ADVISORY OPINION NO. 2012-36

Issued On September 6, 2012 By The
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Employee,** whose agency is responsible for housing the State's historical documents, asks whether she may contract with the State of West Virginia to compile the official papers of a former Governor.

FACTS RELIED UPON BY THE COMMISSION

The Requester is employed by a State agency which is statutorily charged with preserving and archiving the State's historical documents. Her public job duties mainly involve media relations and communications activities. She also assists other divisions and programs in her agency with marketing. In her private capacity the Requester operates a limited liability company (LLC) providing media communications and public relation services.

In West Virginia, historically public money has been appropriated for purposes of contracting with an individual to compile the official papers of former Governors. As a matter of courtesy, the former Governor has always been allowed to be involved in selecting the person who will compile his papers as this project involves more than the ministerial task of indexing documents. Instead, the person who edits the papers has discretion in recommending what papers to include, and is responsible for writing commentary for purposes of officially memorializing the achievements and challenges of the former Governor's administration.

The Governor's Office is responsible for contracting with an individual to edit the papers. The contract is considered a sole source contract. The term "sole source" refers to a contract where there is only one source for the service. W.Va. Code§ 5A-3-10C. The contract is classified as sole source as the person selected is akin to a confidential employee to the extent that the person, in consultation with the former Governor, makes policy decisions in regard to what will be included in the official record and related commentary.[1] The Requester has contracted for this work through her LLC.

Editing official papers is not part of the Requester's public job duties. Indeed, it is only necessary for the State of West Virginia to compile official papers every four or eight years. Moreover, neither the Requester nor her agency is responsible for contracting

[1] A confidential position is a position which, in part, involves government decision-making on issues where there is room for political disagreement on goals or their implementation. Akers v. W. Virginia Dept. of Highways, 188 W. Va. 698, 425 S.E.2d 840 (1992).

with a person to undertake this project. Instead, an employee in the Governor's Office is charged with this responsibility.

In order to compile papers for a former Governor, it is necessary to review a voluminous amount of documents. These documents are archived and stored by the Requester's agency. The papers are public documents which any member of the public or press may review.

The Requester states that she will not review documents, or work on the project, during her regular work hours. Instead, she will work on the project on weekends and in the evenings. If it is necessary for her to work on the project during the day, then she will take annual leave. She will be paid twenty-five thousand ($25,000.00) for this contract. Pursuant to the terms of the contract she will be paid incrementally upon the completion of various phases of the project.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads 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.

W. Va. Code§ 6B-2-5(d)(1) provides in part that ... no elected or appointed public official ... or business with which he ... is associated may be a party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he ... may have control...

W. Va. Code§ 6B-2-5(e) reads:

(e) *Confidential information.* -- 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(h)(6) reads:

A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

ADVISORY OPINION

The Ethics Commission has considered the relevant provisions of the Ethics Act. The Commission finds it does not violate the Ethics Act for the Requester to contract with

the State of West Virginia to edit the papers of a former Governor since:

(1) The Requester does not exercise control over the contract in question. The power to award this contract lies with the Governor's Office who makes this decision in consultation with the former Governor;
(2) The Requester's current public position does not give her access to confidential information so as to give her unfair advantage over other equally qualified candidates. Instead, the papers of former Governors are public documents;
(3) Editing the papers of former Governors is not part of her regular job duties; and,
(4) The Requester's decision to agree to edit the papers does not constitute use of public office for private gain. While the Requester may have a high-ranking position in government, it is the current and former Chief Executive Officers who ultimately decide who will be selected for these projects.

In closing, there is nothing in the Ethics Act which prohibits the Requester from contracting with the State of West Virginia to edit the former Governor's papers. The Requester must perform this work on her own time; not during her State Agency work hours. She may not use public resources, including subordinate staff, in furtherance of her private business.

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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson