



State of West Virginia
Office of the Attorney General

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October 6, 2026

The Honorable Randy E. Smith
Senate President – Lieutenant Governor
State Capitol, Room M-229
State Capitol Complex
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear President Smith:

You have asked for an Opinion of the Attorney General on whether a sitting member of the West Virginia Senate may accept employment with a municipality of this State while retaining his or her Senate seat.

We are issuing this Opinion pursuant to West Virginia Code § 5-3-1, which makes it “the duty of the Attorney General to render to the President of the Senate ... a written opinion or advice upon any questions submitted ... whenever he or she is requested in writing so to do.”

Your letter presents questions in general terms, so we must answer them in general ways. This Opinion does not address the circumstances of any particular Senator or any particular municipal position. For any potential employment arrangement, we would strongly recommend that the Senator consult with counsel who could better engage with its specifics.

Your letter raises three legal questions:

- 1) Is there any statutory or constitutional prohibition, or other legal concern, that would prevent a sitting state Senator from accepting employment with a municipality within the State of West Virginia and simultaneously retaining his or her senatorial seat?
- 2) Does employment by a municipality raise any constitutional or statutory issues or create a conflict between the Senator’s responsibilities as an elected member of the Legislature and the Senator’s duties and interests as an employee of a local governmental entity?

- 3) Would any particular circumstances affect the analysis, including the nature of the municipal employment, the duties performed by the Senator, the compensation received, or matters that may come before the Legislature involving the municipality?

We conclude that West Virginia state law *generally* does not directly prohibit a sitting state Senator from accepting employment with a municipality and retaining his or her seat. But in particular circumstances, concurrent service may not be possible. So in answer to your questions:

- No West Virginia constitutional provision or statute categorically prohibits a sitting Senator from accepting municipal employment. Article VI, Section 13 reaches only lucrative office or employment “under this [S]tate,” and a person hired, paid, and supervised by a municipality ordinarily does not hold such a position. Federal law, however, may limit a Senator whose municipal salary is paid entirely with federal funds. And ultimately, whether a particular position disqualifies a Senator is a question for the Senate itself. See W. VA. CONST. art. VI, § 24.
- Municipal employment can raise constitutional issues in particular cases—under Article V, Section 1, under the contracts clause of Article VI, Section 15, and, for municipal offices, under the common-law incompatibility doctrine. And an employment relationship could present conflicts between legislative and municipal duties, which the Ethics Act regulates through its limits on use of office, dual compensation, voting, and disclosure.
- The circumstances you identify in your letter matter. The analysis turns chiefly on whether the position is an “office” or merely an employment position; how far its duties involve state law, state agencies, or state contracts; whether its salary depends on a state or county contract authorized during the Senator’s term, or on federal funds; and whether matters affecting the municipality come before the Senator as a legislator.

DISCUSSION

I. The Constitution Does Not Expressly Prohibit a Sitting State Senator from Accepting Municipal Employment, but Problems May Arise Depending on the Position.

In reviewing any relevant constitutional provisions, we apply their plain terms as written, syl. pt. 3, *State ex rel. Smith v. Gore*, 150 W. Va. 71, 143 S.E.2d 791 (1965), while giving effect “to every part and to every word,” syl. pt. 2, *Diamond v. Parkersburg-Aetna Corp.*, 146 W. Va. 543, 122 S.E.2d 436 (1961).

A. Article VI, Section 13 Does Not Reach Employment by a Municipality.

We start with Article VI, Section 13 of the West Virginia Constitution, which provides: “No person holding any other lucrative office or employment under this state, the United States, or any foreign government; no member of Congress; and no person who is sheriff, constable, or clerk of any court of record, shall be eligible to a seat in the Legislature.” Three terms in Section 13 dictate whether a person is disqualified from a state Senate seat while holding another position. The

position must first be “lucrative,” W. VA. CONST. art. VI, § 13, that is, compensated. *See Office, BLACK’S LAW DICTIONARY* (12th ed. 2024) (defining “lucrative office”). It must also be an “office or employment”; because the people added “or employment” in 1970, the distinction between “office” and “employment” no longer matters in this context. W. VA. CONST. art. VI, § 13; *see* Legislative Improvement Amendment, H.R.J. Res. No. 8, 1970 W. Va. Acts 456. And it must be “under this [S]tate, the United States, or any foreign government.” W. VA. CONST. art. VI, § 13. A position is “under” the government that creates it and in whose service it is held.¹

The position that you have generally described likely would be “lucrative” “employment,” so the question turns on whether municipal employment constitutes employment “under this State.” *See generally State ex rel. Rist v. Underwood*, 206 W. Va. 258, 524 S.E.2d 179 (1999). A person holds “lucrative employment under this State” when three conditions are met:

- First, that “person is a payee named on a State warrant.”
- Second, that person “occupies a position whereby he performs service for state government.”
- And third, that person works “under conditions where the state government retains the right to control or supervise the work being performed, such as to the means, manner, methods and details thereof.”

Off. of the W. Va. Att’y Gen., Opinion Letter to the Hon. Glen B. Gainer, Jr. (Jan. 4, 1980), 1980 WL 119397, at *3 (quoting Off. of the W. Va. Att’y Gen., Opinion Letter to the Hon. Ivor F. Boiarsky (Jan. 12, 1971), 1971 WL 126093, at *11).

Under this test, municipal employees do not serve “under this State”: they are not paid by state warrant, do not perform services for the state government, and are directly supervised by local officials.² And while this test comes from this Office’s prior opinions rather than from a decision of the Supreme Court of Appeals, it tracks the ordinary meaning of “under” described above. Indeed, even state supervision and state funding of a local position do not render that position a “state” role. In public education, for example, the State Board of Education exercises general supervision over the schools and the State funds much of teachers’ compensation, *see* W. VA. CODE § 18-9A-1 et seq., yet the Supreme Court of Appeals has held that the county board of education remains teachers’ “exclusive employer,” *Meadows ex rel. Pro. Emps. of W. Va. Educ. Ass’n v. Hey*, 184 W. Va. 75, 78, 399 S.E.2d 657, 660 (1990) (holding that teachers are not employed by the State).

¹ The Constitution elsewhere says “under this or any other government” when it means every government, W. VA. CONST. art. VIII, § 7, and “in this state” when it means a geographic reach, *id.* art. IV, § 10; art. VI, §§ 14, 45.

² Other areas of state law also treat the State and political subdivisions as distinct employers. For example, the Governmental Tort Claims and Insurance Reform Act defines an employee as “an officer, agent, employee, or servant ... who is authorized to act and is acting within the scope of his or her employment for a political subdivision.” W. VA. CODE § 29-12A-3(a). The Act expressly excludes “political subdivisions” from its definition of “State.” *Id.* § 29-12A-3(e).

Article VI, Section 13's text confirms that municipal and local employment should be treated as distinct from state employment. For instance, it separately disqualifies any person "who is sheriff, constable, or clerk of any court of record." W. VA. CONST. art. VI, § 13. Sheriffs and constables are county officers, *id.* art. IX, §§ 1-2, and the clerks of courts of record include the clerks of the circuit courts, *id.* art. VIII, § 9. If "office under this State" already reached county offices, that clause would do no work. Syl. pt. 2, *Diamond*, 146 W. Va. 543, 122 S.E.2d 436; *accord Rist*, 206 W. Va. at 270-71, 524 S.E.2d at 191-92. "If possible, [a West Virginia court] must give effect to every word, clause, and sentence; it must not read a statute so as to render any part inoperative, superfluous, or insignificant." *In re A.P.*, 245 W. Va. 248, 254, 858 S.E.2d 873, 879 (2021) (cleaned up).³

Had Section 13's drafters wished to exclude municipal or county employees from serving in the Legislature, they would have said so. The Constitution names counties and municipalities whenever it means to include them. Section 14, the very next section, speaks of public money "whether state, county, township, district, or other municipal organization." Section 15 speaks of contracts "with the state, or any county thereof." Section 27 speaks of officers "whether state, county, district or municipal," and Section 35 of "the state ... including any subdivision thereof, or any municipality therein." Most telling is Section 33. In 1970, in the same joint resolution that added "or employment" to Section 13, the people rewrote Section 33 and barred from the new compensation commission "officers and employees of the state or of any county, municipality or other governmental unit of the state." Legislative Improvement Amendment, 1970 W. Va. Acts at 459; *see Rist*, 206 W. Va. at 272, 524 S.E.2d at 193. The drafters of that resolution knew how to reach municipal employees. They did so in Section 33 and not in Section 13. That omission should be assumed to be "intentional." *Cf. State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995).

One caveat applies where a municipal position, whether office or employment, carries substantial state functions. In that case, "[i]t may be successfully argued ... that [they] hold[] either an office or employment 'under this State.'" Off. of the W. Va. Att'y Gen., Opinion Letter to the Hon. Ken Hechler (Jan. 9, 1991), 1991 WL 628001, at *2 (cleaned up). That argument remains untested, but the scope and type of state-connected duties a sitting legislator performs in his or her municipal role would no doubt bear upon its success. *See* Off. of the W. Va. Att'y Gen., Opinion Letter to the Hon. Robert S. Kiss (Sept. 26, 2002), 2002 WL 31250294, at *2-3.

³ Consistent with our usual practice, in addressing the questions you raise in your letter, we have applied principles of interpretation that we expect a West Virginia court might apply. But in truth, "[e]ach house of the West Virginia Legislature is ... the sole and exclusive judge of whether or not one of its own members satisfies the qualifications set forth in the State Constitution and is eligible to have administered to him the oath of office and is to be given a seat in the hall of the legislative body to which he was elected." Boiarsky Letter, *supra*, at *11; *see* W. VA. CONST. art. VI, § 24. And the question of whether a state Senator could take his or her seat despite his or her municipal employment is the sort of qualification question that the relevant house would have to determine for itself. W. VA. CONST. art. VI, § 24.

