



State of West Virginia

John B. McCuskey

Attorney General

Office of the Attorney General
State Capitol, Bldg. 1, Rm E-26
1900 Kanawha Blvd., E.
Charleston, WV 25305

(304) 558-2021
Fax: (304) 558-0140
www.wvago.gov

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The Honorable Mark A. Hunt
West Virginia Auditor
1900 Kanawha Blvd. East,
Building 1, Room W-100
Charleston, WV 25305

Dear Auditor Hunt:

You requested an Opinion of the Attorney General about whether a member of the West Virginia Legislature can serve as either a contractor or an employee of a West Virginia executive agency. We are issuing this opinion under West Virginia Code § 5-3-1, which provides that the Attorney General “shall give written opinions and advice upon questions of law ... whenever required to do so, in writing, by ... the Auditor.”

Your letter asks us to identify “any prohibitions—statutory, constitutional, or otherwise—on a sitting member of the West Virginia Legislature also serving as either a contractor or an employee of an agency within the executive branch of our state government.” The letter does not provide further explanation.

As to the “employee” aspect of your question, the answer is clear: a sitting member of the West Virginia Legislature cannot, under any circumstances, serve as “an employee of an agency within the executive branch of our state government.” Article VI, Section 13 of the West Virginia Constitution is unequivocal: “No person holding ... employment under this state ... shall be eligible to a seat in the Legislature.” Working as an employee would necessarily constitute “employment under this state.” W. VA. CONST. art. VI, § 13.

“This [restriction] is a fundamental tenet of the separation of powers doctrine contained in our Constitution.” *State ex rel. Rist v. Underwood*, 206 W. Va. 258, 262, 524 S.E.2d 179, 183 (1999). As one court explained in describing its state’s similar constitutional provision, it is designed “to prevent the acceptance by a legislator of any position under the state, ... which creates the opportunity for private aggrandizement, pecuniary in nature or otherwise.” *Parker v. Riley*, 113 P.2d 873, 875 (Cal. 1941).

But without more information, we are unable to offer an opinion as to whether a “contractor” role would offend any prohibition.

West Virginia state law might impose many restrictions on a “contractor’s” ability to perform certain functions. For instance, we can conceive of a contractor role that would constitute *de facto* state employment, which could in turn violate Article VI, Section 13. *Cf. Exp.-Imp. Bank of the U.S. v. Asia Pulp & Paper Co.*, 232 F.R.D. 103, 113 (S.D.N.Y. 2005) (describing the “functional equivalent” doctrine, under which, “by virtue of assuming the functions and duties of full-time employee, the contractor is a *de facto* employee of the company”). Similarly, we could imagine a contractor role that could violate Section 13’s prohibition against legislators holding “lucrative office.” W. VA. CONST. art. VI, § 13; *see, e.g., Dawkins v. Meyer*, 825 S.W.2d 444, 446-47 (Tex. 1992) (holding that a state board member who received a modest per diem for meeting attendance held a “lucrative office”); *see also* W. VA. CONST. art. VI, § 15 (“No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this state, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people.”). Or we could envision situations that create “incompatibility” that, under the common law, could preclude a contractor from serving in the Legislature. *See, e.g., State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 24 S.E.2d 463, 466 (1943) (describing such common-law doctrines).

Apart from these function-focused provisions, state statutory and constitutional law both impose restrictions on a legislator’s ability to contract more generally. Article VI, Section 15 of the West Virginia Constitution is perhaps the most obvious restraint; it flatly declares that no member of the Legislature may “be interested, directly or indirectly, in any contract with the state, or any county thereof, authorized by any law passed during the term for which he shall have been elected.” But that provision hardly stands alone. For example, the Ethics Act places certain restrictions on the ability of legislators to enter public contracts. *See* W. VA. CODE § 6B-2-5(d).

All the above suggests that a person should exercise caution before purporting to act as both a “contractor” of an executive agency and a sitting legislator. But without more details about the specific nature of the “contractor” relationship your letter contemplates, we are unable to confirm every legal provision that might apply and whether any such provision would prohibit concurrent service to both the Legislature and the agency.

Sincerely,

A handwritten signature in black ink, reading "John B. McCuskey". The signature is written in a cursive, slightly slanted style.

John B. McCuskey
Attorney General