

ADVISORY OPINION NO. 2005-16

Issued On October 6, 2005 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Health Department Employee** asks whether there is any prohibition in the Ethics Act against referencing her professional certification, which has been paid for by her public employer, on a website for a private consulting business.

FACTS RELIED UPON BY THE COMMISSION

The requestor is a full-time employee of a County Health Department. The Health Department provides breast-feeding promotion and support services to families who, due to their income levels, are eligible to participate in the Women, Infants and Children (WIC) Program. As part of her job duties, the requestor provides lactation consultation services to eligible families.

The Health Department paid for the requestor to become an International Board Certified Lactation Consultant. This certification is obtained through the International Board of Lactation Consultant Examiners (IBLCE). In order to become certified, according to the IBCLE website, there are various educational requirements. If these requirements are met, then an individual is qualified to sit for an examination. If the individual passes the examination, he or she is then officially certified as a lactation consultant. The certification is effective for five years. At the expiration of the five year period, a person may seek to be recertified. According to the IBCLE Website, the 2005 application fee for the certification was \$420.00. The 2005 recertification application fee is \$245.00.

The requestor was eligible to sit for the exam in part because of college credits she obtained prior to being employed by the Health Department. The Department then paid for additional training and for the application fee. For some classes the requestor missed work. Other classes she took on-line. For some of the on-line classes she completed them on her own time and on her own computer.

The requestor wants to start a home based lactation consulting business. She would conduct the business outside of normal work hours. She would not provide services to individuals who, due to their income level, qualify to receive the same services for free at the Health Department. As part of her business, she wants to have a website where she would advertise her services and advertise that she has an IBCLC certification.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b) provides in pertinent part that: 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.

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Except in specific limited circumstances, the Ethics Act does not prohibit an employee of a local government agency from holding secondary employment, provided the employee is not performing the work on public time or using public resources to conduct or promote such activity. The Commission has never determined whether the use of a professional license or certification, which has been paid for with public funds, may be used for secondary employment.

Various professions and trades require that an individual hold a license or certification. Normally there is a financial cost associated with obtaining or renewing the license or certification.

Numerous state and local government job positions require that the functions of the position be performed by an individual who holds a professional license or certification. At times a public employer may elect to pay the license or certification fee. Expending public funds to pay the expense is permissible as it is related to a legitimate government purpose. First, it may be used as an incentive to attract qualified employees. Otherwise the public employer may be unable to compete with sectors of the private industry which customarily pay for the certification or license. Second, the payment of the license or certification is job related because it ensures that a public employer complies with applicable state and federal laws if it is offering services which must be provided by a licensed professional.

It is the opinion of the Commission that if a public employee uses a license or certification obtained at public expense for secondary employment, it is an incidental benefit which does not constitute the use of public office for private gain. The public agency has made the decision that it serves a public purpose to pay for an individual's certification. The decision of a public employee to take on a second job does not result in an additional cost to the public employer.

If a public employer pays for a license or certification, it becomes part and parcel of the employee's compensation and benefits. In the alternative, a public employer may decide to provide an additional monetary stipend to cover the costs of a license or certification. Regardless of how the benefit is structured, there is no prohibition in the Ethics Act against the employee electing to use the benefit to engage in an occupation or trade outside of his or her normal work hours.

In conclusion, it is the opinion of the Commission that a public employee may use a professional license or certification which they have obtained through the expenditure of public funds for secondary employment. While there is no prohibition in the Ethics Act against the use of a publicly paid license or certification for secondary employment, a public agency may adopt a policy restricting the use of a certification or license which has been paid for with public funds. The Ethics Act sets certain minimum standards of conduct for public servants; however, public agencies subject to the requirements of the Act are free to adopt additional standards of conduct that are more restrictive than the Act.

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