ADVISORY OPINION NO. 2013-56

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THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Sheriff** asks whether he may use Concealed Weapons Funds to pay for flight lessons and airplane rental for such lessons to acquire his pilot's license.

FACTS RELIED UPON BY THE COMMISSION

In West Virginia, sheriffs are statutorily charged with issuing concealed weapons permits and administering the Concealed Weapons License Administration Fund (Concealed Weapons Fund). W. Va. Code§ 61-7-4. Persons in West Virginia seeking to carry a concealed deadly weapon must obtain a permit from the sheriff.

The cost of the permit is seventy-five ($75.00). Fifteen dollars ($15.00) of the fee is deposited in the Courthouse Facilities Improvement Fund. The remainder is deposited in the Concealed Weapons Fund. This money is to be used to administer the permit program. The Code further states "Any surplus in the fund on hand at the end of each fiscal year may be expended for other law-enforcement purposes or operating needs of the sheriff's office, as the sheriff may consider appropriate." W. Va. Code§ 61-7-4(c).

The Requester states that he began taking lessons to become a fixed wing pilot so that he could use such aircraft to exercise his official duties as sheriff, conduct operations as needed by law enforcement within his county, and make available a resource to other counties by being a signed member of the state mutual aid agreement. Specifically, the Requester states:

> Some of the capabilities of having a fixed wing aircraft resource for a rural county ... would be: Traffic Enforcement, Search and Recovery, Search for missing vehicles, Illegal drug eradication searches, Arial Surveillance for safety measures for felony search warrant raids, extraditions, transports and dignitary transports to name a few.

The Requester serves a rural county situated within 50 miles or less of two airports. Upon information and belief, state and federal law enforcement agencies in the surrounding area make their aircraft available to local law enforcement agencies, at no cost, for drug eradication, searching for missing children, and other endeavors.

The Requester began his second term of office as Sheriff in January 2013. Article IX, Section 3 of the W. Va. Constitution, limits a sheriff to two consecutive terms. His successful pursuit of flying lessons would earn the Sheriff a life time license. Upon obtaining such license, the Sheriff proposes to have a line item within his budget for monthly operating expenses for training and "mission critical operations". The Sheriff's letter is silent as to whether there are any plans to purchase a plane for the Sheriff's use. Upon information and belief, the County does not own any aircraft.

According to the Sheriff, the rate for the instructor is $25/hour, with an additional $115/hour to rent the aircraft. The Requester states that he has already spent $525 in instructor fees and $2,400 in aircraft rentals from the Concealed Weapons Fund. He anticipates that there is approximately $3,000 left to complete the training and obtain his life time license. Finally, he states that he has $22,000 in the Concealed Weapons Fund to use for these expenses.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b)(1) reads, in relevant part:

> A public official ... 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.... Incidental use of equipment or resources available to a public official ... 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. The performance of usual and customary duties associated with the office ... or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

ADVISORY OPINION

One of the basic principles of the Ethics Act is that public servants may not use their public positions for their own private gain. The Act's Legislative findings explain that the Act is intended to prevent public servants from using their public positions for personal gain beyond the lawful emoluments of their position or to benefit narrow economic or political interests at the expense of the public at large.

Thus, there are limitations on the use of public funds. As the Ethics Commission wrote in Advisory Opinion 2012-50, these limitations apply regardless of whether the funds are general revenue funds, i.e. funds generated by State or local governmental entities through taxes; or special revenue funds, a term commonly used for funds generated through fees. The Commission noted:

> Regardless of the source of funds, all funds in the possession of a government entity are part of the "public coffers". Without exception,

> money in the public coffers may only be expended by a government entity for an authorized purpose.

In Advisory Opinion 2012-50, the Commission found that a sheriff was prohibited from using Concealed Weapons Funds for meals for staff meetings or meetings with other public officials, e.g. if the sheriff has a staff meeting with his deputies. State law specifically provides: "Any surplus in the [Concealed Weapons] fund on hand at the end of each fiscal year may be expended for other law-enforcement purposes or operating needs of the sheriff's office, as the sheriff may consider appropriate." W. Va. Code§ 61-7-4(c). The Commission wrote:

> While the surplus money in the Concealed Weapons Fund may be "expended for other law-enforcement purposes or operating needs of the sheriff's office as the sheriff may consider appropriate", the Commission finds that there is nothing in this language which authorizes Sheriff's Departments to use this money for meals for staff meetings when other public agencies are not permitted to do so.

Here, however, it appears at first blush that the proposed expenditure if for a legitimate law enforcement purpose. Nonetheless, the particular facts presented require further inquiry. After all, although the excess funds in the Concealed Weapons Fund may be spent by a sheriff "as the sheriff may consider appropriate" it is not a slush fund for sheriffs. A sheriff does not have carte blanche to spend the excess funds, instead all expenditures must satisfy both the requirements of the Ethics Act and W. Va. Code§ 61-7-4(c).

In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure. The Commission also examines whether the expenditure benefits the public servant more than it benefits the public. For example, in Advisory Opinion 2011-05, the Commission concluded that a public university was prohibited from using public funds to pay Rotary membership dues for the university president's spouse because the spouse would personally benefit more from the expenditure than the institution would. See *also* Advisory Opinion 2011-13 (public funds may not be spent to pay for health club or gym fees for public servants in travel status when the hotel does not provide free exercise facilities to lodgers).

Next, most of the stated reasons for the proposed use of aircraft are not critical for law enforcement or are duplicative of services already available at no cost, e.g. drug eradication and searches for missing children). Although not an expert in law enforcement, the Ethics Commission questions whether there is enough demand to justify the use of aircraft in search warrant raids and extraditions. The final justification, "dignitary transports", simply does not fit within the accepted description of law

enforcement duties for county sheriffs, neither does it constitute the "performance of usual and customary duties associated with the office ... or the advancement of public policy goals or constituent services". Instead, that is one of the services provided by the Aviation Division of the State of West Virginia.

Finally, it is impossible to ignore the benefit that the Requester will receive personally as a result of obtaining a life license at public expense. Given that the Requester has only two years left in his term, the benefit that will inure to him personally far outweighs the possible benefit to the public.

Therefore, the Ethics Commission hereby finds that based on the specific facts and circumstances presented herein, it would violate the Ethics Act for the Requester to use Concealed Weapons Funds to pay for flight lessons and airplane rental for such lessons for the purpose of obtaining a life time license.

The Commission also takes this opportunity to revisit other limitations that apply to the use of Concealed Weapons Funds. First and foremost, expenditures from the Concealed Weapons Fund may not be used for the personal gain of any person(s). Next, it must be an authorized expenditure. Finally, as required by W. Va. Code§ 61-7-4(c), any expenditure must be related to law-enforcement purposes or the operating needs of the Sheriff's Office. Sheriffs should exercise caution in the expenditure of these funds and if they ever have any questions, should contact the Ethics Commission to ensure compliance with the Ethics Act relating to such expenditures. The Commission further recommends that sheriffs contact the Auditor's Office regarding any proposed expenditure, if they are unsure as to whether it is authorized or not.

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§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman