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....

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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-SV-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§ 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code§ 68-2-2, 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.

/s/ Robert J. Wolfe, Chairperson
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