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The Honorable Bill J. Crouch
Secretary of the West Virginia Department of Health and Human Resources
Office of the Secretary
One Davis Square, Suite 100 East
Charleston, WV 25301

Dear Secretary Crouch:

You have asked for an Opinion of the Attorney General about the circumstances under which a state employee may forfeit his or her job by failing to cooperate with investigations conducted by agency employees of complaints made by other employees, clients, customers, patients, or residents. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advise upon questions of law, . . . whenever required to do so, in writing, by . . . any . . . state officer, board, or commission." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you explain that union representatives have advised Department of Health and Human Resources ("DHHR") employees not to answer any questions posed to them during internal investigations of employee, client, customer, patient, or resident complaints. You indicate that this lack of cooperation makes it more difficult for DHHR to investigate complaints effectively. You also note that DHHR is currently revising its Employee Conduct policy to encompass an employee's obligation to comply with an internal investigation. In that regard, you have asked a series of questions relating to the potential application of West Virginia Code § 29-6-19, which provides that employees who refuse or fail to cooperate in certain proceedings relating to the affairs or government of the State shall forfeit their employment.

While your letter poses ten distinct questions, those questions fall into two general categories. *First*, you inquire into whether, and in what circumstances, West Virginia Code § 29-6-19 mandates that an employee who refuses or fails to participate in an investigation conducted by agency employees shall forfeit his or her employment. While you do not provide details on the precise type of investigation you have in mind, we assume for purposes of this letter that you mean an internal and informal disciplinary investigation into an employee's conduct conducted by DHHR's human resources personnel and/or supervisory or managerial employees. For purposes of this letter, we shall refer to that type of investigation as an "internal investigation" to distinguish

it from a proceeding that a state employee might initiate before an external tribunal, such as the West Virginia Public Employees Grievance Board. We also will use the term "agency employees" to refer generally to managers, supervisors, and human resources personnel who would be the most likely persons to conduct a first-level informal investigation into a disciplinary matter. We conclude that W.Va. Code § 29-6-19 does not apply to internal investigations conducted by agency employees, and therefore, the statute does not mandate an employee who refuses or fails to participate in such investigations to forfeit his or her employment. Because we have not been asked, we do not address whether DHHR may possess inherent discretionary authority, independent of the statute, to create policies that would impose discipline on employees for conduct relating to an internal investigation.

Second, your letter inquires into whether there may be potential applications of West Virginia Code § 29-6-19 that would interfere with an employee's right to be free from self-incrimination under the Fifth Amendment to the U.S. Constitution or its counterpart under Article III, section 5 of the West Virginia Constitution. Because we conclude that West Virginia Code § 29-6-19 does not apply to internal investigations conducted by agency employees, it is unnecessary to address this question.

This Opinion thus addresses the following legal question:

> *Under West Virginia Code § 29-6-19, does a West Virginia civil service employee forfeit his or her office or position by refusing or failing to comply with a DHHR internal investigation?*

Considering the text of West Virginia Code § 29-6-19, the associated-words canon of construction ("*noscitur a sociis*"), and relevant case law, we conclude that the statute does not require state employees to participate in informal investigations conducted by agency employees on pain of losing their jobs. Rather, we conclude that the statute applies only to formal proceedings held before a court, legislative body, or administrative tribunal or officer specifically authorized by statute to conduct a covered investigation. As noted above, it is beyond the scope of this Opinion whether DHHR may possess inherent discretionary authority to create policies that would impose discipline on employees for conduct relating to an internal investigation.

The relevant provision reads in full (with key words in italics):

> If any employee in the classified or classified-exempt service shall willfully refuse or fail to appear before any court or judge, any legislative committee, or *any officer, board or body authorized to conduct any hearing or inquiry*, or having appeared shall refuse to testify or answer any question relating to the affairs or government of the state or the conduct of any state officer or employee on the ground that his testimony or answers would tend to incriminate him, or shall refuse to accept a grant of immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry, he shall forfeit his office or position and shall not be eligible thereafter for appointment to any position in the classified or classified-exempt service.

W.Va. Code § 29-6-19 (emphasis added); *see also* W.Va. Code St. R. § 143-1-14.10.a.

Close analysis of this provision yields two related conclusions. *First*, an agency employee is not an "officer, board or body" within the meaning of the statute. *Second*, an internal investigation is not a "hearing or inquiry" under the statute. This letter sets forth the bases for these two conclusions in turn.

First, agency employees are not listed among the persons or entities that conduct hearings or inquiries covered by West Virginia Code § 29-6-19.

As a textual matter, agency employees plainly do not constitute a "court or judge" or a "legislative committee." Therefore, the only way in which West Virginia Code § 29-6-19 could apply to agency employees would be if they, either singly or in concert, constituted an "officer, board or body authorized to conduct any hearing or inquiry."

The terms "board" and "body," in common parlance, typically refer to a defined multimember entity with certain official responsibilities. *See* Black's Law Dictionary 184 (8th ed. 2004) (defining "board" as "[a] group of persons having managerial, supervisory, or advisory powers");[1] *id.* at 185 (defining "body," in relevant part, as "[a]n artificial person created by a legal authority"). There are certain official entities created by state law that fit naturally within the plain meaning of "board" or "body." For example, the West Virginia Legislature has created a West Virginia Public Employees Grievance Board whose purpose is to process and resolve formal grievances filed by state employees. *See* W. Va. Code §§ 6C-3-1 et seq. Similarly, the State Personnel Board is charged under state law with, among other things, proposing legislative rules to set personnel policies for state agencies. *See id.* at §§ 29A-1-1 et seq. By contrast, we have not identified any statute, nor does your letter point to any, that constitutes any particular set of DHHR agency employees as a "body" or "board."

We also have no reason to believe that the agency employees conducting internal investigations for DHHR constitute "officer[s]" under state law.

The distinction between "officers" and "employees" runs throughout the civil service code. *See, e.g.*, W. Va. Code §§ 29-6-11 and -12. The Supreme Court of Appeals of West Virginia has authoritatively construed this term in other sections of the code and has instructed that the same language appearing in different provisions of the code should be read harmoniously. *See State ex rel. Callaghan v. W. Va. Civil Serv. Comm'n*, 166 W. Va. 117, 120, 273 S.E.2d 72, 74 (1980) ("Our civil service system act is a conglomeration of statutes that must be read in pari materia.").

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[1] *See also Comm'rs of State Ins. Fund v. Dinowitz*, 39 N.Y.S.2d 34, 38 (N.Y. Sup. Ct. 1942) (defining "board" as "an official or representative body organized . . . to execute official or representative functions or which has the management of a public office or department exercising administrative or governmental functions") (citing 11 C.J.S., Board, p.369).

To distinguish officers from employees, the Supreme Court of Appeals has applied a well-established set of criteria, including

> whether the position was created by law; whether the position was designated as an office; whether the qualifications of the appointee have been prescribed; . . . and whether one occupying the position has been constituted a representative of the sovereign.

Syl. Pt. 5, *Fraley v. Civil Serv. Comm'n*, 177 W. Va. 729, 356 S.E.2d 483 (1987) (quoting Syl. Pt. 5, *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970)); *see also* W. Va. Op. Att'y Gen., 2017 WL 3224718 (Jul. 18, 2017), available at http://www.ago.wv.gov/publicresources/Attorney%20General%20Opinions/Documents/M02224 74.pdf. These criteria, commonly referred to as the *Carson* factors, have repeatedly been applied by the Supreme Court of Appeals in a variety of other contexts as well.

While applying the *Carson* factors to distinguish "officers" from "employees" can at times present challenging legal questions, *see, e.g.*, *Cales v. Town of Meadow Bridge*, 800 S.E.2d 874, 879–885 (W. Va. 2017), we have no reason to suspect that the agency employees conducting internal investigations for DHHR should be considered officers. While you do not identify such employees with specificity, typically individual supervisors, managers, and human resources personnel do not occupy positions created by law, have not had their positions designated as offices, do not have qualifications set by statute, and have not been designated representatives of the sovereign. Your letter thus presents materially different facts from those in *Fraley*, in which the Supreme Court of Appeals ruled that the position of county coroner is a public office because it was created by the West Virginia Constitution and statute, required appointees to take the same oath as other county officers, and contained statutory limitations on qualifications and duties. *See Fraley*, 356 S.E.2d at 487–88.

The traditional canon of construction *noscitur a sociis* further supports the conclusion that agency employees are not covered "officers." Under that canon, also known as the associated-words canon, "words are given meaning by their context." Antonin Scalia & Bryan Garner, *Reading Law* 195 (2012). Specifically, "[w]hen several nouns . . . are associated in a context suggesting that the words have something in common, they should be assigned a permissible reading that makes them similar." *Id.*

Here, the word "officer" is part of a longer list of covered entities and persons—namely, "court," "judge," "legislative committee," "board," and "body." The first three of these terms, and arguably all five, share in common the characteristics of being official government entities or agents with specific legal authority to investigate and adjudicate certain disputes, and deriving that authority either directly from the West Virginia Constitution or an act of the state Legislature. In addition, this statutory list appears designed to cover the official adjudicatory functions of all three branches of government—the judicial ("court or judge"), the legislative ("legislative committee"), and the executive ("officer, board or body"). Read in this way, the phrase "officer, board or body" appears to represent the executive-branch equivalent of a court or legislative committee—that is, an official entity constituted by law to handle investigatory or adjudicative matters. That reading

finds further support in the phrase considered as a whole—"any officer, board or body *authorized* to conduct any hearing or inquiry" (emphasis added)—which suggests that it refers to administrative tribunals located within the executive branch that have been "authorized" by legislative acts to resolve certain disputes requiring witness statements or testimony. As noted above, the West Virginia Public Employees Grievance Board and State Personnel Board would appear to fit the definition of "board[s]" covered under this reading of the statute.

In short, West Virginia Code § 29-6-19 appears to exclude from its reach any disciplinary inquiries or investigations handled internally by agency employees.

Second, an internal investigation does not appear to constitute a "hearing or inquiry" under the statute.

The plain meaning of the word "hearing" denotes a formal proceeding—either "[a] judicial setting . . . held for the purpose of deciding issues of fact or of law," or "[a]ny setting in which an affected person presents arguments to an agency decision-maker." Black's Law Dictionary 737 (8th ed. 2004). The word "inquiry," by contrast, can refer more broadly to "fact-finding" or, in parliamentary law, "[a] request for information, either procedural or substantive." *Id.* at 808.

Absent additional context, it might be possible to construe the word "inquiry" to apply to any question or investigation conducted by anyone, regardless of degree of formality. But the associated-words canon again demonstrates that the term is properly read narrowly. When paired with the word "hearing," and in connection with the antecedent references to courts, legislative committees, and various administrative tribunals, the word "inquiry" most naturally takes on a more formal connotation—namely, an official investigatory or adjudicative proceeding before some duly-authorized public body.

This conclusion finds support in the U.S. Supreme Court decision in *United States v. Nugent*, 346 U.S. 1 (1953). In that case, the Court considered the scope of the similar terms "appropriate inquiry" and "hearing" for claims of conscientious objection under Section 6(j) of the Selective Service Act. *Id.* at 3–7. The Court explained that, under Section 6(j), the Department of Justice must "accord[] a fair opportunity to the registrant to speak his piece before an impartial hearing officer," "produce all relevant evidence in his own behalf," and supply him or her with "any adverse evidence in the investigator's report." *Id.* at 6. These requirements of an impartial hearing officer and presentation and receipt of adverse evidence are not characteristic of (and are certainly not required in) internal investigations conducted by agency employees.

This reading is further supported by at least one decision of the Education and State Employees Grievance Board—the predecessor to the Public Employees Grievance Board. In the case of *John Brewster v. West Virginia Bureau of Employment Programs*, 1998 WL 248527 (W. Va. Educ. St. Empl. Griev. Bd. Apr. 24, 1998), the Board construed language in state administrative personnel rules similar to that contained within West Virginia Code § 29-6-19 to determine whether an employee was entitled to paid leave for participating in an internal agency investigation. *See id.* at *3. The personnel policy at issue provided for paid leave for time spent "appear[ing] as a witness before any court or judge, any legislative committee, or any officer,

board, or body authorized by law to conduct an hearing or inquiry." *Id.* (quoting W. Va. Div. of Pers. Admin. R. § 15.11(a)). The Board observed that it would "stretch[] the meaning of the word 'inquiry'" to have it apply to internal investigations, *id.* at *4, and concluded that the employee "failed to prove" that the personnel policy extended to internal investigations, *id.* at *6.

* * *

In sum, we conclude that West Virginia Code § 29-6-19 does not apply to internal investigations conducted by agency employees and, therefore, that employees who "willfully refuse or fail to appear" in connection with such investigations do not thereby "forfeit" their employment. Because we conclude that the statute does not apply to internal investigations, we do not reach the question whether there might be particular applications of the statute that would violate the federal or state constitutional right to be free from self-incrimination.

The opinion expressed in this letter is limited to the conclusion that public employees do not *automatically* forfeit their employment by operation of statute if they fail to cooperate with internal investigations. Nothing in this letter should be construed to express an opinion as to whether, and in what circumstances, DHHR may as a matter of *discretion* adopt personnel policies requiring employee participation in internal agency investigations. Nor does this letter express any opinion as to whether DHHR may in its discretion terminate or otherwise discipline an employee for conduct relating to an internal investigation—such as insubordination or making untruthful statements. This letter simply concludes, as a matter of statutory interpretation, that the Legislature did not *mandate* in such cases forfeiture of civil-service positions and loss of opportunity for future appointments.

Sincerely,

Patrick Morrisey

Patrick Morrisey
Attorney General

Thomas M. Johnson, Jr.
Deputy Solicitor General