

Advisory Opinion 2018-07

Issued on April 5, 2018, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether it may allow the Sheriff to live rent-free in a house located in the county park because the Sheriff's presence would enhance security at the park and he would repair and maintain the house.

Facts Relied Upon by the Commission

The County Commission owns a house in a county park that originally served as the Park Superintendent's residence but has been vacant for eight years. The house has been vandalized and has fallen into a state of disrepair. The Requester states that pursuant to the terms of a national parks grant used to develop the park, the County may not sell the house or allow it to be used for non-park purposes.¹ The Requester has not had the house appraised but estimates that if the Commission could rent the house to the public, the house's rental value would be between \$250 and \$350 a month.

The Requester states that the Sheriff would be using the house for a valid park purpose because his presence would enhance the security and safety of the park grounds resulting in more park usage. The Sheriff has agreed to incur the expenses of repairing and maintaining the house and he would pay all utilities while he lives in the house.

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.

....

¹ Restrictive covenants require all structures in the park to be dedicated to park use. There is, however, a "conversion" procedure available to the County through which the County could dedicate other County property for park purposes in exchange for the house which would allow the County to sell it. However, the Requester states that it has been unsuccessful for eight years in its attempts to exchange the property.

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*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body

W. Va. Code § 61-10-15(a) states, in relevant part:

It is unlawful for ... any 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 ... [an] officer ..., he or she may have any voice, influence or control

Advisory Opinion

The Ethics Commission must determine whether the Ethics Act's private gain and public contract prohibitions, at W. Va. Code §§ 6B-2-5(b) and (d), or W. Va. Code §§ 61-10-15 prohibits the Sheriff from living in the house in the county park.²

Private Gain

The Ethics Commission has recognized that in some cases there exists an overriding public benefit sufficient to justify private gain to a public servant. In Advisory Opinion 1991-02, the Commission ruled that a county board of education may allow law enforcement officers to live in their private mobile homes on the board's properties without paying rent for the land. These properties were adjacent to schools, bus impound lots and other board of education properties. The Commission found that this arrangement served as a "deterrent to criminal trespass, destruction of properties, theft and property defacing" stating that the public "will benefit significantly from this practice." The Commission adopts the same reasoning in the instant situation and recognizes that the public also will benefit from the Sheriff's repairs to and maintenance of the house.

The Ethics Commission concludes that the Ethics Act's private gain provision, at W. Va. Code § 6B-2-5(b), does not prohibit the Sheriff from living in a house located in the County park because the private gain, if any, is justified because there are overriding public benefits.

² At first blush, it may seem that the prohibited gift provision in the Act, at W. Va. Code § 6B-2-5(c), should also be analyzed; however, public officials and employees are not prohibited by this provision from accepting gifts from another public agency. Advisory Opinion 1992-30.

Prohibited Contract

Sheriffs are subject to the public contract prohibitions in W. Va. Code § 61-10-15, which prohibits certain county officials from having an interest in contracts over which they “exercise voice, influence or control,” and W. Va. Code § 6B-2-5(d), which prohibits public officials and employees from having a pecuniary interest in contracts over which they exercise “direct authority or control.” The Commission determined in Advisory Opinion 1991-63 that a county clerk did not have voice, influence or control over the county commission’s contracts for gasoline. The Commission likewise finds that for purposes of the applicable prohibited contract provisions, the Sheriff does not exercise voice, influence, authority or control over the County Commission’s contracts concerning the county park.

The Ethics Commission concludes that the prohibited contract provisions, at W. Va. Code § 6B-2-5(d) and W. Va. Code § 61-10-15, do not prohibit the County Commission from allowing the Sheriff to live rent-free in a house located in the County park.

The Ethics Commission recommends that the County Commission document the terms of occupancy for this arrangement.

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 §§ 6B-1-1 through 6B-3-11, and W. Va. § 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code § 6B-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.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission