

Advisory Opinion 2019-04

Issued on March 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **City** which purchases equipment and supplies for a volunteer fire department ("VFD") asks whether it may make the purchases from a business owned by a person who serves as the Fire Chief for both the City and the VFD.

Facts Relied Upon by the Commission

The Requester has an ordinance that establishes a fire department and creates the office of Fire Chief who is responsible for overseeing the Department's members, property and equipment. The City Council appoints the City's Fire Chief on an annual basis and, as authorized by the City's charter, pays him a salary of \$400 per year. He is insured by the City's workers' compensation and liability insurance coverage. The Fire Chief is not required to work a set number of hours per week or to keep set office hours, and the City considers him to be a part-time appointed public official. The City's Fire Department has no other employees.

The City's charter states that the City shall provide fire protection services through a volunteer fire department ("VFD"). The charter also provides that the VFD shall be under the direction and control of the City Council and, although the VFD elects its officers and Fire Chief, they must be approved by City Council. To support the VFD, the City charges and collects a fire service fee. The City deposits the fire service fee in a City bank account.

The VFD is a separate legal entity which has been incorporated as a nonprofit organization. The VFD uses its own fire facilities, equipment and apparatus. The City does not own much firefighting equipment but instead relies upon the VFD to provide fire services.

Pursuant to the City's charter and ordinance and the VFD's by-laws, both the City's Fire Department and the VFD have the same Fire Chief. The VFD's Fire Chief is responsible for overseeing all VFD members and equipment. The VFD's by-laws do not provide for any compensation for the Fire Chief position.

The VFD's Treasurer is responsible for all VFD funds and its bank accounts. All VFD expenditures must be approved by the members of the VFD Board. At present, if the VFD wants the City to purchase services or supplies for the VFD, then the VFD submits the invoice for the purchase to the City for consideration by City Council. If the City Council approves the purchase, then the City directly pays the vendor from its fire service

fee bank account. The prior practice was for the VFD to pay the vendors directly from the VFD's bank account and seek reimbursements from the City.

The Fire Chief owns a business that sells fire equipment and supplies. The VFD has made purchases from the Fire Chief's business and then received reimbursement from the City. The Requester states that it believes the Fire Chief has participated in discussions and votes of the VFD Board relating to the purchases.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3 states, in relevant part:

G) "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.

(k) "Public official" means any person who is elected to, appointed to, or given the authority to act in any state, county, or municipal office or position, whether compensated or not, and 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 or 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 a de minimis nature on the interest or interests of any person. The term "public official" includes a public servant volunteer.

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

Persons subject to section. -- 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.

W. Va. Code § 6B-2-5(b) states, 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-2-5(d)(1) states, 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. Provided, however, That nothing herein shall prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code§ 6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection 0) of this section.

W. Va. Code§ 68-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

Advisory Opinion

Public officials and public employees in state, county and municipal government are subject to the restrictions in the West Virginia Ethics Act against having an interest in public contracts over which they exercise authority or control. W. Va. Code§§ 68-2-5(a) and 6B-2-5(d). For purposes of analyzing the application of the Act to the purchases in question, the Ethics Commission will first consider whether the Fire Chief is subject to the Act.

The Requester has an ordinance creating the office of Fire Chief. The Fire Chief is appointed by the City Council and, as provided by charter, receives an annual salary of \$400 from the City.

The City's Fire Chief is responsible for the oversight of employees and equipment of the City's Fire Department and he is responsible for providing fire protection to the City and

the surrounding areas. Pursuant to the City's charter and ordinance, the City's Fire Chief is also responsible for serving as the Fire Chief to a VFD.

Based upon the relevant facts, the Ethics Commission finds that the Requester's Fire Chief is subject to the Ethics Act in his public capacity as the Fire Chief for the City.

Because the Fire Chief is subject to the Act, both he and the City must abide by the restrictions in the Ethics Act which prohibit public officials from being a party to certain public contracts over which they have authority and control and in which they have a financial interest. While the general rule is that public officials may not have a financial interest in contracts under their authority or control, there is an exception in the Act for *part-time appointed* officials who have not participated in the review or evaluation of the contract. W. Va. Code § 6B-2-5(d).

The Commission must determine whether the Fire Chief exercises authority or control over equipment and supplies purchased by or through the City for use by the City or the VFD. The Fire Chief is responsible for overseeing the personnel and equipment for both the Requester's Fire Department and the VFD. The Commission finds, therefore, that he exercises authority or control over decisions of the City to purchase equipment or supplies for use by the City or the VFD to provide fire protection to the City.

In order to analyze the public contract restrictions in the Act, the Commission must also consider whether the Fire Chief is a part-time appointed official or a public employee. In Advisory Opinion 2017-16, the Ethics Commission held that a state agency's section chiefs were public officials for purposes of the Ethics Act because the position of section chief was created by law, filled by appointment, and the duties were established by West Virginia Code.

In the present case, the Fire Chief's position is created by law, filled by appointment, and his duties are established by the City's ordinance and charter. The Fire Chief is not required to work a set number of hours per week, and the Requester does not consider him to be a full-time worker.

The Ethics Commission finds that the Fire Chief, in his public capacity as the Fire Chief for the City, is a part-time appointed public official.

Pursuant to the City's charter and ordinance, and the VFD's by-laws, the same person serves as the City's Fire Chief and the VFD's Fire Chief and is responsible for overseeing the property and equipment for both entities. A part-time appointed public official may, however, contract with his or her government agency if "he or she has not participated in the review or evaluation thereof" and "has been recused from deciding or evaluating" the contract. W. Va. Code § 6B-2-5(d). The Requester states that it believes that the Fire Chief has been involved in the VFD's decisions to make purchases from his private business, and that the City paid for these purchases.

The Ethics Commission holds that the City may make purchases from the Fire Chief's private business if it is willing and able to remove him from participating in decisions involving the purchase of equipment or supplies for the City Fire Department and/or the VFD. The private gain provision prohibits City officials and employees from showing favoritism to the Fire Chiefs business. Even if he removes himself from purchasing decisions, his business cannot be preferred.

The Ethics Commission further holds that the Ethics Act prohibits the City from making purchases from the Fire Chief's business, either directly or through a reimbursement request from the VFD, in instances where he had been involved in the purchasing decisions because the part-time appointed official exception would not apply.

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 §§ 68-1-1 through 68-3-11, and does not purport to interpret other laws or rules.

In accordance with W Va. Code § 68-2-3, 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.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission