

Advisory Opinion 2023-01

Issued on February 2, 2023, by

The West Virginia Ethics Commission

Opinion Sought

A **Sheriff** asks whether he may be privately employed as a security officer during his off-duty hours in the same county in which he is Sheriff.

Facts Relied Upon by the Commission

A Sheriff has been asked by several private companies in his county if they may hire the Sheriff's deputies to provide private security services. The security services would include protecting a company's properties and facilities from trespassers, thieves, and other threats.

The Requester permits his deputies to have private employment outside their regular work hours and states that the private companies are having a hard time finding enough deputies or other qualified persons to hire for the private security positions. Since the companies have not been able to fill all of these positions with deputies or other qualified persons, the Sheriff asks whether the Ethics Act prohibits him from accepting a private security job under the Ethics Act.

The Requester states that his office hours as Sheriff are from 7:30 a.m. to 4:30 p.m. on weekdays and that he would only perform the private security work during his off-duty hours.¹ The Requester also states that he would be paid \$100 per hour by the private companies as an independent contractor. If an incident would arise that requires official law enforcement action while the Requester is performing security services, the Requester states that he would immediately shift from performing private security duties to performing his law enforcement duties as a sheriff. He would not be compensated by the private company once he began his duties as a sheriff.

Provisions Relied Upon by the Commission

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. 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

¹ The Requester asserts, however, that he would still be available during his off-duty hours to perform any of his elected duties.

gain does not constitute use of public office for private gain under this subsection. 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(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 12 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.

(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; and “subordinate” includes only those agency personnel over whom the public official or public employee has supervisory responsibility.

.....

(6) A full-time public official or full-time public employee may not receive private compensation for providing information or services that he or she is required to provide in carrying out his or her public job responsibilities.

W. Va. Code R. § 158-7-7.1(a)(2008) states:

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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Secondary Employment with Regulated Persons and Vendors

Under W. Va. Code § 6B-2-5(h)(1), a full-time public official, such as a sheriff, may not “seek employment with [or] be employed by” certain persons. These persons include, among others, those who “[h]ad a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months” or “[h]as a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.” Performing services as an independent contractor is considered employment for purposes of this restriction. W. Va. Code § 6B-2-5(h)(2).

The Ethics Commission analyzed the effect of the above restrictions in W. Va. Code § 6B-2-5(h) on a sheriff in [Advisory Opinion 2019-28](#). In that Opinion, a sheriff asked whether he may continue to operate a residential real estate leasing business. The Ethics Commission found that “[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.” Therefore, the Commission held that the Ethics Act did not prohibit a sheriff from continuing to operate a real estate business in the county in which he was sheriff. The Ethics Act did prohibit the sheriff, however, from selling or leasing property to people and businesses “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.”²

Here, rather than seeking to sell or lease property to individuals or businesses within the Requester’s county, the Requester asks whether he may be employed by private businesses in the county where he is sheriff to provide private security services during his off-duty hours. The restrictions in W. Va. Code § 6B-2-5(h)(1) and (2) are the same for employment and property transactions. Therefore, although providing security services bears a closer relationship to a sheriff’s law enforcement duties than does selling or leasing property, the analysis and conclusions here are the same as in [Advisory Opinion 2019-28](#).

² Some examples of regulatory matters of a sheriff given in [Advisory Opinion 2019-28](#) include individuals or businesses that were “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.”

Therefore, the Ethics Commission holds that the Sheriff may provide security services to private businesses in the county where he is sheriff because a sheriff does not regulate or have ongoing matters before his or her department with all county residents and taxpayers by merely providing routine police services or by performing the ministerial functions of collecting taxes which are not delinquent.

The Sheriff may not, however, perform security services for private businesses that have been the subject of a regulatory matter within the last 12 months or currently have a matter before the Sheriff's Department.

The Sheriff must perform any private security work during his off-duty hours and may not use Sheriff's Department resources in performing private security services. See W. Va. Code § 6B-2-5(b). The prohibition on the use of Sheriff's Department resources does not include the use of those resources when a situation at the private business has escalated to a law enforcement situation.³

Private Compensation for Performing Public Duties

W. Va. Code § 6B-2-5(h)(6) restricts public officials, like the Requester, from receiving private compensation for performing services that they are required to provide as part of their public job duties. The Ethics Commission held in [Advisory Opinion 2015-03](#) that W. Va. Code § 6B-2-5(h)(6) did not prohibit a state employee from conducting private safety classes for persons in an industry that was regulated by his agency but not by him or a subordinate. The Commission held that it was permissible for the public employee to provide private safety classes because, while his public job title was "safety instructor," his private business would not "offer information or services which he is required to provide as part of his public job responsibilities." In the instant situation, the Commission finds that a sheriff is not statutorily charged with maintaining a constant physical presence on private property to provide security services.

Therefore, the Ethics Commission holds that W. Va. Code § 6B-2-5(h)(6) does not prohibit the Requester from being employed by private individuals and businesses to provide private security services within his County because his official job duties as Sheriff do not include providing private security services.

The Ethics Commission notes, however, that W. Va. Code § 6-3-1(a)(5) states as follows:

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

³ The Requester does not state if he intends to drive his Sheriff's Department cruiser to his private employment. The Ethics Commission does not have an Advisory Opinion addressing whether it is permissible for a sheriff to use a department-owned vehicle for outside employment in the county. If the Requester wants guidance on this issue, he may submit a formal Advisory Opinion request. The Opinion request should include information from other law enforcement agencies in West Virginia or other states regarding whether it is normal and customary to allow law enforcement officers to use their cruisers for outside employment based on public policy objectives such as promoting public safety by having a heightened law enforcement presence by off-duty officers.

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.⁴

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 §§ 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 public servants and other persons 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

⁴ Another Code provision states, in relevant part: "No sheriff may have a direct or indirect pecuniary interest in any outside employment. A deputy sheriff performing additional police work shall wear an identifying armband to indicate special duty." W. Va. Code. § 7-14-15a.