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ADVISORY OPINION NO. 2012-19

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of the Legislature** asks whether he may be retained to provide consulting services to a Public University during and after his term of office.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a long-term Member of the Legislature whose term expires in December 2012. He is not seeking re-election.

Although he had earlier been a member of the Finance Committee, the Requester asked the Presiding Officer to transfer him to the Judiciary Committee so as to avoid any conflict of interest related to pursuing opportunities in Higher Education. For the same reasons, he will no longer serve on the following Interim Committees: Education Accountability, and Outcomes-Based Funding Models in Higher Education.

The University has entered into a sole source one year contract with the Requester to provide consulting services as "Planning Officer", beginning June 1, 2012. The contract requires the Requester to work closely with the University President to develop foundational research, a prospectus, and identification of the necessary application processes for an off-campus center to be established for the University. According to a press release the University issued, the proposed center will offer courses for adult undergraduate and graduate students at a more convenient times and locations.

The Requester has made it clear that although he is willing to resign from the Legislature before taking the position, he is cognizant of the challenges presented in filling a vacant seat for such a short time.

CODE PROVISIONS RELIED UPON BY COMMISSION

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

> (b) *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... 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(i) reads:

> (i) *Members of the Legislature required to vote.* -- Members of the Legislature who have asked to be excused from voting or who have made inquiry as to whether they should be excused from voting on a particular matter and who are required by the presiding officer of the House of Delegates or Senate of West Virginia to vote under the rules of the particular house shall not be guilty of any violation of ethics under the provisions of this section for a vote so cast.

ADVISORY OPINION

In Advisory Opinion 2012-17, the Commission imposed strict limitations regarding secondary employment of a presiding officer of a house of the West Virginia Legislature. In doing so, however, the Commission recognized its prior opinions authorizing certain outside employment for various Members of the Legislature. That opinion, like its predecessors, recognized that there is no provision in the Ethics Act that prohibits part-time public servants from accepting any particular employment position. While the Ethics Act places employment limitations on full-time public servants, a different standard applies to part-time public servants, most of whom must balance their public responsibilities with the need to make a living and support their families. For example, although required for full-time public servants, part-time public servants are not required to seek an employment exemption before seeking employment with persons and businesses subject to their regulatory authority. W. Va. Code § 6B-2-5(h).

The Ethics Act acknowledges the potential for conflict involved in balancing public and private responsibilities and directs that part-time public servants avoid such conflict by not taking official action on matters in which they have a personal interest. This concept is supported by the Act's prohibition against public servants using their public positions for their own private financial gain, or that of another. Together they serve to limit the potential for conflicts of interest inherent in governments which rely heavily on part-time public servants.

In Advisory Opinion 2001-20, a State Legislator asked if he could be employed as the Director of a federally funded State University Institute. Although the Commission ruled that the Ethics Act did not prohibit the proposed employment, it cautioned:

> It is clearly a problem for public servants to use the influence of their public positions for their own private financial gain. It would be a problem if the Legislator used the influence of his Legislative position in an attempt to affect the actions of University personnel in regard to his candidacy for the Director's position or to enhance his benefits if he were to be hired.

The Ethics Act provides that performance of usual and customary duties associated with a public office **without compensation** does not constitute use of office for private

gain. W. Va. Code §6B-2-5(b)(1) (emphasis supplied) The usual and customary duties of a Member of the Legislature include introducing legislation, advocating for its passage, and voting thereon. In Advisory Opinion 91-90, the Commission stated: "It would be a violation of the Ethics Act for the Legislator to enter into an employment contract which provided payment in exchange for introducing and advocating legislation in the legislature or for requesting recorded votes." *See also* Advisory Opinion 99-23 ("The introduction and advocacy of legislation is a vital constituent service which is to be provided without additional pay from interested parties. A legislator may not sell services which are a part of the official responsibilities of office.")

Here, the Requester has executed an agreement with the University to begin work on June 1, 2012. Before assuming the position, he worked with the leadership of his particular house to take steps to remove any potential conflicts related to finance and to higher education; the Commission finds this action commendable. He recognizes that he is prohibited from using his legislative position to influence either the State's distribution of federal grant money or State funds to the University for any purpose, not just those related to his consulting contract. As a result of these actions, he has removed the possibility of an inescapable conflict that may otherwise have arisen had he remained a member of the Finance Committee and those committees related to higher education and/or funding for education.

In Advisory Opinion 2003-14 a State Legislator asked if it would violate the Ethics Act for him to sponsor legislation authorizing a county referendum on an issue which would benefit the company by which he was employed. The Commission ruled:

> The usual and customary duties of members of the Legislature include sponsoring legislation, particularly legislation which is sought by constituents. However, in this situation the Legislator is employed full-time by a business which is among the principal beneficiaries of the legislation proposed. The Legislator shares a common financial interest with his employer in the proposed legislation and he should not, therefore, sponsor the legislation.

Similarly, in Advisory Opinion 2006-06 a Legislator inquired whether she could request or influence legislative appropriations for a nonprofit which was considering employing her. The Commission held that a Legislator should not use his or her position to influence the appropriation of public funds to a nonprofit by which she is employed. The Commission ruled:

> [A] Legislator should not use his or her position to "work behind the scenes" to influence the appropriation of funds to his or her private employer. However, the Ethics Commission does not have jurisdiction to determine whether voting on approving a budget which contains a line item appropriation for a nonprofit by which a Legislator is employed constitutes a conflict of interest. Instead, the decision regarding whether

members of the Legislature are required to vote is governed by the rules of the particular house...

Thus, the Ethics Commission finds that the Ethics Act permits the Member of the Legislature to provide consulting services to a Public University and continue to serve in the Legislature. He must, however, consult with the Presiding Officer of his house and abide by the appropriate legislative voting rule. He may not use the influence of his Legislative position to engage in any of the following activities:

- attempt to affect the actions of University personnel to enhance his contractual benefits;
- introduce, sponsor or advocate legislation to benefit the University in any way;
- influence either the State's distribution of federal grant money or State funds to the University for any purpose, not just those related to his consulting contract; or
- to influence the appropriation of public funds to benefit the University in any way.

The Commission finds that the limitations outlined above are consistent with the plain language in the Ethics Act and its stated purpose, i.e. to prevent not only actual impropriety, but also situations that give the appearance of impropriety. Nonetheless, the Legislature is free to impose stricter standards on its Members than those contained in the Ethics Act.

This advisory opinion is rendered on the unique facts and circumstances presented herein and 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 public agencies unless and until it is amended or revoked, or the law is changed.

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