

Advisory Opinion 2023-13

Issued on November 2, 2023, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether the County Fire Coordinator may be a paid or unpaid member of a volunteer fire department that receives County levy funds.

Facts Relied Upon by the Commission

The Requester's County has levy funds that it uses to provide financial support to fire departments in the County as authorized by W. Va. Code § 7-1-3d. The County Commission created the position of Fire Coordinator to oversee the distribution of the levy funds. The Fire Coordinator is a full-time County employee hired and supervised by the County Commission. The Fire Coordinator position is not created by Code, and he or she does not take an oath of office.

A job applicant for the Fire Coordinator position is a member of a volunteer fire department (VFD), organized as a nonprofit corporation, that receives levy funds from the County through the Fire Coordinator's Office. The Fire Coordinator job applicant, in his capacity as a VFD member, is paid by the VFD as a contract employee for responding to emergencies.

The County Commission believes that it creates a conflict of interest and the appearance of impropriety for the Fire Coordinator to be paid by a VFD that receives levy money that the Fire Coordinator is responsible for overseeing and distributing. Due to the potential for conflict, the County Commission seeks guidance from the Ethics Commission on whether the County's Fire Coordinator may be a paid or unpaid member of a county VFD in the same county where he serves as Fire Coordinator.

Each fire department, which includes volunteer fire departments (VFDs) and municipal fire departments, annually receives a set amount of levy funds per a formula adopted by the County Commission with the input of the Fire Coordinator. Under the current formula, each fire department receives \$50,000 annually and may request additional money.

The County has additional levy money which it distributes on a discretionary basis to the fire departments based upon the needs of a fire department applicant. For example, if a fire department needs new protective equipment, it may apply for discretionary funds through the Fire Coordinator. The Fire Coordinator, subject to County Commission approval, is responsible for granting discretionary funding requests. The Fire Coordinator also oversees all fire departments in the County to ensure that they are generally operating in a responsible manner. If the Fire Coordinator observes any

deficiencies, he or she will report the deficiencies to the appropriate state agency.¹ For example, the Fire Coordinator may visit a fire department to see if it is staffed or if its station and grounds appear to be unkempt. If a fire department has deficiencies, either observed by the Fire Coordinator or found by the Fire Marshal or Auditor's Office, then the deficiencies may result in the County not funding the fire department or requiring the repayment of funds to the County.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(h) defines person as:

“Person” means 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-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 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(d)(1) states, in relevant part:

In addition to the provisions of § 61-10-15 of this code, no 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: *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: *Provided*, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body . . . when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

¹ The West Virginia Fire Marshal's Office primarily regulates the operations of the fire departments. The West Virginia State Auditor's Office audits the fire departments.

W. Va. Code R. § 158-8-4 (2009) states:

4.1. The prohibition of W. Va. Code § 6B-2-5(d) against being a party to or having an interest in the profits or benefits of a contract applies only to public contracts involving a governmental body or agency.

4.2. Public officials or public employees or members of their immediate family are considered to be “associated” with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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.

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W. Va. Code § 61-10-15 states, in relevant part:

(a) 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 member of any other county or district board or any 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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Advisory Opinion

The Requester asks several questions. Each will be addressed separately.

May a County Fire Coordinator be an unpaid member of a VFD?

The Ethics Act prohibits public officials, public employees, and businesses with which a public official or public employee is associated 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). A business association, for purposes of the public contract restrictions, exists only when a public servant or an immediate family member is a director, officer, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class. W. Va. Code R. § 158-8-4 (2009). In the instant situation, the firefighter, as a mere member, is not associated with the VFD. Further, if the County Fire Coordinator is an unpaid member of a VFD, then he or she does not have financial interest in the County's appropriations of levy funds to or contracts with the VFD. Therefore, this provision would not prohibit the firefighter's contract for responding to emergencies or other services provided to the VFD if he is unpaid.

The Ethics Commission analyzed a similar issue in [Advisory Opinion 2021-12](#) in which it held that municipal officials do not have a financial interest in an emergency services organization if the municipal officials receive no compensation from the organization. While Advisory Opinion 2021-12 analyzed the voting restrictions in the Act, the analysis and conclusion are the same when a public employee is an unpaid volunteer with an organization that receives funding from his or her public employer. An unpaid volunteer does not have a financial interest in an organization through his or her volunteer service

and, therefore, no provision in the Ethics Act bars his or her volunteer service with such an organization.²

The Ethics Commission finds that a County Fire Coordinator may be an unpaid member of a County VFD. If the County believes that it is a conflict of interest for its Fire Coordinator to be a volunteer member of a VFD that receives funds through the County and the Fire Coordinator office, then it does not violate the Ethics Act for the County Commission, as a term of the Fire Coordinator's employment, to prohibit him or her from engaging in this volunteer service with a County VFD.³

May a County Fire Coordinator be a paid contract employee with a VFD that receives levy funds from the County?

The Ethics Act restricts full-time public employees and public officials from having other employment in certain circumstances. Specifically, W. Va. Code § 6B-2-5(h)(1), provides that full-time public officials and employees may not seek employment with or be employed by those persons⁴ who have had a matter on which the public official or public employee has taken regulatory action within the preceding 12 months. W. Va. Code § 6B-2-5(h)(1)(A). The restrictions extend to persons who currently have a matter before the agency on which the public official or public employee is working, or a subordinate is known to be working. W. Va. Code § 6B-2-5(h)(1)(B).⁵ The Requester would be subject to the restrictions in (h) because he, as the County Fire Coordinator, would be a full-time public employee.

The Requester states that the Fire Coordinator is responsible for distributing funds to each fire department in the county. Some of the funds are distributed annually to each fire department based upon a formula established by the County Commission in consultation with the Fire Coordinator. The Fire Coordinator, with the approval of the County Commission, has discretionary authority to distribute additional money to one or more fire departments throughout the year based upon a fire department's specific need. The Fire Coordinator is also responsible for overseeing the general operations of fire departments in the County to ensure that they are operating in a responsible manner.

² The public employee may not unlawfully favor his VFD; for example, he may not authorize the distribution of money to the VFD if it does not meet the requirements for receiving funds.

³ The Ethics Act sets a minimum standard of conduct. When the Legislature or a public agency imposes stricter standards, then public officials and public employees are also subject to the stricter standards. W. Va. Code R. § 158-6-10 (2022).

⁴ The definition of "person" in the Act includes corporations. W. Va. Code § 6B-1-3(h). The definition does not state that the term "corporation" only means for-profit corporations. The term corporation, as used in the Act's definition of "person," also covers nonprofit corporations. This conclusion is supported by the fact that the Act expressly contains a separate definition for "business" that states a business is "any entity through which business for-profit is conducted including a corporation, partnership, proprietorship" W. Va. Code § 6B-1-3(b).

⁵ For purposes of this provision, "the term 'employment' includes professional services and other services rendered by . . . the public employee, whether rendered as employee or as an independent contractor . . ." W. Va. Code § 6B-2-5(h)(2).

The Ethics Commission has analyzed the rules governing outside employment by full-time public employees in various Advisory Opinions. In [Advisory Opinion 2023-06](#), the Commission held that a state agency director may continue his part-time, of counsel, employment with a private law firm unless the law firm, either directly or through the law firm's representation of clients, has matters before the state agency on which he or any of his state agency subordinates is working. In [Advisory Opinion 2020-01](#), the Commission held that a state agency's technician may not provide private services for pay to persons who currently have a "matter" on which the technician or a subordinate is working. Persons whose management practices are being verified for payment by the technician and persons for whom the technician completes ranking forms used to approve program applications constitute "matters" on which the technician is working.⁶ See also [Advisory Opinion 2023-02](#) (an executive director of a housing authority may accept a stipend from a bank for serving on an advisory council when the housing authority is not doing business with the bank) and [Advisory Opinion 2018-06](#) (a deputy fire marshal may lease and operate a private club that is subject to the City's fire code as long as neither he nor a subordinate of his inspect or investigate matters concerning the club).

The Ethics Commission finds that the fire departments in the county have ongoing matters before the Fire Coordinator on which he or she is working because the Fire Coordinator oversees the general operations of the fire departments in the county to ensure that they are operating in a sound manner for purposes of receiving levy money from the County. **The Ethics Commission finds, therefore, that the County Fire Coordinator may not be a paid member of a nonprofit VFD in the County due to the restriction in the Ethics Act, at W. Va. Code § 6B-2-5(h)(1)(B), that prohibits full-time public employees from being employed by persons, including nonprofits, with matters before his or her agency on which he or she is working.**⁷

Last, the Ethics Commission finds that the County Fire Coordinator is not subject to the stricter prohibitions governing the employment and contracts of county officials found in W. Va. Code § 61-10-15 because the County Fire Coordinator is a county employee and not a county official. The County Fire Coordinator is not a county official because he does not take an oath of office or have a set term of office. This conclusion is consistent with the holding of the Ethics Commission in [Advisory Opinion 2001-07](#), in which it held that a county employee, working as a project coordinator, is not subject to W. Va. Code § 61-10-15.⁸

⁶ The Commission also held that providing routine services in the form of technical assistance and recommendations to individuals on how to install best land management practices do not constitute matters on which the technician is working.

⁷ The restriction also extends to matters on which the Fire Coordinator's subordinates are working. The Fire Coordinator may not, therefore, avoid the conflict by delegating matters affecting the VFD, by which he or she is paid, to subordinates.

⁸ W. Va. Code § 61-10-15(a) states: "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 member of any other county or district board or any 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. . . ." See [Advisory Opinion 2010-24](#) (discussing the test under the Ethics Act and W. Va. Code § 61-10-15 for determining who is a public official).

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should 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 §§ 68-1-1 through 68-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules. In accordance with W Va. Code § 68-2-3, this Opinion has precedent/al 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/ Terry L. Walker



Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission