest for the Mayor to simultaneously be employed by the City.

In this case, due to another provision in the West Virginia Code, the Commission declines to formally address whether pursuant to the Ethics Act a Part-Time Appointed State Board Member may also be employed by the Board on which he or she serves for the purpose of teaching continuing education courses. It appears that the Legislature has already considered this issue and has declined to allow it. Chapter 30 of the Code reads in relevant part: No member of any board in this Chapter may receive compensation as an employee of the Board. W.Va. Code § 30-1-11. Absent legislative authority, the Board may not hire their Board members to teach the courses.

It is consistent with the Ethics Act to compensate Board members at the statutorily established per diem rate when they are performing official duties which may include acting as a course instructor for Board sponsored training. In order for a Board Member to act as an instructor for Board sponsored classes, the Board should officially authorize the Board sponsorship of the course and the use of its Board Members for this purpose. This authorization should be a matter of public record. In making this decision, each Board must determine whether acting as an

instructor at a Board sponsored class falls within the official duties of the Board Members as defined by its enabling legislation sufficient to justify payment of the per diem for those duties.

2. Employment by third-party course providers to teach classes

Pursuant to a legislative rule adopted by the Board, all course providers and instructors must be certified by the Board. If Board Members teach a continuing education class for a third-party course provider, the Board must certify its own members. By certifying an instructor, the Board is conferring an economic opportunity upon the Board Member. While a Board Member may be qualified, it undermines public confidence in the Board's ability to fairly govern members of its profession if it is using its powers to certify one of its own Board Members for this purpose. While the Board Member could be recused from voting on the certification; still, it is the opinion of the Ethics Commission, that the recusal under these circumstances does not effectively eliminate the appearance of impropriety. Instead, the Commission finds that when a State Board is required to certify its members to act as a course instructor for a third-party provider, it amounts to the use of public office for private gain and should not be permitted. This opinion should not be construed as restricting the Board's ability to use and compensate its own Board Members at the statutorily established "per diem" rate when the Board itself is sponsoring a class and collecting fees.²

The Commission also finds that there may be instances where it would be unduly restrictive to prevent a Board Member from teaching a class through a third-party provider. For example, Board Members may have unique qualifications or experience in their field and may be one of a few individuals qualified to teach a particular subject. In those instances, the Board Member may write to the Executive Director of the WV Ethics Commission to seek an exemption from this opinion and its limitations.

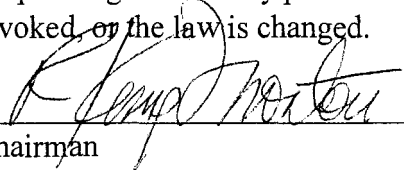
The Executive Director, in his or her discretion, may determine if the interests of the public will be served by allowing the Board Member to teach the course and receive compensation from a third-party provider. The Executive Director's decision must be ratified by the Commission. If the requester needs an answer prior to the next Commission meeting, the Executive Director may grant a temporary exemption which remains in effect until his or her decision is ratified or rejected by the Commission.

Upon ratification by the Commission, a copy of the exemption will be sent to both the requesting Board Member and the Board. If the exemption is granted, the Board shall keep a copy of the exemption and, if requested, make it available to the public. Further, the affected Board Member

² The general rule is that part-time appointed Board members may be employed by persons they regulate, provided that they recuse themselves from voting on matters which affect their employer individually, as opposed to affecting them as a member of a class. W.Va. Code § 6B-2-5(h). However, due to the unique powers and functions of the State Board Requester to certify instructors, the Ethics Commission finds that the proposed employment is prohibited.

shall recuse him or herself from voting on matters which affect the third-party course provider individually, as opposed to affecting it as a member of a class.

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