ADVISORY OPINION NO. 2011-17

Issued On January 12, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Licensing Board** asks the following questions:

1. May its Executive Director be a member and/or officer of a professional association consisting of licensees which the Board regulates?
2. May a member of the Licensing Board be a member and/or officer of a professional association consisting of licensees which the Board regulates?

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Licensing Board ("Board") established under Chapter 30 of the West Virginia Code. The Board consists of eleven members that are appointed by the Governor, with the advice and consent of the West Virginia Senate. In accordance with its enabling statute, nine of the eleven members must represent an array of specified interests and disciplines within the profession. The remaining two members are required to be citizens who are not licensed or regulated by the Board.

In furtherance of its duties, the Board employs an Executive Director. The Executive Director is responsible for the administration of the Board and oversight of its day to day operations.

According to the Requester, the Executive Director, and many of the Board members, belong to a private professional association ("Association") relating to the same professional discipline which the Board regulates. Associations are generally discipline-specific organizations whose members pay a yearly membership fee. Depending on the size, most Associations have a paid administrative staff as well as a Board of Directors and officers. The officers of the Associations are typically elected by a vote of the entire Association membership, and serve without compensation. The officers serve as the decision-making body for the Associations and advocate on behalf of its members.

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.

. . .

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.

ADVISORY OPINION

The Requester seeks guidance about a matter that has troubled licensing boards in West Virginia for several years.[1] Specifically, to what extent, if any, may a Board member and/or Executive Director be involved with a related professional association. The issue is not unique to the State of West Virginia nor is it isolated to the Requester's profession. Instead, it is a question which most Chapter 30 Boards have struggled with, and for which there is no universal solution.

The difficulty arises out of the common membership of the Association and the regulated professionals. Indeed, many of the licensees regulated under Chapter 30 of the West Virginia Code belong to one or more professional associations relating to their respective professions or occupations.

While the Associations and Boards generally share a goal of advancing the profession and protecting the public, their policies and viewpoints may differ on certain issues (e.g. increase in licensing fees). On occasion, these differences have manifested themselves into vocal disputes and aggressive lobbying of the Legislature and/or public to advance their respective positions. These disputes also typically result in the officers taking a formal position on a matter, and advocating for its position on behalf of its Association membership. The Board, in turn, speaks and advocates through staff and the members of its Board.

When an Association officer concurrently serves as an appointed member of the Board, the affected Board member must reconcile his or her duty to the Board with the official stances of the Association in which he or she is an officer. On most matters, this does not pose a problem. However, when there is disagreement on an issue, there has been a concern of an appearance of impropriety and potential conflict with the Board member wearing "two hats". Additionally, even if there is agreement between the two, there could be a concern of collusion if a member serves concurrently as an officer of the Association and an appointed member of the Board. These concerns are further

[1] The Requester's Licensing Board, and all other professional Licensing Boards in West Virginia, are established under Chapter 30 of the West Virginia Code. These various licensing boards are generally referred to as Chapter 30 Boards. When discussing the Licensing Boards collectively, the Commission utilizes the term "Chapter 30 Boards" throughout this Advisory Opinion.

exacerbated in professions with multiple disciplines and Associations whose professions are governed by a single Board.

Some States have either statutorily or administratively prohibited a member of a Licensing Board from concurrently serving as an officer of a related professional Association.[2] Many of these prohibitions are based upon the respective State's Ethics rules, while other States have simply prohibited all members of licensing boards from being officers of a Professional Association. In contrast, some States have expressly allowed the dual service, while other States have never formally addressed the issue.[3]

Although some bills have been introduced to expressly prohibit the dual service in West Virginia, the Legislature has not passed a law nor exercised its "advice and consent" power to universally prohibit the appointment of an officer of a professional association to a Chapter 30 Board. However, in at least one Chapter 30 Board, the Legislature did expressly prohibit the dual service. *See* W.Va. Code § 30-32-7(c).

In light of such, the Requester asks if the concurrent service is prohibited under the West Virginia Ethics Act.

1. Membership in a related Professional Association

The Requester's initial question is whether the Ethics Act prohibits the Executive Director from being a member of an association of professionals which the Board regulates. Additionally, the Requester asks whether the Ethics Act prohibits a member of the Board from being a member of an Association. At issue is whether membership in an Association creates an appearance of impropriety.

In establishing the Ethics Act, the Legislature sought to maintain the public's confidence in the impartiality and independence of decisions and actions by public officials and employees, and to ensure that all such decisions be made free of undue influence, favoritism or threat at all levels of government. W.Va. Code § 6B-1-2. However, the Legislature additionally recognized that "many part-time public officials and public employees serv[e] in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service[.]" W.Va. Code § 6B-1-2(c).

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[2] *See, e.g.* Ohio Ethics Commission Advisory Opinion 90-012 (holding that a Board member of a licensing board **may not** serve as an officer of a professional association because it constituted an impermissible conflict of interest); New York State Ethics Commission Advisory Opinion No. 96-13 (holding that an Agency's prohibiting dual service is consistent with the State's ethics rules); *See also* Commonwealth of Kentucky's Executive Branch Ethics Commission Advisory Opinion 09-21 (holding that the State's Ethics provisions do not exclude service *per se*, but held that "the Board member will be precluded from participating in practically all matters that come before the Board").

[3] *See, e.g.* State of Arkansas Ethics Commission Advisory Opinion No. 93-EC-006 (expressly held that dual service not violate State's ethics provisions).

