ADVISORY OPINION NO. 2011-19

Issued On December 1, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Licensing Board** asks:

(1) Whether it may use public funds to hire its former Executive Director, a registered lobbyist, to serve as a Legislative liaison;

(2) If it hires a registered lobbyist, whether the person must register on behalf of the Board; and,

(3) Whether the newly enacted revolving door prohibitions relating to lobbying would prohibit the Board from hiring its former Executive Director to lobby on its behalf.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Licensing Board which regulates members of a profession. The Board's duties include, but are not limited to, issuing licenses, conducting investigations and proposing legislative rules.

Recently, the Board's Executive Director resigned. Based upon information and belief, the Director resigned his employment prior to July 1, 2011. At the time of his resignation and at all times relevant hereto the Director was a registered lobbyist who represented several private clients. Based upon information and belief, he does not represent clients whose areas of interests fall within the jurisdiction of the Board.

The Board has recently hired a new Executive Director. The new Executive Director is a licensed professional in the profession regulated by the Board. The Board is in the process of proposing a re-write of its enabling legislation and related legislative rules. The Board states that neither the new Director nor the Board has the practical experience or time to undertake this re-write, including working with the Legislature and members of the profession to accomplish this task. As such, the Board is considering hiring its former Executive Director as a contract employee for this purpose. The Board seeks guidance on whether it may do so, and, if so, what other limitations may apply.

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-3-1(6).

> "Lobbying" or "lobbying activity" means the act of communicating with a government officer or employee to promote, advocate or oppose or otherwise attempt to influence: (i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state....

W. Va. Code § 6B-3-1(8) defines "Lobbyist" as:

> (A) "Lobbyist" means any individual employed by a lobbying firm or who is otherwise employed or contracts for economic consideration, other than reimbursement for reasonable travel expenses, to communicate directly or through his or her agents with any elective state official, agency official or legislative official for the purpose of promoting, advocating, opposing or otherwise attempting to influence:
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> > (i) The passage or defeat or the executive approval or veto of any legislation which may be considered by the Legislature of this state...
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> (B) The term "lobbyist" does not include the following persons, who are exempt from the registration and reporting requirements set forth in this article, **unless they engage in activities which would otherwise subject them to the registration and reporting requirements.**(emphasis added):
> ....
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> (vi) Employees of the executive branch whose duties include seeking to have Legislation introduced and passed at the request of their agency, or who otherwise serve as a Legislative liaison, do not have to register as a lobbyist. W.Va. Code § 6B-3-1(8)(B)(vi). Here, the former director does not fall within this exception as he is a professional lobbyist.

ADVISORY OPINION

The Ethics Act prohibits public agencies, including licensing boards, from using public funds for their own private gain or the private gain of another. In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure. [1] *See* A.O. 2010-19.

In considering the question presented, the Commission finds that it does not violate the Ethics Act for a public agency to hire a contract employee for purposes of assisting the

[1] The Board is funded through a special revenue fund consisting of licensing fees collected by the agency; however, these funds are still public funds and may only be expended for purposes authorized by law.

agency in drafting legislation or rules or promoting their passage through communications with the Legislature and other interested parties. Normally, agencies have persons on staff with the assigned responsibility of serving as the agency's Legislative liaison. During the Legislative session and throughout the year, this staff person or the head of the agency may communicate with the Legislature on matters of interest to the agency.

The term "lobbying" is defined, in relevant part as, "the act of communicating with a government officer or employee to promote, advocate or oppose or otherwise attempt to influence...the passage or defeat ....of legislation."[2] W. Va. Code § 6B-3-1(8). When an agency is communicating with the Legislature to promote the passage of legislation or legislative rules, these communications constitute lobbying.

There is no prohibition in the Ethics Act against an agency using public resources and staff to lobby, i.e. to communicate with the Legislature. If an agency is interested in promoting the passage of a proposed rule or legislation which the agency believes is necessary for the efficient operation of the agency or promotes the mission of the agency, then it is necessary for its staff to interact with the Legislature to communicate the agency's position.

If the agency does not have adequate staff to draft legislation or rules, field questions from interested parties, meet with Members of the Legislature or attend Legislative Committee meetings, then the agency may elect to hire a temporary employee or contract employee for this purpose. The Commission finds that the expenditure of public funds for this purpose does not violate the private gain provisions in the Ethics Act, even if the person the agency hires is a registered lobbyist.

The Commission recognizes that the question presented is unique as a public agency is using public resources to hire a professional registered lobbyist to serve as its Legislative liaison. Based upon information and belief, historically, few public agencies in West Virginia have hired professional lobbyists.

On the national level, some states hire lobbyists to lobby Congress. Some commentators believe that this practice does not constitute sound public policy; others argue the contrary. Regardless, it does not violate the Ethics Act's private gain provision for a public agency to hire a lobbyist; provided that, the agency consults with the Auditor's Office to determine whether the expenditure of public funds for this purpose is authorized. Additionally, the Commission cautions public agencies against using public funds to purchase meals or gifts for public officials in furtherance of the agency's lobbying efforts.

Next, the Commission must consider whether a registered lobbyist who is hired as a contract employee by a public agency to serve as its Legislative liaison must register as a lobbyist.

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[2] The fact that a person communicates with Members of the Legislature to express his or her view on a bill constitutes lobbying; however, such communications, standing alone, do not trigger the lobbyist registration requirements. Instead, the test is whether the person is compensated to lobby or expends $150.00 or more on public officials in furtherance of his or her lobbying activities.

Public officials and employees are not required to register as lobbyists when lobbying the Legislature on behalf of their agency. W. Va. Code § 6B-3-1(8)(B)(vi) and A.O. 99-09. However, in the present case, a different rule of law applies. Specifically, if the Board hires the person under consideration as its Legislative liaison, he is not exempt from the registration requirements for executive branch employees as he is a professional registered lobbyist. The Commission reached a similar conclusion in A.O. 2010-07 wherein the Commission found that a registered lobbyist is required to register as a lobbyist on behalf of a non-profit organization even if she volunteers her lobbying services to the non-profit without compensation. As such, if hired, he must register the Board as one of his clients with the West Virginia Ethics Commission and pay the $100.00 registration fee.

Last, the Commission must consider whether the agency's act of hiring its former Executive Director as a contract employee/lobbyist triggers the newly enacted revolving door prohibition which requires certain public officials, including heads of agencies, to wait one year before registering as a lobbyist. This provision became effective July 1, 2011, The Executive Director terminated his employment prior to July 1st. Hence, if he is hired as a contract employee and is in fact a contract employee as defined by applicable federal law and Internal Revenue Service regulations, then the contract for his services does not trigger the one year waiting period. This question was considered and answered in Advisory Opinion 2011-04.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.* and W.Va. Code § 61-10-15, 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, III Chairperson