

Advisory Opinion 2022-01

Issued on January 6, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **State Commission Member** asks whether her board may contract with a person who serves on another state board that provides administrative support to the State Commission.

Facts Relied Upon by the Commission

The Legislature, through a Senate Concurrent Resolution, created a State Commission whose purpose is to facilitate the construction of a memorial on the State Capitol grounds.¹ As required by the Senate Concurrent Resolution, the Governor appointed members to the State Commission. The Legislature has charged another state board with providing staffing and administrative support to the State Commission.

The Legislature appropriated money to the State Commission to use in accomplishing its mission. The appropriated funds are administered by the related state board, but the State Commission decides how the funds will be spent.

The State Commission must gather public input and solicit funds and proposals for the memorial. To achieve this objective, the State Commission has hired four persons, on short-term contracts, to educate the public about the memorial and to solicit input on the memorial's design.

The State Commission solicited applications for the contract positions by sending job descriptions to various departments and professors with expertise in communications, history, and related areas at two public universities. Each contractor will be paid \$5,000 from the State Commission's appropriated funds.

One of the persons selected by the State Commission as a contractor serves on the related state board. Neither the state board nor the board member selected as a contractor had any role in creating the job description; drafting the contract, or recommending and selecting the contractors. The power to award the contract rests solely with the State Commission and not the state board.

Due to the relationship between the State Commission and the state board, the Requester seeks guidance on whether contracting with the state board member is permissible.

¹ The project must be approved by the Capitol Grounds Building Commission.

Code Provisions Relied Upon by the Commission

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

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(d) states, in relevant part:

(1) In addition to the provisions of § 61-10-15 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 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.

...

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

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

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

....

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The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). The Act also contains specific exceptions to the public contract restrictions. *Id.*

The State Commission wants to contract with a person who serves on a state board that provides administrative support to the State Commission. Neither the state board nor the board member selected as a contractor had any role in creating the job description; drafting the contract, or recommending and selecting the contractors. The power to award the contract rests solely with the State Commission.

The Ethics Commission finds, therefore, that the related state board and its board members do not exercise direct authority or control over the State Commission's contracts, and that the state board member may therefore be awarded the contract by the State Commission because, as represented by the Requester, the state board member had no role in drafting or awarding the contract in question.

The following exception in the Ethics Act also applies.

[N]othing herein shall be construed to 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 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.

W. Va. Code § 6B-2-5(d)(1). This exception expressly authorizes part-time appointed board members (public officials) to contract with the state board or commission on which they serve and other government agencies when they have "not participated in

the review or evaluation thereof, [have] been recused from deciding or evaluating and [have] been excused from voting on the contract and [have] fully disclosed the extent of his or her interest in the contract.” The Requester states that these conditions have been met.

The Ethics Commission further finds that, based on the representations of the Requester, the exception for part-time appointed public officials in the Ethics Act, at W. Va. Code § 6B-2-5(d)(1), applies. Hence, it is also permissible for the State Commission to award the contract to the state board member per this exception.

The State Commission may not unlawfully favor the state board member, and the state board member must continue to remove herself from any decisions affecting the State Commission contract.²

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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.

/s/ Terry L. Walker
Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission

² If a matter affecting the contract comes before the state board on which she serves, she must also recuse herself. W. Va. Code § 6B-2-5(j).