

**WEST VIRGINIA
SECRETARY OF STATE
BETTY IRELAND
ADMINISTRATIVE LAW DIVISION**

Form #3

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FILED

2005 JUL 27 A 10: 54

OFFICE WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: West Virginia Ethics Commission TITLE NUMBER: 158

CITE AUTHORITY: W.Va. Code 6B-2-5(k)

AMENDMENT TO AN EXISTING RULE: YES ☐ NO ☒

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 14

TITLE OF RULE BEING PROPOSED: Filing of Verified Time Records

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Lewis D. Bruner, Executive Director
Authorized Signature

Robert M. Ferguson Jr.

QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: July 18, 2005

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) West Virginia Ethics Commission, 210 Brooks Street

Suite 300, Charleston, WV 25301 1838

LEGISLATIVE RULE TITLE: FILING OF VERIFIED TIME RECORDS

1. Authorizing statute(s) citation W.Va. Code 6B-2-5(k)

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:

May 13, 2005

b. What other notice, including advertising, did you give of the hearing?

Provided information to the executive directors of the Association of Counties and the Municipal League. Based upon information and belief, they informed their membership of the proposed rule.

c. Date of Public Hearing(s) *or* Public Comment Period ended:

June 17, 2005

d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached X No comments received

- e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

July 27, 2005

- f. **Name, title, address and phone/fax/e-mail numbers** of agency person(s) to receive all written correspondence regarding this rule: (Please type)

Theresa M. Kirk, Legal Counsel

210 Brooks Street, Suite 300

Charleston, WV 25301 1838

tkirk@wvadmin.gov
(304) 558-0664

- g. **IF DIFFERENT FROM ITEM 'f'**, please give **Name, title, address and phone number(s)** of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

Lewis G. Brewer, Executive Director

Theresa M. Kirk, Legal Counsel

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

- a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

**BRIEF SUMMARY OF COMMENTS RECEIVED;
AGENCY RESPONSE; AND AMENDMENTS**

JAMES A. SMITH - DIRECTOR OF PERSONNEL
BRIDGEPORT, WV:

Comment 1: Expressed concern that the new provision will result in excessive amounts of documents (*i.e.* verified time records) being filed with the Ethics Commission.

Agency Response 1: The Commission recognizes that the new provision confers additional responsibilities upon the Commission. Noted that the Commission cannot limit the scope of its statutory responsibilities through rule making. Nonetheless, to clarify exactly what documents need to be filed, the Commission was of the opinion that an amendment was warranted.

Amendment 1: The amendments are: (1) to avoid confusion we have incorporated language from W.Va. Code 6B-2-5(k) which clarifies that verified time records must only be filed by a full-time or part-time public employee who has regularly scheduled work hours when they have missed time to perform the functions of the other public position or employment and the public employee is permitted to make up the time missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or taking unpaid leave from his or her public employment (158 C.S.R. 3.2); (2) clarified that a verified time record only needs to be filed for the actual work day or days where time was missed, and the employee was granted permission to make-up the work. 158 C.S.R. 3.2. These proposed amendments should make it clearer regarding when records should be filed and what information the records should contain. Also revised the reporting form.

Comment 2: Mr. Smith expressed concerns that there is no "checks and balance" program to enable the Commission to independently verify the filings.

Agency Response 2: The Ethics Commission cannot interject into the rule a power which has not been granted by the legislation. Noted that if a public employee is allegedly violating this provision, and if a complaint is filed or the Commission receives reliable information upon which it may independently file a complaint, then during the course of its investigation the Commission will take appropriate steps to determine whether, when applicable, that proper time records were kept.

Amendment 2: No amendment made

**ALAN K. PERDU - GENERAL COUNSEL
SHEPHERD UNIVERSITY**

COMMENT 1: If the public employee who has dual public employment has not filled out the form, does the agency have a duty to make the employee complete the disclosure or do the duties only arise after the employee fills out their portion of the form and submits it to the employer.

Agency Response 2: Responded that the comment could be construed as expressing a concern that a public employer may not know when an employee has other public employment. The Commission does not anticipate that from a reporting standpoint that this situation would arise very frequently for the following reasons. A full-time or part-time public employee only has to maintain time records if they miss work at one public job to work at another public position and they are permitted to make up the hours missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or taking unpaid leave from his or her public employment to perform the duties of another public office or employment. We would assume that normally if an employee is requesting to miss work and to then make it up, that in all likelihood his or her supervisor would inquire as to the reason for the request. Additionally, if an employee is an appointed or elected official then normally it is common knowledge that they hold the public position.

Nonetheless, in response to the concerns raised, we amended the proposed rule to make it clear that the duty is only triggered when there is actual knowledge by the employer.

Amendment 1: Added a new subdivision to read:

4.2. If a public employer has actual knowledge that an employee is subject to the requirements of this section and W.Va. Code § 6B-2-5(k) then the employer shall require the employee to keep time records when required by this rule.

Comment 2: Expresses a concern that faculty have very grey parameters in regards to work hours. While they have approximately twenty hours of scheduled office and classroom hours, they perform their class preparation, committee work, research projects and other scholarly pursuits on a flexible self-directed schedule. Then goes on to state that he is not sure what the term regularly scheduled work hours means, but that he would hope that the time outside of the classroom would always be treated as outside of the regular work schedule.

Agency Response 2: The Commission agrees that for the time outside of the classroom, based upon the description provided and the plain language of the statute, that the full-time faculty do not have regularly scheduled work hours. Hence they would not be subject to the reporting requirements.

The main focus of the rule is to require the submission of verified time records for the

day or days when an employee is authorized to make up work at a later date. Likewise, they must submit a time record for the days on which the work is made up. Both the statutory provision and proposed rule reflect that the Legislature anticipated that there may be times when a public employee is authorized to make up work to perform the duties of another public office or employment in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time. At the same time the Legislature recognized that to maintain public confidence and to protect tax payer dollars, that there should be some accounting of work hours when an employee has regular work hours and is authorized to make up time outside of those hours.

However, based upon the comments, the Commission reviewed the rule and realized that the wording does create confusion. To make it clearer and more user friendly, we made some amendments.

Amendment 2: The Ethics Commission added language which states that a full-time or part-time public employee only has to maintain time records if he or she misses work at one public job to work at another public position and they are permitted to make up the hours missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment. (158 C.S.R. 3.2) (Similar language is already in the statute)

Next we added language to make it clear that a part-time employee who does not have regularly scheduled work hours can likewise comply with the statute by having his or her salary reduced on a pro rata basis for the time missed, or using earned paid vacation, personal or compensatory or taking unpaid leave. If for some reason a part-time employee without regular scheduled work hours does elect to make-up time, then they must file a verified record. (The Ethics Commission anticipate that a part-time employee without regularly scheduled work hours will rarely fall within the reporting requirements because normally a part-time employee with a flexible schedule is going to find time during the course of a work week and/or pay period to work the required amount of hours. Nonetheless, there may be instances when he or she misses work and is authorized to make it up during another pay period. In that instance, they would need to file verified time records for both the day on which he or she is authorized to miss work, and for the day on which the work is in fact made up).

BRIEF SUMMARY OF PROPOSED RULE
Title 158, Series 14

The rule provides guidelines for the maintenance of verified time records by public employees who also have other public employment or hold a public office. A public employee is defined as any full-time or part-time employee of any state, county or municipal governmental body.

The rule also provides a procedure for the filing of the time records by an employee's immediate supervisor. The time records, in accordance with W.Va. Code § 6B-2-5(k), must be filed on a quarterly basis with the West Virginia Ethics Commission. The quarterly filing deadlines are incorporated into the rule as well as a form which must be submitted with the time records.

STATEMENT OF CIRCUMSTANCES
Title 158, Series 14

The Legislature amended the West Virginia Ethics Act during the January 2005 Special Session. A new provision, W.Va. Code § 6B-2-5(k), prohibits a public employee from receiving additional compensation from another publicly funded source for working the same hours. This section also outlines various exceptions to the general prohibition. For instance an employee can use earned paid vacation, personal or compensatory time if they miss work to perform the duties of their other public employment.

The section also requires any state, county or municipal employee, who is also employed by another public body or holds public office, to maintain verified time records on a quarterly basis if the public employee is authorized to make up, outside of regularly scheduled employment, time missed to perform the duties of another public office or employment. The time records must be verified by the public employee and his or her immediate supervisor, and filed on a quarterly basis with the Ethics Commission.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: FILING OF VERIFIED TIME RECORDS

Type of Rule: ☒ Legislative ☐ Interpretive ☐ Procedural

Agency: West Virginia Ethics Commission

Address: 1207 Quarrier Street, Suite 407
Charleston, WV 25301-1836

Phone Number: (304) 558-0664 Email: tkirk@wvadmin.gov

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

During the 2005 Special Session, extensive changes were made to the Ethics Act. The Legislature added a provision to the Act which prohibits a public employee from receiving additional compensation from another publicly funded source for working the same hours. Pursuant to this provision, in certain circumstances a public official or employee who holds two public positions must file verified time records with the Ethics Commission. The proposed rule implements this provision. While the amendments to the Ethics Act created additional duties for the Ethics Commission, and hence resulted in the Legislature appropriating additional monies to the Commission, this proposed rule has no independent fiscal impact.

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0.00	0.00	0.00
Personal Services			
Current Expenses			
Repairs & Alterations			
Assets			
Equipment			
Other			
2. Estimated Total Revenues			

Rule Title: FILING OF VERIFIED TIME RECORDS

3. Explanation of above estimates (including long-range effect):

Please include any increase or decrease in fees in your estimated total revenues.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: 5/10/05

Signature of Agency Head or Authorized Representative

Lewis D. Brown

**TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION**

FILED

2005 JUL 27 A 10: 54

**SERIES 14
FILING OF VERIFIED TIME RECORDS**

OFFICE WEST VIRGINIA
SECRETARY OF STATE

§ 158-14-1. General.

1.1. Scope.- - This legislative rule sets forth the guidelines for the maintenance of verified time records by public employees who have other public employment or hold another public office and the submission of time records to the Ethics Commission by the immediate supervisor of these public employees in accordance with W.Va. Code § 6B-2-5(k).

1.2. Authority. - - W.Va. Code § 6B-2-5(k)

1.3. Filing Date. -

1.4. Effective Date. -

§ 158-14-2. Definitions.

2.1. "Public employee" means any full-time or part-time employee of any state, county or municipal governmental body or any political subdivision thereof, including county school boards.

2.2. "Public official" means any person who is elected or appointed to any state, county or municipal office or position who is responsible for the making of policy or takes official action which is either ministerial or nonministerial, or both, with respect to: (1) Contracting for, or procurement of, goods and services; (2) administering or monitoring grants or subsidies; (3) planning or zoning; (4) inspecting, licensing, regulating or auditing any person; or, (5) any other activity where the official action has an economic impact of greater than de minimis nature on the interest or interests of any person.

§ 158-14-3. Public Employees Required to Maintain Verified Time Records

3.1. If a public employee has other public employment or holds a public office, then the public employee shall maintain verified time records for each pay period in which:

3.1.a. the public employee is employed on a part-time basis and does not have regularly scheduled work hours and is authorized to make up time missed to perform the duties of another public office or employment; or,

3.1.b. the public employee is either part-time or full-time and is authorized to make up, outside of regularly scheduled work hours, time missed to perform the duties of another public office or employment.

3.1.c. No verified time records are required to be submitted when:

3.1.c.1. The public employee's compensation from one public employer is reduced by the amount of compensation received from the other public employer;

3.1.c. 2. The public employee's compensation from one public employer is reduced on a pro rata basis for any work time missed to perform duties for the other public employer;

3.1.c. 3. The public employee uses earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment.

3.1.c.4. The employee is a full-time employee who does not have regularly scheduled work hours.

3.2. For a part-time or full-time employee who has regularly scheduled work hours, a verified time record only needs to be maintained and submitted for the actual workday or workdays where there was time missed to perform the functions of the other public position or employment and the public employee is permitted to make up the time missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment.

3.3 For a part-time employee who does not have regularly scheduled work hours, a verified time record only needs to be maintained and submitted for the actual workday or workdays where there was time missed to perform the functions of the other public position or employment and the public employee is permitted to make up the time missed in another pay period in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment.

3.4. An elected or appointed public official who has other public employment, does not have to maintain time records for the office to which they have been elected or appointed; Provided, That, when applicable the elected or appointed public official must maintain verified time records for his or her other public employment, and these records must be filed with the Commission, in accordance with the requirements of this section

and W.Va. Code § 6B-2-5(k).

3.5. The requirements of this section do not apply to public employees who have taken a military leave of absence in accordance with W.Va. Code 15-F-1.

§ 158-14-4. Public Employers Required to File Verified Time Records

4.1. If a public employer employs a person who is required to maintain verified time records, as required by this rule and W.Va. Code § 6B-2-5(k), then the public employer shall submit the time records to the Ethics Commission on a quarterly basis. Time records only need to be submitted for the actual days where an employee missed work to perform the functions of another public position and was granted permission to make up the work in lieu of having his or her compensation reduced on a pro rata basis for the time missed, using earned paid vacation, personal or compensatory time, or taking unpaid leave from his or her public employment to perform the duties of the other public office or employment. Time records shall also be submitted for the day or days on which the employee makes up the work.

4.2. If a public employer has actual knowledge that an employee is subject to the requirements of this section and W.Va. Code § 6B-2-5(k) then the employer shall require the employee to keep time records when required by this rule.

§ 158-14-5. Form of Filing.

5.1. Copies of the time records must be submitted with a form which is attached as Appendix A to this rule. The form must be completed and signed by both the public employee and his or her immediate supervisor.

§ 158-14-6. Designation of Quarters and Time for Filing

5.1. The records and attached form must either be filed with the Commission or postmarked by the following dates:

5.1.a. For any pay period ending between January 1st and March 31st, by April 15th.

5.1.b. For any pay period ending between April 1st and June 30th, by August 15th.

5.1.c. For any pay period ending between July 1st and September 30th, by October 15th.

5.1.d. For any pay period ending between October 1st and December 31st, by January 15th.

APPENDIX A
Title 158, Series 14
VERIFIED TIME RECORDS

THIS FORM AND THE CORRESPONDING VERIFIED TIME RECORDS ONLY HAVE TO BE FILED IF DURING THE QUARTERLY REPORTING PERIOD THE PUBLIC EMPLOYEE MISSED TIME TO PERFORM THE WORK DUTIES OF ANOTHER PUBLIC OFFICE OR EMPLOYMENT AND WAS AUTHORIZED TO MAKE UP TIME. THE TIME RECORDS MUST BE SUBMITTED FOR THE ACTUAL WORK DAYS OR PAY PERIODS DURING WHICH THE TIME WAS EITHER MISSED OR MADE UP. IF THE TIME IS MADE UP IN ANOTHER REPORTING PERIOD, THEN THE PUBLIC EMPLOYEE IS REQUIRED TO SUBMIT THIS FORM AND CORRESPONDING TIME RECORDS DURING THAT REPORTING PERIOD AS WELL.

NAME OF PUBLIC EMPLOYEE: _____

JOB TITLE OF PUBLIC EMPLOYEE: _____

CHECK THE BOX TO INDICATE IF THE EMPLOYEE IS PART-TIME OR FULL-TIME.

PART-TIME: _____

FULL-TIME: _____

PUBLIC EMPLOYER: _____

NAME: _____

MAILING ADDRESS: _____

TELEPHONE NUMBER: _____

PUBLIC EMPLOYEE'S IMMEDIATE SUPERVISOR: _____

JOB TITLE OF IMMEDIATE SUPERVISOR: _____

CHECK A BOX TO INDICATE THE DESIGNATED PAY PERIOD FOR THE PUBLIC EMPLOYEE:

WEEKLY: _____

EVERY TWO WEEKS: _____

TWICE A MONTH: _____

OTHER: _____

IF OTHER, INDICATE IN THE SPACE PROVIDED THE DESIGNATED PAY PERIOD: _____

**LIST THE OTHER PUBLIC OFFICE OR EMPLOYMENT HELD BY EMPLOYEE.
INCLUDE THE ADDRESS AND TELEPHONE NUMBER:** _____

**CHECK A BOX TO INDICATE WHETHER THE OTHER PUBLIC OFFICE OR
EMPLOYMENT IS A PART-TIME OR FULL-TIME POSITION.**

PART-TIME: _____

FULL-TIME: _____

CHECK QUARTER FOR WHICH THE FORM IS BEING FILED:

January 1st - March 31st _____

April 1st - June 30th _____

July 1st - September 30th _____

October 1st - December 31st _____

I, _____, IN ACCORDANCE WITH WEST VIRGINIA CODE
§ 6B-2-5(k), VERIFY THAT THE TIME RECORDS SUBMITTED SHOW THE HOURS
THAT I DID IN FACT WORK FOR THIS PUBLIC EMPLOYER.

EMPLOYEE SIGNATURE

DATE

I, _____, IN ACCORDANCE WITH WEST VIRGINIA CODE
§ 6B-2-5(k) VERIFY THAT I AM THE IMMEDIATE SUPERVISOR OF THIS
EMPLOYEE AND THAT, TO THE BEST OF MY KNOWLEDGE, THE TIME RECORDS
SUBMITTED SHOW THE HOURS THAT THE EMPLOYEE DID IN FACT WORK.

IMMEDIATE SUPERVISOR SIGNATURE

DATE

From: Lewis Brewer
To: Alan Perdue
Date: 5/25/2005 4:15:54 PM
Subject: Re: New proposed Rule

Alan:

Thank you for your comments. Your concerns represent the kind of feedback we are looking for through the public comment process. I hope to provide a more formal response on the changes we propose after we receive all public comments.

Lew Brewer
Executive Director
WV Ethics Commission

>>> "Alan Perdue" <aperdue@shepherd.edu> 05/25/05 03:33PM >>>

st1\:{behavior:url(#default#ieooui)}Lew,I have read the proposed rule regarding reporting on dual employment and reporting of time records. I see several complications in implementing the rule at higher ed institutions: 1. We will only know that a second employment is occurring if the employee tells us. If the public employee who has dual public employment has not filled out a form, does the agency have a duty to make the employee complete the disclosure, or do our duties only arise after the employee fills out their portion of the form and submits it to us? 2. Faculty have VERY grey parameters to their work schedules. Typically, our faculty have scheduled instructional time, and scheduled office hours, which routinely total less than 20 hours per week. They then do class preparations, committee work, research, scholarship, etc on a very flexible, self-directed schedule. I'm not sure what the term 'regularly scheduled work hours' in Section 3.1.b means in this context. I think we would hope that time outside of the scheduled classroom time would always be treated as outside of the regular work schedule. K. Alan Perdue
General Counsel
Shepherd University
PO Box 3210
Shepherdstown, WV 25443
aperdue@shepherd.edu
304-876-5289
304-876-6007 (fax)

CC: Theresa Kirk

From: "Jimmy Smith" <jimsmith@bridgeportwv.com>
To: <tkirk@wvadmin.gov>
Date: 6/13/2005 12:28:53 PM
Subject: Ethics Rules WV 6B-2-5(k)

Ms. Kirk:

I have reviewed Title 158, Series 14, and SB 1003 and wish to comment on the content of the rules set forth by the Ethics Commission.

I am in full support of establishing stricter guidelines on officials and employees who 'moonlight' and 'double-dip' from each employer. I think that is a clear violation of the Code of Ethics, not to mention, I believe it would be illegal and on the same level as pilferage. This is stealing time from one entity; therefore, should be prosecutable as theft.

However, I do not see in the original SB #1003 is the establishment of a new department in the ethics commission which is what I think it would take to process the mounds of paperwork the ethics commission will be receiving. I also did not see any reference made of a full 'checks & balances' program initiated for the verification of timesheets. I feel as though you could easily take any section of the WV Ethics Code or State Code and dedicate an entire department to the enforcement of that particular rule/law. Hence, I do not think this particular item warrants such an aggressive campaign to enforce. I have to wonder if the legislative intent was to create such an abundance of paperwork for the ethics commission and for all state departments and political sub divisions thereof. Is this another unfunded mandate?

I appreciate the great job that the Ethics Commission does and has done enforcing the rules and regulations of the State. Which, I feel that this law gives an additional tool for the commission to continue the great job of ensuring that our public officials and employees are not utilizing taxpayer's dollars in an improper manner. However, this rule shouldn't be enforced any stricter or less strict than any other commission rule. Therefore, when a complaint arises, then the commission could utilize this law to fine or penalize a person taking advantage of their position.

Should you have any questions, please feel free to contact me at your convenience.

Sincerely,

James A. Smith, MBA

Director of Personnel/HR

City of Bridgeport

515 W. Main Street

Bridgeport, West Virginia 26330

(304)842-8217 Office

(304)842-8201 fax

HYPERLINK "<http://www.bridgeportwv.com>"www.bridgeportwv.com

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No virus found in this outgoing message.

Checked by AVG Anti-Virus.

Version: 7.0.323 / Virus Database: 267.6.9 - Release Date: 06/11/2005

CC: "Bonita Sienkiewicz" <bsienk@lewisburg-wv.com>, "Miki Marino" <benefits@cityofweirton.com>, "David Denham" <whghrd2002@yahoo.com>, "Karen Weaver" <weavers@bcnetmail.org>, "James Marino" <jmarino@clarksburg.com>



COPY

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Lewis G. Brewer
Executive Director

July 22, 2005

Alan K. Perdue
General Counsel
Shepherd University
PO Box 3210
Shepherdstown, WV 25433

RE: Response to Comments to Title 158, Series 14, Filing of Verified Time Records.

Dear Mr. Perdue:

We are in receipt of your email correspondence dated 05-25-05 wherein you comment on the proposed rule. In your correspondence you comment in part: We will only know that a second employment is occurring if the employee tells us. **If the public employee who has dual public employment has not filled out the form, does the agency have a duty to make the employee complete the disclosure or do the duties only arise after the employee fills out their portion of the form and submits it to us.**

Your comment may be construed as expressing a concern that a public employer may not know when an employee has other public employment. We do not anticipate that from a reporting standpoint that this situation would arise very frequently for the following reasons. A full-time or part-time public employee only has to maintain time records if they miss work at one public job to work at another public position and they are permitted to make up the hours missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment. We would assume that normally if an employee is requesting to miss work and to then make it up, that in all likelihood his or her supervisor would inquire as to the reason for the request. Additionally, if an employee is an appointed or elected official then normally it is common knowledge that they hold the public position.

Nonetheless, in response to your concerns, we have amended the proposed rule by adding a new subdivision which reads:

4.2. If a public employer has actual knowledge that an employee is subject to the requirements of this section and W.Va. Code § 6B-2-5(k) then the employer shall require the employee to keep time records when required by this rule.

We believe that the amendment is consistent with the statutory language which states that "The public employer shall submit these time records to the Ethics Commission on a quarterly basis." It will also make it clear that the public employer only has a duty to submit time records if they have actual knowledge of the other employment. In our opinion, the addition of this language only imposes a slight burden on the public employer because it only arises when there is actual knowledge of other employment. At the same time the small burden is weighed against the greater benefit of ensuring that public employers comply with the spirit and intent of the law and likewise require their employees to do the same. The Commission notes that if a public employer fails in this duty, the Commission may not take action against them because complaints may only be initiated against individuals, not entities. Nonetheless, if a public employer is failing to fulfill their responsibilities, they may be subject to a mandamus action or the Legislature may elect to revisit this provision down the road if compliance becomes problematic.

Next you express a concern that faculty have very grey parameters in regards to work hours. While they have approximately twenty hours of scheduled office and classroom hours, they perform their class preparation, committee work, research projects and other scholarly pursuits on a flexible self-directed schedule. You then go on to state that you are not sure what the term regularly scheduled work hours are but you would hope that the time outside of the classroom would always be treated as outside of the regular work schedule. We agree that for the time outside of the classroom, that the full-time faculty do not have regularly scheduled work hours. Hence they would not be subject to the reporting requirements.

The main focus of the rule is to require the submission of verified time records for the day or days when an employee is authorized to make up work at a later day. Likewise, they must submit a time record for the day or days when the work is made up. Both the statutory provision and proposed rule reflect that the Legislature anticipated that there may be times when a public employee is authorized to make up work to perform the duties of another public office or employment in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time. At the same time the Legislature recognized that to maintain public confidence and to protect tax payer dollars, that there should be some accounting of work hours when an employee has regular work hours and is authorized to make up time outside of those hours.

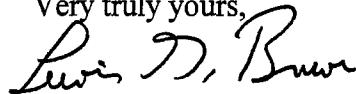
However, based upon your comments, we reviewed the rule and realized that the wording does create confusion. To make it clearer and more user friendly, we made some amendments. We added language which states that a full-time or part-time public employee only has to maintain time records if he or she misses work at one public job to work at another public position and they are permitted to make up the hours missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment. (158 C.S.R. 3.2) While similar language is

already in the statute, the requirements of the rule and statute are more easily understood by repeating the same language.

Next we added language to make it clear that a part-time employee who does not have regularly scheduled work hours can likewise comply with the statute by having his or her salary reduced on a pro rata basis for the time missed, or using earned paid vacation, personal or compensatory or taking unpaid leave. If for some reason a part-time employee without regular scheduled work hours does elect to make-up time, then they must file a verified record. We anticipate that a part-time employee without regularly scheduled work hours will rarely fall within the reporting requirements because normally a part-time employee with a flexible schedule is going to find time during the course of a work week and/or pay period to work the required amount of hours. Nonetheless, there may be instances when he or she misses work and is authorized to make it up during another pay period. In that instance, they would need to file verified time records for both the day on which he or she is authorized to miss work, and for the day where the work is in fact made up. We also revised this provision because in our opinion the rule could be construed as requiring all part-time employees without regularly scheduled work hours to keep time records if they held another public position regardless if they "missed" any work. However when the statute is read in its entirety it is clear that the reporting requirements only apply when an employee is authorized to make up work in lieu of taking personal time, leave without pay, or having his or her salary reduced.

We greatly appreciate your comments. Please do not hesitate to contact us if you have any other questions or concerns.

Very truly yours,

A handwritten signature in black ink, appearing to read "Lewis G. Brewer". The signature is fluid and cursive, with the first name "Lewis" and last name "Brewer" clearly distinguishable.

Lewis G. Brewer



COPY

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Lewis G. Brewer
Executive Director

July 22, 2005

James A. Smith
Director of Personnel
City of Bridgeport
515 W. Main Street
Bridgeport, WV 26330

RE: Response to Comments to Title 158, Series 14, Filing of Verified Time Records.

Dear Mr. Smith:

We are in receipt of your email correspondence dated 06/13/05. In your email you express support for the provisions in S.B. 1003 which prohibit public employees from receiving additional compensation from another publicly funded state, county or municipal office for working the same hours unless certain exceptions apply. (W.Va. Code 6B-2-5(k)). This provision was added to the Ethics Act during the First Special Session of the 2005 Legislature.

You also express concern that the new provision will result in excessive amounts of documents (*i.e.* verified time records) being filed with the Ethics Commission. Please be advised that we recognize that the new provision confers additional responsibilities upon the Commission. However, we cannot limit the scope of our statutory responsibilities through rule making. Further, we believe that with the anticipated hiring of new staff, that we will be able to effectively fulfill our obligations. While the Commission welcomes its new responsibilities, if there comes a time when we believe that we have inadequate staff or resources to fulfill our duties, then we will certainly work with the Legislature to take steps to ensure that we can continue to comply with the mandates in the law.

Nonetheless, in response to your comment, and the comment received by another individual, we have amended the rule to further clarify when records must be filed and what the

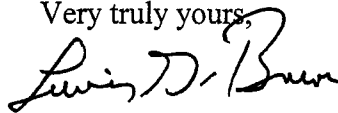
records must reflect. The proposed amendments are: (1) to avoid confusion we have incorporated language from W.Va. Code 6B-2-5(k) which clarifies that verified time records must only be filed by a full-time or part-time public employee who has regularly scheduled work hours when they have missed time to perform the functions of the other public position or employment and the public employee is permitted to make up the time the time missed in lieu of having their compensation reduced on a pro rata basis for the time missed or using earned paid vacation, personal or compensatory time or takes unpaid leave from his or her public employment to perform the duties of another public office or employment. (158 C.S.R. 3.2); (2) clarified that a verified time record only needs to be filed for the actual work day or days where time was missed, and the employee was granted permission to make-up the work. 158 C.S.R. 3.2. These proposed amendments should make it clearer regarding when records should be filed and what information the records should contain. We have also revised the reporting form.

You also express concerns that there is no "checks and balance" program to enable the Commission to independently verify the filings. We cannot interject into the rule a power which has not been granted by the legislation. However, the law is clear that a public employee is prohibited from receiving compensation for the same hours worked. If a public employee is allegedly violating this provision, and if a complaint is filed or the Commission receives reliable information upon which it may independently file a complaint, then during the course of its investigation appropriate steps will be taken in order to determine whether, when applicable, that proper time records were kept. Further during the investigation the accuracy of the records will be verified. Otherwise it appears that the main purpose of the statute is to create a system where there is disclosure of time records when a public employee has other public employment, or is an elected or appointed official. This measure ensures that the public has access to the documents, and that both public employers and employees are put on notice that while dual public employment is permissible, still there is a prohibition against receiving compensation from both sources for working the same hours.

If the change in the law proves to be ineffective, then the Legislature may revisit this issue in the future. However, we are not authorized to make changes in the rule to address your concerns relating to independent verification. Further we are of the opinion that the effectiveness of the changes in the law cannot be fully evaluated until a period of time has passed under the new system.

Thank you for taking time to respond to the proposed rule. If we can be of any further assistance, please let us know.

Very truly yours,



Lewis G. Brewer