ADVISORY OPINION NO. 2013-15

Issued On May 2nd, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commission** asks whether it may compensate the Sheriff's Chief Law Enforcement Deputy to continue to serve as the County's 911 Director when the Chief Law Enforcement Deputy previously served in that capacity without pay when he was Sheriff in the previous administration.

FACTS RELIED UPON BY THE COMMISSION

In 2009, a County Commission and a Sheriff entered into a Memorandum of Understanding (MOU) whereby the Sheriff, or his or her designee, would be the Director of the 911 Communications Center. The 911 Director's responsibilities include structuring and managing the staff, budget, equipment at the 911 Center; interviewing new hires; the same authority and control over staff as the Sheriff has over sheriff and tax deputies; implementation of policies; and appointment of the Chief of E911 Operations. The MOU does not afford the 911 Director any additional compensation for undertaking these duties. In his role as Sheriff, he performed duties related to the 911 Center on a daily basis, such as answering questions and decision-making, including frequent events outside of normal operational hours, while serving as Sheriff.

In 2012, a new sheriff was elected. He hired the outgoing Sheriff - the party to, and signor of, the MOU - as his Chief Law Enforcement Deputy. The new Sheriff has designated, with the acceptance of the County Commission, the Chief Law Enforcement Deputy (Chief Deputy) to continue to serve as the County's 911 Director. The current Sheriff and the County Commission agreed to add an additional $10,000.00 to the Chief Deputy's salary for the added duties.

In his role as Chief Deputy, he performs duties related to the 911 Center on a daily basis, such as answering questions and decision-making, including frequent events outside of normal operational hours, while serving as Chief Deputy. The Chief Deputy is a salaried, overtime-exempt, appointed position with the County Sheriff's office with set hours. According to the Requester, the 911 Director position does not have set hours, and, upon information and belief, is considered a part-time position.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code§ 6B-2-5(b) reads 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.

W. Va. Code§ 6B-2-5(d)(1) reads, in pertinent part that no elected or appointed public official 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 b"ody.

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

> (a) It is unlawful for any ... county ... 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....

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought *to* create a code of ethics *to* guide public officials and employees in their public employment. The expressed goal was *to* assist public servants in avoiding conflicts between their public service and any outside personal interests. W. Va. Code§ 6B-1-2(d).

In furtherance of this goal, the Legislature established certain limits and prohibitions against a public servant contracting with his/her own governmental entity. In particular, the Ethics Act prohibits public servants 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).

Additionally, the Ethics Act prohibits public servants from using their public office for private gain, and from receiving compensation for "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services." W. Va. Code§ 6B-2-5(b).

In Advisory Opinion 2013-04, the Commission stated:

> There is no provision in the Ethics Act which prohibits a County Employee from performing three separate job functions for the same County Employer. This arrangement does not constitute unlawful "double dipping", i.e. receiving additional compensation from another publicly-funded county office for working the same hours. W. Va. Code§ 6B-2-5(I)(1). Instead, the public employer has made the management decision that having one employee perform the duties of the three positions is in the best interest of the county. While the employee may be compensated from two county funds, the source of the funding does not change the analysis or conclusion herein.

The Requester has stated that while the 911 Director position does not have set hours, the Chief Deputy answers questions and makes decisions as the 911 Director while on duty as Chief Deputy on a daily basis. Indeed, during his previous term as Sheriff, he performed these same duties of the 911 Director, while on duty, **at no additional compensation.**

The County Commission and Sheriff are now using the original MOU to empower the Sheriff, or his designee, to function as the 911 Director. The original MOU, however, does not provide for compensation for the 911 Director, regardless of who the Sheriff designates. As a result, according to the Requester, the current Sheriff and the County Commission agreed to add an additional $10,000 to the Chief Deputy's salary for the added duties. At a regular meeting of the County Commission on January 2, 2013, the minutes read: "Sheriff [redacted] also appointed [redacted] to be the [redacted] County 911 Director in addition to his position as Chief Deputy. Commissioner [redacted] moved to approve the Sheriff's appointment of [redacted] to 911 Director along with the accompanying salary for that position. Commissioner [redacted] seconded the motion and the motion passed." It is unclear what role, if any, the Chief Deputy/former Sheriff played in the agreement to provide compensation.

Given the overlap between the Requester's law enforcement duties and the responsibilities and duties of the 911 Director, the Commission hereby finds that compensating the Chief Deputy for performing the duties of the position of 911 Director constitutes impermissible compensation for the performance of usual and customary duties, in violation of W. Va. Code§ 6B-2-5 (b).

The analysis, however, does not end here; instead, the Commission must determine whether a chief deputy is a public official subject to the prohibitions contained in W. Va. Code§ 61-10-15 which applies to certain county officers. A public official is normally one whose position is created by law, has a fixed tenure of office and takes an oath of office. State ex rel. Key v. Bond, State Auditor, 118 S.E. 276,277 (W. Va. 1923). *See also,* State ex rel. Ralich v. Millsap, 76 S.E.2d 737 (W. Va. 1953).

This is not the first time that the Commission has undertaken to determine whether a chief deputy is subject to the prohibitions contained in W. Va. Code§ 61-10-15. Indeed, in Advisory Opinion 2010-24 the Ethics Commission found that a chief **tax** deputy is not subject to W. Va. Code§ 61-10-15. Additionally, the Fourth Circuit Court of Appeals ruled in an unpublished opinion that chief tax deputies do not fall within the statutory definition of a deputy sheriff contained within W. Va. Code§ 7-14-1 *et seq.* Sizemore v. Aliff, 64. F.3d 659 (1995) (citing dissent in Adkins v. Miller, (421 S.E.2d 682). The opinion notes the distinction between a tax deputy and a law enforcement deputy:

> This is particularly so in light of the different duties and responsibilities required of employees in these two positions, law enforcement deputy and tax deputy. A chief tax deputy does not fall within the statutory definition of a deputy sheriff as an armed law enforcement officer, W. Va. Code§ 7-14-12. Adkins v. Miller, 421 S.E.2d 682,697 n. 17 (W. Va. 1992) (Neely, J., dissenting). Rather, a chief tax deputy is appointed by the sheriff pursuant

to W. Va. Code§ 7-7-7 to "assist [the sheriff] in the discharge of [his] official duties" as ex officio county treasurer. W. Va. Code§§ 6-8-5, 7-5-1.

The position of chief law enforcement deputy is further distinguished from Key wherein the Supreme Court found that the Chief Clerk for the Office of the Secretary of State was not a public official since the term of office, powers and duties are not fixed by law.

> As a general rule, it may be stated that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are continuing in their nature and not occasional or intermittent. But one who merely performs the duties required of him by persons employing him under an express or implied contract, though such persons themselves be public officers, and though the employment be in or about public work or business, is a mere employee.

Key at 279.

W. Va. Code§ 6-3-1(a)(4) states:

> Each deputy so appointed shall take the same oath of office required of his principal, and may, during his continuance in office, perform and discharge any of the official duties of his principal, and any default or misfeasance in office of the deputy shall constitute a breach of the conditions of the official bond of his principal.

W. Va. Code§§ 7-14-1 and 2 read:

> **§7-14-1. Appointments and promotions of deputy sheriffs.**
> Notwithstanding the provisions of article three, chapter six, and article seven, chapter seven of this code, all appointments and promotions of full-time deputy sheriffs shall be made only according to qualifications and fitness to be ascertained by examinations, which, so far as practicable, shall be competitive, as hereinafter provided. On and after the effective date of this article, no person except the chief deputy shall be appointed, promoted, reinstated, removed, discharged, suspended or reduced in rank or pay as a full-time deputy sheriff, as defined in said section two, of any county in the state of West Virginia subject to the provisions hereof, in any manner or by any means other than those prescribed in this article.
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> **§7-14-2. Definitions; population.**
> (a) For the purpose of this article:
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> (1) "Appointing officer" or "appointing sheriff' shall mean the sheriff of the county in which the appointment of a deputy sheriff shall be made pursuant to this article; and

> (2) "Deputy sheriffs" or "deputies" shall mean persons appointed by a sheriff as his deputies whose primary duties as such deputies are within the scope of active, general law enforcement and as such are authorized to carry deadly weapons, patrol the highways, perform police functions, make arrests or safeguard prisoners. This definition shall not be construed to include any person or persons whose sole duties shall be the service of civil process and subpoenas as provided in section fourteen, article one, chapter fifty of this code, but such exclusion shall not preclude the service of civil process or subpoenas by deputy sheriffs covered by the provisions of this article.

In addition to taking an oath, a deputy is empowered by statute to "perform and discharge any of the official duties of [the sheriff]." Given the clear distinction between a tax deputy and a law enforcement deputy, the finding in Advisory Opinion 2010-24 is inapplicable here. Instead, based on the analysis above, the Ethics Commission hereby finds that a law enforcement deputy sheriff or chief law enforcement deputy **is** subject to the provisions contained in W. Va. Code§ 61-10-15.[1]

Having established that a Chief Law Enforcement Deputy is subject to§ 61-10-15, the Ethics Commission must next determine whether he has voice, influence, or control over contracts between the County Commission and the Sheriff's Department. Clearly, while Sheriff, as the party and signatory of the original MOU, he had direct authority and control over the MOU. Given his involvement in the original MOU as well as the statutory role of a deputy to perform any of the sheriff's duties, the Ethics Commission hereby finds that the Chief Law Enforcement Deputy has the requisite voice, influence, or control over the new contract to compensate the 911 Director, as contemplated by§ 61-10-15. [2]

Thus, the Ethics Act prohibits the Chief Law Enforcement Deputy from accepting additional compensation from the County for performing the duties and responsibilities of 911 Director. As a result, the Chief Law Enforcement Deputy may only accept compensation for the contractual duties if the County Commission seeks and obtains a contract exemption.

In order to obtain a contract exemption, the County Commission must demonstrate that the Ethics Commission's decision herein creates an undue hardship, substantial interference with government operations, or excessive cost. The County Commission is welcome to submit its request for a contract exemption for the Ethics Commission's consideration. The Ethics Commission is unable to imagine a situation where performing contractually obligated usual and customary duties would meet this test.

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[1] Given the conclusion that a chief law enforcement deputy deputy is a public official subject to W.Va. Code § 61-10-15, it is unnecessary to analyze the application of W. Va. Code § 6B-2-S(d).

[2] This conclusion should not be construed as a finding that a law enforcement deputy or chief law enforcement deputy has voice, influence, or control over **every** contract to which the sheriff is a party. Instead, the finding herein as to the MOU and subsequent agreement is fact specific.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.* and W. Va. Code§ 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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman