# ADVISORY OPINION NO. 2013-54

**Originally Issued on December 12, 2013 and**

**Ratified on January 21, 2014 by**

**THE WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

A **State Agency** asks if its staff attorneys may serve as Assistant Prosecuting Attorneys.

## FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Agency comprised of several operating divisions. One such division provides services related to Unemployment Compensation (UC). Among other duties, the UC division collects contributions from state employers that fund the state Unemployment Compensation Trust Fund. Employers are required to submit regular reports and to make quarterly contributions to the fund for their employees. If an employer fails to timely pay or submit reports, the Requester is authorized to file a civil collection action or file a criminal complaint in Magistrate Court.

The Requester's enabling legislation provides that it may employ "temporarily or as regular members of the department additional legal counsel. The remuneration of such counsel shall be paid from the administration fund." Presently, the Requester employs two attorneys, one of whom represents the agency at hearings, files tax liens and tracks employer bankruptcies.

According to the Requester, the other attorney was recently employed to serve as an assistant prosecutor to specifically prosecute non-compliant employers. This attorney's salary is funded entirely by the Requester; the County Prosecuting Attorney's Office does not compensate the attorney. Further, the Requester has developed and adopted policy and protocol to comply with the relevant law governing state agency attorneys serving as assistant prosecuting attorneys.

## CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads, in relevant part:

> A ... 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 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 ... does not constitute the use of prestige of office for private gain.

W. Va. Code§ 6B-2-5(e) reads, in relevant part:

> No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code§ 6B-2-5(l) reads:

> (1) A public employee may not receive additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours....

W. Va. Code§ 6B-2-5(m) reads:

> No public official or public employee shall knowingly request or accept from any governmental entity compensation or reimbursement for any expenses actually paid by a lobbyist and required by the provisions of this chapter to be reported, or actually paid by any other person.

**ADVISORY OPINION**

The Ethics Act prohibits the use of public office for private gain, but expressly excepts the "performance of usual and customary duties associated with the office or position", even if a *de minimis* amount of private gain results therefrom. Thus, the proposed arrangement to allow a staff attorney to serve as an Assistant Prosecuting Attorney does not violate the Ethics Act's prohibition against use of office for private gain.

Next, the staff attorney will necessarily acquire confidential information in the performance of her/his public duties. Use of such information to prosecute delinquent employers does not constitute knowing and improper disclosure.

W. Va. Code§ 6B-2-5(1) prohibits a full-time public employee from receiving additional compensation from another publicly-funded state, county or municipal office or employment for working the same hours. W. Va. Code§ 6B-2-5(m) likewise prohibits a public employee from accepting from any governmental entity compensation actually paid by any other person. Here, however, the staff attorney will only be paid out of the Requester's administrative fund; no additional compensation will come from the County Prosecuting Attorney's office (or any other source).

As a result of the foregoing, the Ethics Commission hereby finds that the State Agency's staff attorneys may serve as Assistant Prosecuting Attorneys for purposes of prosecuting non-compliant employers.

The Commission is only authorized to interpret the Ethics Act. The Ethics Commission notes that attorneys are also subject to the Rules of Professional Conduct for attorneys, and recommends that the Requester seek the State Bar's approval before implementing the proposed arrangement.

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

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman