ADVISORY OPINION NO. 2012-30

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Emergency Services Director** asks whether it is permissible to privately contract with a Municipality within the County to manage a federal grant for mitigation projects.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the Director of Emergency Services for a County, a full-time, salaried position. As the Director, the Requester is responsible for overseeing multiple County programs and services. His duties further include serving as the 911 Director and the floodplain permit officer.

The stated mission of the County Emergency Services is "[t]o guide and assist in response and recovery in times of disaster in [the] County" as well as "[t]o manage development within the floodplain by enforcement of the floodplain ordinance and the teaching of safe and secure development practices." Additionally, as the floodplain permit officer, the Requester is charged with enforcing the County's floodplain ordinances, as well as the issuance of permits for construction in a floodplain.

However, as the County floodplain officer, his jurisdiction does not include incorporated municipalities. Instead, some municipalities either choose not to adopt the County's floodplain ordinance or enact their own ordinances. The Requester states that the Municipality with which he has a contract has its own floodplain ordinance and floodplain officer. Hence, as the County floodplain officer, he has no authority or jurisdiction over the properties/structures within the Municipality.

Over the past several years, several municipalities within the County experienced damaging floods, and sought State/Federal funding for mitigation projects. In particular, the municipalities have sought and received multiple Hazard Mitigation grants. According to the Requester, the grants are 75% Federal and 25% State, and are overseen by the WV Division of Homeland Security and Emergency Management.

Typically, the mitigation projects include: (1) Acquisition/demolition (e.g. county acquiring a flood prone structure and demolishing the structure); (2) Elevation (e.g. raising a structure out of the flooding hazard while ensuring the lower part of the structure will allow for the unobstructed flow of water.); (3) Relocation (e.g. physically moving a structure out of the hazard area); and (4) Flood-proofing (e.g. making a structure more resistant to the effects of flooding).

Under these grants, the Municipality, by and through its City Council, serves as grantee and is responsible for overseeing/contracting with vendors to perform the various mitigation projects. As part of the oversight, the Municipality typically is allocated a percentage of the grant for administration. Some municipalities use this administrative money to offset salaries for employees that manage the mitigation projects as part of their public job duties/responsibilities.

Other municipalities contract with entities/individuals to manage the projects. In these situations, the entity/individual is treated as a vendor for purposes of the grant, and the entity/individual's services are invoiced and billed to the Municipality. The Municipality in turn pays the contractor from the allocated administrative percentage of the grant monies. The selection and payment of the project manager must comply with the grant guidelines, and the invoicing/payment is subject to oversight by the State in its role as Grantor.

According to the Requester, a Municipality within the County in which he is employed as Director of Emergency Services sought and received a Hazard Mitigation Grant from the State/FEMA. According to the Requester, the Municipality desired to contract out the project manager position, and executed a contract with the Requester to serve as the project manager under the Hazard Mitigation Grant. According to the Requester, his contractual role as the project manager is to administer the various mitigation projects through their completion. The Requester further states that the Municipality has historically only utilized the acquisition/demolition mitigation, and not the relocation or elevation mitigations. As a result, he has not had to seek or obtain a floodplain permit from the Municipality for the mitigation projects.

The Requester states that he is not an employee of the Municipality, and has no existing financial relationship with the Municipality other than this contract. He further stated that he separates his project manager duties for the Municipality from his duties as Director of the County Emergency Services. In particular, he states that he works four 10 hour day shifts as the Director, and then performs his contractual work in the evenings and on days five and six of a typical week.

Additionally, the Requester states that he is compensated separately for the two jobs. With respect to his Director position, he is salaried employee of the County and paid from the County general fund. With respect to his contractual position, he states that he provides an invoice to the Municipality for his contractual work, and is paid by the Municipality, which in turn seeks reimbursement from the grant.

In light of his County Director position, the Requester desires to know whether it is permissible for him to contract with the Municipality to act as their Mitigation project manager.

CODE PROVISIONS RELIED UPON BY THE 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.
>
> 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.

Further, W.Va. Code§ 6B-2-5(d)(3) states:

> If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

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).

The Commission addressed a related situation in A.O. 2012-29, wherein the Commission was asked if the County Director of the Emergency Services could contract with the ***County to*** serve as the Mitigation project manager. The Commission held that the County Director had a prohibited financial interest in the contract, and concluded that the Director may not contract with the County. *See* A.O. 2012-29.

In this opinion request, the Commission is asked to consider whether the County Director may contract to serve as a ***Municipality's*** project manager.

Unlike in A.O. 2012-29, the Municipality is the grantee, and the Requester is not an employee of the Municipality. While the Requester does hold a County position, his contract is with a separate governmental entity than his employer (e.g. County Commission) or over which he has authority or control. In light of such, the

Commission hereby finds, for purposes of the Ethics Act and W.Va. Code§ 61-10-15, that the Requester does not possess a prohibited financial interest in the contract with the Municipality. Specifically, the Commission finds that, as the County Director, his position does not give him direct authority voice, influence, or control over the Municipality's decision relating to the grant money, and the expenditure thereof.

However, the Commission's consideration of the question does not end there. Rather, the Commission must analyze whether the contract with the Municipality constitutes an impermissible use of public office for private gain. W.Va. Code§ 6B-2-5(b). In particular, the Commission must determine if the contract with Municipality constitutes "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."

In A.O. 2012-29, the Commission found that that contracting to serve as project manager for a County mitigation project constituted impermissible "compensation" for the performance of the usual and customary duties associated with a County Director of Emergency Services, as well as constituent services within the County. In particular, the Commission noted:

> Finally, inasmuch there may overlap between his County position duties and the mitigation project, the contract position of the project manager constitutes impermissible "compensation" for the performance of the usual and customary duties, as well as constituent services within the County. This is especially true when considering flood mitigation projects, and the project manager is also the floodplain officer delegated to enforce floodplain ordinances.

A.O. 2012-29

To the extent the Requester seeks to contract with a governmental entity or municipality that falls under the County floodplain ordinance, and his County jurisdiction, the prohibition outlined in A.O. 2012-29 would be applicable. However, contracting with a Municipality within the County that does **not** fall under the County's floodplain jurisdiction presents a unique scenario.

Since he has no County public duties to the Municipality to enforce the floodplain, the Requester's contracting with a Municipality does not violate the compensation provision of W.Va.Code 6B-2-5(b). Accordingly, the Commission hereby holds that it is permissible for the Requester, as the County Director of Emergency Services, to contract with the Municipality to be the project manager for the Municipality's mitigation projects.

However, given the unique nature of this arrangement, the Commission directs the Requester to notify the County Commission of the contractual arrangement with the Municipality; to obtain their approval; and abide by any restrictions that the County Commission imposes. As the Commission has often noted, public agencies are free to impose stricter standards upon their employees than those outlined in the Ethics Act.

The advisory opinion rendered herein is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact us for further advice as it may alter the analysis and render this advice invalid. This advice is limited to the analysis of whether the Ethic Act would be violated by the proposed conduct. The Ethics Commission is without authority to determine whether other laws or rules, including the policies of the Requester's government agency prohibit or otherwise restrict the proposed conduct.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 68-1-1, *et seq.* and W.Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. Due to the unique facts and situation presented, this opinion has no precedential effect and may not be relied upon in good faith by other public agencies.

/s/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson