

## **Advisory Opinion 2020-05**

**Issued on March 5, 2020, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A part-time **State Board member** asks whether he may be employed by a professional association whose members are regulated by the State Board on which he serves.

### **Facts Relied Upon by the Commission**

The Requester serves on a State Board (“State Board” or “Board”) whose members are appointed by the Governor. As required by the West Virginia Code, the majority of the Board members are licensed providers in the field which the Board regulates. The Code also requires that two Board members be citizens who are not licensed by the Board and do not perform services related to the profession regulated by the Board. The Requester serves on the Board in his capacity as a licensed provider. All Board members serve on a part-time basis, e.g., the Board is only required to meet twice a year and there is no requirement that the members devote full time to their Board duties.

The Requester is considering applying for a part-time Executive Director position with a professional society (“hereinafter association”) comprised of persons and providers in the profession which the Board regulates. His duties with the association would include planning the annual meeting; retaining and recruiting members; publishing the newsletter and managing the organization. The Requester states that he would not lobby on behalf of the association.

### **Provisions Relied Upon by the Commission**

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

The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

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

(a) The provisions of this section apply to all public officials and public employees, whether full or part-time and whether compensated or not, in state, county, municipal governments and their respective boards, agencies, departments, and commissions and in any other regional or local governmental agency, including county school boards.

(b)(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. 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.

### **Advisory Opinion**

In general, the Ethics Act does not prohibit a part-time state board member from being employed in the public or private sector. The Legislature has expressly recognized “that certain conflicts of interest are inherent in part-time service,”<sup>1</sup> and, as required by law, state boards often have members who are licensed and regulated by the state board on which they serve.

In Advisory Opinion 2011-17, the Ethics Commission analyzed whether a state board member may be an officer or board member of an association comprised of persons in the profession which the state board regulated. The Commission declined to create a bright-line rule and concluded that the matter “is more appropriately addressed by the Legislature.” Hence, the Ethics Commission did not prohibit – or allow – state board members from being involved as officers or board members in professional associations whose membership consists of persons the state board regulates.

In Advisory Opinion 2016-07, the Commission held that a state board member may, for pay, be an expert witness in a civil case against a defendant who had appeared as a party in unrelated matters before the state board. The Ethics Commission cautioned that board member that he may not improperly use his position on the board or confidential information for his personal benefit.

In considering the plain language in the Ethics Act and past Advisory Opinions, the Ethics Commission finds that no provision in the Act prohibits a part-time state board member from being employed by a professional association comprised of persons which the board regulates.<sup>2</sup> **The Ethics Commission holds that the Requester may**

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<sup>1</sup> W. Va. Code § 6B-1-2(c).

<sup>2</sup> The Ethics Act contains more stringent restrictions on full-time public officials and employees seeking employment with or being employed by regulated persons and vendors. W. Va. Code § 6B-2-5(h).

**be employed by a professional association comprised of persons the state board regulates.**

The Ethics Commission cautions the Requester that while the Ethics Act does not prohibit his employment by the professional association, he may not knowingly and improperly disclose any confidential information acquired in the course of his official duties or use such information to further his personal interests or the interests of another person.<sup>3</sup> Further, while the Requester states he will not be lobbying on behalf of the private association, he must be cognizant of the restriction in the Ethics Act which provides that “[a] lobbyist or a lobbyist's immediate family member may not participate in any decision as a member of a state or county board, council, commission or public service district if the lobbyist may receive direct, personal economic or pecuniary benefit from a decision of that state or county board, council, commission or public service district. The lobbyist's economic or pecuniary benefit must affect him or her directly and not merely as a member of a class.”<sup>4</sup>

The Ethics Commission also takes this opportunity to overrule Advisory Opinion 2013-60, which held that a member of a state licensing board may not accept a paid position with a private entity that conducts business with professionals that the board licenses and regulates. The legal basis asserted for that holding was, in relevant part, that the outside employment was impermissible because “regulated professionals might easily be influenced to engage in business with the private entity [employing the requester/board member] as an attempt to curry favor ... with the [p]ublic [b]oard” and there would be the “appearance of conflict.” The Commission finds that the holding in Advisory Opinion 2013-60 is not consistent with the plain language in the Ethics Act or the Commission’s prior Advisory Opinions. While state board members must recuse themselves if they or their employers have a prohibited financial interest in a matter before the state board on which they serve, the Ethics Act does not, in general, ban part-time board members from having outside employment or business interests.<sup>5</sup>

*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.*

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<sup>3</sup> W. Va. Code § 6B-2-5(e)

<sup>4</sup> W. Va. Code § 6B-3-3b

<sup>5</sup> The matter must uniquely affect the board member, an immediate family member or a business by which they are employed or associated as opposed to affecting them as a member of, and to no greater extent than, any other member of a profession, occupation, class or persons or class of businesses. W. Va. Code § 6B-2-5(j)(2).

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission