

Advisory Opinion 2019-28

Issued on November 7, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **pre-candidate for Sheriff** asks whether he may continue to operate his residential real estate leasing business.

Facts Relied Upon by the Commission

The Requester is a pre-candidate for the office of county Sheriff.

He owns a real estate business which leases residential rental properties and farmland in the county in which he has pre-filed with the Secretary of State as a candidate for Sheriff. The business leases land it owns, land that the Requester owns, and two parcels of land that his family's trust owns. The real estate business currently has approximately 27 clients (tenants). The business may continue to sell property that it owns, but it is no longer engaged in purchasing properties.

Sheriffs have statutory duties that go beyond mere law enforcement. For example, W. Va. Code § 11A-1-4 provides, "The sheriff, as ex officio county treasurer, shall collect all taxes levied in his county"

The Requester asks whether, if he is elected, he may continue to operate the business before and after regular business working hours. He also asks whether he may hire a third party to manage his business if he is elected and if he is precluded from continuing the day-to-day management of his business.

Provisions Relied Upon by the Commission

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, or

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

- (i) Drafting bid specifications or requests for proposals;
- (ii) Recommending selection of the vendor;
- (iii) Conducting inspections or investigations;
- (iv) Approving the method or manner of payment to the vendor;
- (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or
- (vi) Taking other nonministerial action which may affect the financial interests of the vendor.

.....

W. Va. Code R. § 158-7-7.1(a) states as follows:

Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.

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Under W. Va. Code § 6B-2-5(h)(1), a full-time public official, such as a Sheriff, may not “seek to purchase, sell or lease real or personal property to or from” certain persons. These persons include, among others, those 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.”¹

The Commission will consider herein which actions taken by sheriffs and their subordinates are “regulatory” and what constitutes “a matter” on which they are working for purposes of W. Va. Code § 6B-2-5(h)(1). In Advisory Opinion 1997-04, the Commission held:

State Troopers provide a wide variety of services, many of which are not regulatory in nature. For example, State Troopers do not exercise regulatory authority when they assist motorists stranded due to mechanical failure. However, a State Trooper does exercise regulatory authority when stopping a vehicle for a violation of law and it would be a violation of the Act for the Trooper’s [towing] company to be hired to tow

¹ W. Va. Code § 6B-2-5(h)(C) also prohibits public officials and employees from leasing and selling property to vendors.

such a vehicle, if it had been stopped by the Trooper or a subordinate. A situation where a trooper is investigating an accident to determine possible fault would also constitute a regulatory action.

If the Trooper is to operate such a [towing] business, it is his responsibility to insure that the business does not perform work for persons or businesses subject to his regulatory authority or that of a subordinate. It would be a violation for his business to be employed by regulated persons and businesses.

In Advisory Opinion 1997-07, the Commission restated its holding in 1997-04 and provided further guidance by stating:

In A.O. 97-04 the Ethics Commission ruled that State Troopers performed a variety of functions, many of which were not regulatory in nature. Again in A.O. 96-37 the Commission found that ‘the mere fact that the city police department provides routine police services to the festival organization, as it would similar events staged within the City, does not subject the festival commission to the ‘regulatory’ authority of the city police chief or his subordinates.’

In this case the Commission finds that the Chief Tax Deputy does not regulate all taxpayers in a given County when he or his subordinates merely perform the ministerial functions of collecting taxes and fees.² Therefore, it would not be a violation ... for the Chief Tax Deputy to continue providing private accounting services to his clients provided they have not been delinquent in paying taxes and fees owed to that County.

In addition, W. Va. Code R. § 158-7-7.1(a), a Legislative Rule specifically applicable to the Ethics Act’s gift prohibitions in W. Va. Code § 6B-2-5, is instructive on what constitutes regulatory control by law enforcement. It states: “This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.” The Commission here adopts the same standard for purposes of defining “regulatory action” under W. Va. Code § 6B-2-5(h)(1)(A).

Whether a person has a “matter” before the Sheriff’s Office under W. Va. Code § 6B-2-5(h)(1)(B), however, is a separate question from what constitutes regulatory action. Some examples of persons who have matters before the Sheriff’s Office that are

² Conversely, in Advisory Opinions 2011-04 and 96-52, the Commission stated that an elected assessor exercises regulatory authority for purposes of (h) over all property owners in the county where he or she serves since assessors are responsible for assessing the value of all real or personal property in the county.

not regulatory in nature include persons who are under investigation by the Sheriff's Office or the subject of an outstanding warrant or civil or criminal process.

Given the Commission's prior rulings and the Legislative Rule cited above, the Commission holds as follows:

The Ethics Act permits a Sheriff to continue to operate a real estate business that leases and sells property to individuals and businesses in the same county. A Sheriff does not regulate or have ongoing matters before his Office with all county residents and taxpayers merely by providing routine police services or by performing the ministerial functions of collecting taxes which are not delinquent.

A Sheriff may not, however, seek to sell or lease property to persons, which includes businesses,³ which have been the subject of a regulatory matter within the last 12 months or which currently have a matter before the Sheriff's Office. Some examples of persons or businesses to whom a Sheriff may not sell or lease property include those who are: under investigation by the Sheriff's Office, delinquent in paying taxes or fees owed to the county or subject of an outstanding warrant or civil or criminal process.

This holding does not mean that the Sheriff must terminate a lease with a tenant who falls under one of the above categories. The Commission held the following regarding existing leases in Advisory Opinion 2017-18:

The restrictions in W. Va. Code § 6B-2-5(h) apply only to circumstances where a full-time public servant seeks [emphasis added] to lease property to a regulated person ... The Ethics Commission finds the restrictions in this Code section do not apply to this lease agreement as the Requester is not seeking to enter a lease with a regulated person; instead, it is a pre-existing lease which is being continued under its original terms.

The Requester also asks whether he may operate the real estate business personally on a day-to-day basis or if he must hire a third party to manage the business. The Ethics Commission holds the following:

No provision of the Ethics Act prohibits the Requester from personally operating his real estate business during his private time. The Ethics Act does not require the Requester to hire a third party to manage his business.

However, W. Va. Code § 6-3-1(a)(5) states as follows:

³ The Act defines a "person" as "an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group. W. Va. Code § 6B-1-3(h).

A sheriff in any county in which there are more than four deputies shall devote his full time to the performance of the services or duties required by law of such sheriff, and he shall not receive any compensation or reimbursement, directly or indirectly, from any person, firm or corporation for the performance of any private or public services or duties: Provided, That any such sheriff may retain or make any investment and receive income therefrom, unless such investment is otherwise prohibited by law or will impair his independence of judgment in the exercise of, or might reasonably tend to conflict with the proper discharge of, the services or duties of his office. A sheriff in any county in which there are four or fewer deputies, or a deputy sheriff in any county irrespective of the number of deputies, need not devote his full time to the services or duties of his office as sheriff or his employment as deputy sheriff, as the case may be; but any such sheriff or deputy sheriff shall not engage in any business or transaction, accept other employment or make any investment which is otherwise prohibited by law or which will impair his independence of judgment in the exercise of, or might reasonably tend to conflict with the proper discharge of, the services or duties of his office as sheriff or his employment as deputy sheriff, as the case may be. A sheriff and his deputies in any county, irrespective of the number of deputies, shall receive for the performance of their public services and duties no compensation or remuneration except such as may be regularly provided and paid out of public funds to the amount and in the manner provided by law. No sheriff or deputy sheriff in any county, irrespective of the number of deputies, may receive, directly or indirectly, any gift or donation from any person, firm or corporation.

The Ethics Commission does not have jurisdiction to render an opinion on whether the Requester's situation could violate the above statute.

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 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/ Lawrence J. Tweel
Lawrence J. Tweel, Acting Chairperson
West Virginia Ethics Commission