ADVISORY OPINION 2015-12

Issued on September 3, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Chief Deputy Sheriff** asks whether excess home incarceration funds may be used to purchase equipment for the Sheriff's Office or to purchase equipment solely for the use of Home Confinement Officers.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that the Sheriff's Office controls the Home Confinement Program for the county. The home incarceration fund consists solely of payments made to the Sheriff's Office by individuals placed on home confinement.

The Requester additionally states that the Sheriff's Office has several employees who serve exclusively as Home Confinement Officers, but that at times Deputy Sheriffs could be asked to assist the Home Confinement Department with home visits, hook ups, arrests and transports.

The Requester specifically asks whether excess funds from the home incarceration fund may be used to purchase police cruisers and fixed radar units for use by the Sheriff's Office. In addition, he asks whether those excess funds may be used to purchase Tasers which would be used by both Home Confinement Officers and by Deputy Sheriffs. The Requester also asks whether the excess funds may be used for office equipment, uniforms and additional equipment solely for the use of Home Confinement Officers.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

> 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 funds at issue here are generated by operation of the Home Incarceration Act, which provides, in part:

> **Home incarceration fees; special fund.**
> All home incarceration fees ordered by the circuit court or a magistrate pursuant to subdivision (7), section five of this article are to be paid to the county sheriff. The county sheriff is to establish a special fund designated the home incarceration services fund, in which the sheriff is to deposit all home incarceration fees collected pursuant to this section. The county commission shall appropriate money from the fund to administer a home incarceration program, including the purchase of electronic monitoring devices and other supervision expenses, and may as necessary supplement the fund with additional appropriations. The county commission may also appropriate any excess money from the fund to defray the costs of housing county inmates or for community corrections programs, if the sheriff or other person designated to administer the fund certifies in writing to the county commission that a surplus exists in the fund at the end of the fiscal year.

W. Va. Code § 62-11B-7.

Accordingly, monies in the home incarceration fund are public funds which are subject to the limitations set forth in the Ethics Act. "[T]he expenditure of public funds is permissible if there is a legitimate government purpose for the expenditure." A.O. 2012-27. This is consistent with W. Va. Code § 6B-2-5(b)(1), which provides that "[t]he performance of usual and customary duties associated with the office or position . . . does not constitute the use of prestige of office for private gain."

Prior Advisory Opinions have found that County Sheriff's Offices' expenditures for fitness supplies and equipment, dry cleaning of officers' uniforms, office furniture and weapons are permissible under the Ethics Act. *See* A.O. 2014-11 and A.O. 2012-50.

"The Commission also examines whether the expenditure benefits the public servant more than it benefits the public." A.O. 2013-56. For example, in Advisory Opinion 2013-56, the Commission considered whether a Sheriff may use public funds to acquire his pilot's license. After determining that the expenditure for the license would not serve a legitimate purpose for the office, the Commission noted that the personal benefit a county sheriff would receive from receiving a lifetime pilot's license far outweighed any benefit to the public. The Ethics Commission concluded in that Advisory Opinion that based on the specific facts therein, it would violate the Ethics Act for the Sheriff to use Concealed Weapons Funds to pay for flight lessons and airplane rental for such lessons for the purpose of obtaining a lifetime pilot's license.

With respect to the question of whether home incarceration funds may be used to purchase equipment for the Sheriff's Office, utilization of those funds for police cruisers, Tasers and fixed radar units for cruisers is acceptable under the Ethics Act. Those items are directly related to general law enforcement, including patrolling highways and making arrests. Moreover, the public will benefit from Sheriff's Office employees being properly equipped to carry out their duties to maintain public safety.

Similarly, the Requester's proposed expenditure of these funds for equipment to be used by Home Confinement Officers, including office equipment, Tasers and uniforms, is acceptable under the Ethics Act.

However, the Ethics Commission does not have jurisdiction to answer of the question of whether excess funds from the home incarceration fund statutorily may be used for purposes other than those specifically set forth in W. Va. Code § 62-11B-7. That provision provides, in part, that:

> The county commission may also appropriate any excess money from the fund to defray the costs of housing county inmates or for community corrections programs, if the sheriff or other person designated to administer the fund certifies in writing to the county commission that a surplus exists in the fund at the end of the fiscal year.

The Ethics Commission accordingly recommends that Requester contact the County Commission for his county and the State Auditor's Office to ensure that the use of excess home incarceration funds for Requester's proposed purchases constitute authorized expenditures.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

Robert J. Wolfe, Chairperson
WV Ethics Commission

ADVISORY OPINION 2015-14

Issued on September 3, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Executive Director of a County Ambulance Authority** asks whether it would be a violation of the Ethics Act to request and receive a personal loan from the County Ambulance Authority for the purpose of transferring from the Public Employees Retirement System to the Emergency Medical Services Retirement System.

FACTS RELIED UPON BY THE COMMISSION

Requester states that in 2012, the West Virginia Legislature passed a bill that provided a one-year window for any Emergency Medical Director to transfer time with the Public Employees Retirement System (hereinafter "PERS") to the Emergency Medical Services Retirement System (hereinafter "EMSRS"). According to Requester's letter, the bill stated that any costs to transfer into the EMSRS would be paid by the employee and that the application to transfer had to be made within one year.

At a regularly scheduled meeting of the Board of the County Ambulance Authority (hereinafter "Board"), Requester not only made a request to transfer from the PERS to the EMSRS, but also requested that the Board pay for the transfer with the understanding that Requester would sign a contract to pay the money back to the Board. The Board approved both requests and issued a check to the Requester. Requester's letter indicates neither the amount of the check nor the terms of the contract.

The Requester subsequently submitted an application to the West Virginia Retirement Board for the transfer to the EMSRS and paid the amount needed for the transfer. The Requester is currently in the process of paying the Board back the full amount in a lump sum.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(b)(1) provides:

> 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.

W. Va. Code § 6B-2-5(d)(1) reads in relevant part:

> [N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control[.]

Finally, W.Va. Code § 61-10-15(a) reads, in pertinent part:

> It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools . . . or any other county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control....

ADVISORY OPINION

Private Gain

The Ethics Act, at W. Va. Code § 6B-2-5(b), prohibits public officials from using their office or the prestige of their office for private gain to themselves or to another person. However, "[t]he performance of usual and customary duties associated with the office . . . does not constitute the use of prestige of office for private gain." W. Va. Code § 6B-2-5(b)(1). Before addressing whether Requester's conduct violates the Ethics Act's private gain prohibition, the Commission will first address the statutory amendments referred to in Requester's letter.

In 2012, the West Virginia Legislature amended the "West Virginia Emergency Medical Services Retirement System Act" by adding the following subsection to W. Va. Code § 16-5V-9:

> (e) Notwithstanding any provision of this code to the contrary, any Emergency Medical Services director who: (1) Is an active member of the Public Employees Retirement System; and (2) has, or obtains within one year of the

> effective date of the amendments to this section enacted during the 2012 regular session of the Legislature, basic or higher emergency management technician certification, is eligible to transfer service credit from the Public Employees Retirement System to the Emergency Medical Services Retirement System, upon payment of associated costs by the transferring director. The board shall compute the actuarially appropriate amount of any increased benefit cost of transfer to be borne by the transferring director to be paid according to terms established by the board. Any Emergency Medical Services director who transfers to the Emergency Medical Services Retirement System pursuant to the provisions of this subsection shall apply for the transfer to the board within one year of the effective date of the amendments to this section enacted during the 2012 regular session of the Legislature. Upon receipt of the total payment of all associated costs by the transferring director, the board shall compute the amount of assets to be transferred from the Public Employees Retirement System to the Emergency Medical Retirement System and shall transfer the assets within six months of the receipt of the application. Any director transferring into the retirement system as provided in this subsection is prohibited from retiring within three years of transfer.

H.B. 4332, Eightieth Leg., Reg. Sess. (W. Va. 2012). Thus, the Legislature permitted any Emergency Medical Services director who is (1) an active member of the PERS and (2) has basic or higher emergency management technical certification to transfer from the PERS to the EMSRS. However, in order to transfer to the EMSRS, a director had to both pay the costs associated with the transfer as well as apply for the transfer within one year of the effective date of the amendments.

Under the facts provided in the instant request, the Commission concludes that Requester receiving public funds from the Board in order to transfer to the EMSRS violates the Ethics Act's prohibition on the use of office for private gain. Executing personal loans does not fall within the usual and customary duties associated with a County Ambulance Authority, whose purpose is to establish and maintain adequate emergency ambulance systems. The private gain that accrues to Requester is not only in the form of the public monies Requester received from the Board. By using public funds in this manner, Requester also received the private gain of transferring to a retirement system of Requesters' choice within the time limit afforded by W. Va. Code § 16-5V-9.

Public Contracts

The Commission also finds that the contract between Requester and the Board is a prohibited public contract under the Ethics Act. The Ethics Act prohibits a public servant from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

Requester's letter provides no facts which indicate that the benefit of his contract with the Board did not exceed one thousand dollars. It is also without question that Requester has an interest in the benefits of the contract with the Board, namely, the monies required to transfer to the EMSRS.

W. Va. CSR §158-8-2 provides that "[e]xamples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers." **Even though Requester has no formal voting authority on the Board, the Ethics Commission nonetheless finds that Requester was involved in securing the contract and is an individual of the same kind and class as those enumerated in W. Va. CSR § 158-8-2. *See* A.O. 2012-29 (finding that a county emergency services director had direct authority and control over a contract even though the director had no formal voting power). Thus, the Ethics Commission finds that Requester had direct authority or control over the contract.**

The contract accordingly is prohibited under the Ethics Act. Having found the contract to be prohibited, the Commission need not address whether W.Va. Code § 61-10-15 (a criminal provision prohibiting certain county officials from having a financial interest in a public contract) is applicable. *See* A.O. 2012-29.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

Robert J. Wolfe, Chairperson
WV Ethics Commission