While the Commission is mindful of maintaining the impartiality and independence of the decisions of State Boards, neither the Requester's enabling statute nor the Ethics Act prohibits membership in a private organization consisting of licensees which the Board regulates. Rather, the Commission finds that being a member of a professional association relating to the profession which is regulated by a State Board does not alone create such a conflict that it warrants a mandatory prohibition.

In fact, there may be a public benefit for members of a profession to join others in their discipline in furtherance of their training and expertise, as well as to discuss issues affecting their profession. Additionally, it is contemplated that the members of the Board bring to the Board their own experiences, judgments, and beliefs.

Accordingly, in the absence of express statutory prohibition, the Commission hereby finds that the Ethics Act does not prohibit a Chapter 30 Board member or the Board's Executive Director from being a member of a professional association relating to the profession which the Board regulates.

2. Officers of a related Professional Association

Having found that membership in a professional association is not prohibited, the Commission must next determine whether the Chapter 30 Board member and/or Executive Director may be the President, Chairperson, officer, and/or hold an executive committee position (hereinafter "officer") of the professional association while serving as a Board member or Executive Director.

Officers of an Association owe a duty of loyalty to the Association. At times, this duty conflicts with a member's duty of loyalty to the Chapter 30 Board which regulates the profession as a whole. A Board member or Executive Director in this position would therefore wear "two hats" and have potentially divided loyalty. The Requester asks whether this dual service is permissible under the Ethics Act.

Given the different responsibilities of a Board member and Executive Director, they shall be addressed separately.

A. Executive Director

The Executive Director is hired by the Board to serve the Board. The Executive Director is required to gather facts, issue spot, and oversee the administration of the Board's activities. By contrast, a board member is one of several politically appointed decision-makers who does not have a role in the day to day operations of the Board.

If an Executive Director were also an officer or employee of the professional association, the duty of loyalty to the Board could be breached by the duties owed to the Association. More importantly, given the public advocacy and agenda setting associated with the position of Executive Director, there is an inescapable conflict in maintaining a duty of loyalty to potentially competing entities (e.g. Board vs. Association).

Accordingly, the Commission hereby finds that an Executive Director of a Chapter 30 Board **may not** serve as an officer or employee of a professional association relating to the profession which the Board regulates.

B. Board Members

With respect to members of a Chapter 30 Board, the analysis is not as clear. The enabling legislation of some Chapter 30 Boards expressly requires members of a related association to serve on its Board or to nominate association members to the Board. *See* W.Va. Code § 30-29-2(b) and W.Va. Code § 30-36-4(c)(2). In contrast, at least one other Board expressly prohibits officers of an association from serving on the Board. *See* W.Va. Code § 30-32-7(c)("No member of the board shall at the same time serve in an elected, appointed, or employed position in any state-level organization representing speech-language pathologists and audiologists, or both, which presents or may present a conflict of interest.")

As a result of the statutory differences regarding Board memberships, the Commission is unable to ascertain an express Legislative intent. Thus, while the Commission is mindful of maintaining the impartiality and independence of Board decisions, the Commission recognizes its limited jurisdiction.

Therefore, the Commission declines to create a universal rule permitting or prohibiting dual service. Rather, the issue is more appropriately addressed by the Legislature, if it deems that the matter requires redress, and/or by each Chapter 30 Board. In that regard, the Commission notes that the Requester may seek a resolution to the question through a change to its enabling legislation.

The Commission also notes that other restrictions may apply. First, the primary duty of loyalty for all Chapter 30 Board members is to the public. Thus, when a true conflict arises between the Chapter 30 Board's position on legislation and that of the Association, the Association officer must give her/his loyalty to the Board. Notwithstanding the member's role as an officer of the Association, the member may not publicly advocate the Association's position when it contrasts with the Board's position. *See, e. g.* ALJ AO 2006-01 (ALJ may maintain private practice, but may not counsel or advocate for a client against any interest of the State of West Virginia). Otherwise, a Board member's advocacy on the Association's behalf lends the prestige of the public position to the private entity. W.Va. Code § 6B-2-5(b)(prohibiting use of public office for private gain of another).

Similarly, regarding issues on which the Board has not taken a position but the Association has, a board member may not, when lobbying on the Association's behalf, identify her/himself as a board member, but only as an Association officer. This prohibition extends to any public speaking when the board member is promoting the Association's position or agenda; the board member must clearly identify her/himself as an Association officer speaking on the Association's behalf. If in an introduction or

biography s/he is identified in both capacities, s/he must clarify that her/his remarks are solely those of the Association; failure to publicly make such a disclaimer improperly confers a benefit upon the Association.

The Commission recognizes that, as a practical matter, these restrictions may cause the Association or the officer to conclude that Chapter 30 Board members would be ineffective as Association officers. Nonetheless, these measures are necessary to protect against the prohibited use of public office for the private gain of another. Members are additionally cautioned to review other provisions of the Ethics Act which may apply and require the Board member's recusal. *See e.g.* W.Va. Code § 6B-2-5(b), (d), (e) and (g).[4]

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 public agencies unless and until it is amended or revoked, or the law is changed.

R. Kemp Morton, Chairperson

[4] The Commission recently discussed this issue in A.O. 2011-15 and A.O. 2011-16, wherein it held that a Board member who is also a member of a fraternal association which is suing the Board must recuse him/herself from matters relating to the lawsuit. However, the Commission held that the Board member is not required to be recused from general policy matters underlying the lawsuit.