

Advisory Opinion 2018-06

Issued on March 1, 2018, by

The West Virginia Ethics Commission

Opinion Sought

A **City Fire Chief** asks whether a deputy fire marshal may continue his employment in the fire marshal's division of the Fire Department and operate a private club that is subject to the City's fire code.

Facts Relied Upon by the Commission

The Fire Department has established a fire marshal's division which is responsible for enforcing the City's fire code. The Fire Chief has appointed a chief fire marshal and three deputy fire marshals from the Department's firefighters. Deputy fire marshals conduct inspections and investigate complaints regarding the fire codes for all occupied buildings. Deputies also review, or assist in reviewing, plans for new and existing construction for compliance with the fire code.

One of the deputy fire marshals owns 50 percent of a limited liability company. In 2017, the deputy's company entered into a lease to operate a private club that serves food and alcohol. The deputy's company acquired the lease while he was working as a deputy fire marshal; however, the deputy has not inspected or investigated a complaint about the club since 2009.

The deputy fire marshal is not employed by his limited liability company or club.

The club is subject to the City's fire code. The Requester states that another deputy fire marshal could perform the inspections and investigations of the club. The Requester states that the deputy would, however, have to inspect and investigate possible fire code violations of other private clubs. The deputy asserts that he has not and will not inspect or investigate the club while his company is operating it.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) 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. 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.

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

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment ...

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

Advisory Opinion

The above provision of the Ethics Act, at W. Va. Code § 6B-2-5(h), has two applications in the instant situation.

Leasing the club

First, the Act prohibits public employees from purchasing or leasing property from a person who had a matter on which the employee (or his subordinate) is working. In Advisory Opinion 2015-10, the Commission held that, pursuant to W. Va. Code § 6B-2-5(h)(1)(B), a city's chief code enforcement officer was prohibited from acquiring a commercial property within the city (without a property exemption from the Commission) because the chief code enforcement officer or his subordinates were charged with continually inspecting all properties in the city.

The deputy fire marshal in the instant case has not inspected or investigated a complaint about this club or its property since 2009. Also at the time his company entered into the

lease, there were other deputy fire marshals on staff who could have handled matters concerning the club.

The Ethics Commission holds that no provision in the Ethics Act prohibits the deputy fire marshal's company from entering into a lease with the club's owner to operate the club.

Employment

Second, W. Va. Code § 6B-2-S(h)(B) prohibits public employees from being employed by an individual or business who has a matter on which the employee or his or her subordinate is working for his public employer. The deputy is not an employee of the club or his limited liability company. Further, the instant deputy fire marshal, unlike the chief code enforcer in Advisory Opinion 2015-10, will not inspect the club because another deputy fire marshal is available to inspect and investigate further matters concerning the club.

The Ethics Commission holds that no provision in the Ethics Act prohibits the deputy fire marshal's company's operation of the club.

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, at 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 other public agencies unless and until it is amended or revoked or the law is changed.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission