

**ADVISORY OPINION NO. 96-54**

**Issued on January 9, 1997 by the**

**WEST VIRGINIA ETHICS COMMISSION**

**PUBLIC SERVANT SEEKING OPINION**

University Professors

**OPINION SOUGHT**

Is it a violation of the Ethics Act if public university professors serve on a drug formulary Committee?

**FACTS RELIED UPON BY THE COMMISSION**

A State Agency, at the suggestion of the Governor's Medicaid Crisis Panel, established a drug formulary Committee consisting of physicians and pharmacists. The Committee is charged with researching various classes of pharmaceuticals and recommending a formulary to that Agency and the Public Employees Insurance Agency.

The individual members of the Formulary Committee are each assigned a particular drug class to review. Each individual member becomes the chairperson of a Sub-committee charged with studying the literature and recommending the most effective product(s) in that class to the full Committee. The Sub-committees' findings are submitted to the full Committee in written reports, including references cited, and their recommendations are voted on by the full Formulary Committee in an open meeting. Minutes of these meetings are available to the public and any pharmaceutical manufacturer is allowed a thirty day period to file a rebuttal once it receives a copy of the Committee's minutes.

The full Committee's final recommendation is then forwarded to the appropriate Agency officials for a final determination.

Members of the Committee were recommended for service by several public and private entities. The members serve part-time. The Agency has offered the members a per diem allowance to compensate them for their time spent.

Some of the Committee members are full-time university professors who have received research grants and/or honoraria from pharmaceutical manufacturers whose drugs are subject to Committee evaluation. Those research grants do not generally provide for direct payments to the individuals, but rather are paid to the institutions which use the funds to pay the salaries and expenses of the research project. The institutions may also use a portion of the funds to make incentive salary payments to the grant recipients.

### **PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION**

West Virginia Code 6B-2-5(l) states in pertinent part that...Any person who is employed as a member of the faculty or staff of a public institution of higher education and who is engaged in teaching, research, consulting or publication activities in his or her field of expertise with public or private entities and thereby derives private benefits from such activities shall be exempt from the prohibitions contained in subsections (b), (c) and (d) of this section when the activity is approved as a part of an employment contract with the governing board of such institution or has been approved by the employees' department supervisor or the president of the institution by which the faculty or staff member is employed.

West Virginia Code 6B-2-5(b)(1) states 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.

### **ADVISORY OPINION**

The Ethics Commission has determined that there is no provision of the Ethics Act which would prohibit the Committee members from serving on the Committee even though they may have received grants and/or honoraria from certain drug manufacturers whose products may be evaluated by the Committee.

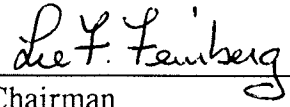
In Advisory Opinion 91-37, a state agency planning to rewrite regulation unilaterally created an advisory task force comprised of members who are affected by that regulatory process. The Ethics Commission held that since the members of an advisory task force had no authority to promulgate regulations or establish policy for the state agency, they were not covered by the provisions of the Ethics Act.

In Advisory Opinion 91-43 that same state agency was required by statute to establish an advisory task force for assistance on developing a methodology for a rate review system. The task force had to contain a variety of members including some directly affected by the rate review system. Again the Ethics Commission held that since the members of this advisory task force did not have the authority to promulgate regulations or establish policy for the state agency, they were not covered by the Ethics Act.

The Ethics Commission finds that the Drug Formulary Committee is also advisory in nature. Its role is not to promulgate regulations or make policy for the State Agency but rather to provide the Agency with expert advice on the efficacy of pharmaceuticals. The final policy decision on whether to place a particular product on the drug formulary remains the responsibility of the appropriate officials in the State Agency.

Therefore the Commission finds that the members of the drug formulary Committee are not covered by the Ethics Act when they serve as members of that Committee.

The Ethics Act, at WV Code 6B-2-5(l), exempts faculty members of state colleges and universities from the provisions of WV Code 6B-2-5(b),(c) and (d) if they are engaged in teaching, publishing, researching or consulting in their areas of expertise with their public employer's consent. The Ethics Commission finds that the research under the grants described above fall within this exception. The Commission also finds the speaking engagements and time spent on the drug formulary Committee to be consulting activities as that term is used in WV Code 6B-2-5(l).

  
Chairman