B. Depending on the Position, Article V, Section 1 and Article VI, Section 15 May Be Implicated.

We have also examined Article V, Section 1 of the West Virginia Constitution, which forbids any person from “exercis[ing] the powers of more than one” department “at the same time.” An executive-agency employee participates in the executive power of the State. *See* Off. of the W. Va. Att’y Gen., Opinion Letter to the Hon. Mark A. Hunt (Oct. 27, 2025), 2025 WL 3101404, at *2.

As noted, a municipal employee generally does not exercise *state*-level executive power. The departments of Article V are those of state government. *See* W. VA. CONST. art. VI, § 1; art. VII, § 1; art. VIII, § 1. In contrast, municipalities act under general law on “municipal affairs.” *Id.* art. VI, § 39a. And it is a “general rule” that the “separation of powers doctrine applies to state government and state officers and ordinarily does not extend to the government of municipal corporations.” *Hubby v. Carpenter*, 177 W. Va. 78, 83, 350 S.E.2d 706, 710 (1986).

Still, separation-of-powers problems could arise if a sitting legislator accepted a municipal position with a substantial nexus to state funds, policies, or government. We have explained before that “any distinction suggesting that [Article V, Section 1] appl[ies] only to State (rather than county) officers, ignores the reality of [its] underlying purpose—to prevent a consolidation of both legislative and executive power in a single public officer.” Kiss Letter, *supra*, at *3 (cleaned up). Factors including the Legislature’s involvement, the scope of state-related duties, and the interconnectedness of a particular position with state government would all weigh on the constitutionality of that dual service. *See id.*

Municipal judgeships present a distinct question. Article V, Section 1 separates the judicial department as well as the executive, and a municipal judge hears and decides cases, imposes fines, and may impose jail sentences for ordinance violations. Article VIII, Section 1 vests “[t]he judicial power of the State” in the Supreme Court of Appeals, the circuit courts, and such intermediate appellate and magistrate courts as the Legislature establishes. Municipal courts are not on that list. The Constitution addresses them separately in Article VIII, Section 11, and confines them to enforcing municipal ordinances. That structure, together with *Hubby* (which relied on Section 11), suggests that a municipal judge exercises municipal rather than state judicial power. But the question is unsettled, and a Senator serving as a municipal judge may also be subject to judicial-conduct limits on political activity that are difficult to reconcile with legislative service. We therefore advise special caution before a sitting Senator accepts a municipal judgeship.⁴

⁴ Article VIII, Section 7 bars a “justice, judge or magistrate” from holding any other office or becoming a candidate for nonjudicial elective office, and the Code of Judicial Conduct requires a judge to resign upon becoming such a candidate. *See* W. VA. CONST. art. VIII, § 7; W. VA. CODE OF JUD. CONDUCT R. 4.5(A). We do not decide here whether those provisions reach municipal judges. *Cf. Robinson v. City of Bluefield*, 234 W. Va. 209, 216, 764 S.E.2d 740, 747 (2014) (Benjamin, J., concurring) (appearing to assume that these provisions do *not* reach municipal judges). But if they do, they cannot be reconciled with legislative service—providing yet another reason for caution.

Further, Article VI, Section 15 may restrict sitting Senators from accepting a municipal position that depends on state or county contracts. Section 15 has two parts: a bar on certain appointments and a bar on certain contract interests. It reads:

No senator or delegate, during the term for which he shall have been elected, shall be elected or appointed to any civil office of profit under this state, which has been created, or the emoluments of which have been increased during such term, except offices to be filled by election by the people. Nor shall any member of the Legislature be interested, directly or indirectly, in any contract with the state, or any county thereof, authorized by any law passed during the term for which he shall have been elected.

Section 15 serves dual aims. It “is aimed not just at eliminating self-dealing on the part of legislators; rather, it is also intended to forestall even the remotest possibility of executive influence over the legislature.” *Rist*, 206 W. Va. at 269, 524 S.E.2d at 190. To that end, it “provides a straightforward and absolute bar against a member of the Legislature obtaining any public office that was created, or the emoluments of which were increased, during the legislator’s term of office.” *Id.* at 263, 524 S.E.2d at 184. Because that first sentence reaches only offices “under this State,” it ordinarily does not apply to a municipal position, for the reasons given in Part I.A. And that sentence expressly excepts “offices to be filled by election by the people,” W. VA. CONST. art. VI, § 15, so it would not reach an elected municipal office in any event.

On one hand, Section 15’s contracts clause never mentions municipalities, and Article VI elsewhere distinguishes municipalities from counties. *See, e.g.*, W. VA. CONST. art. VI, §§ 14, 27, 39. A municipal employment agreement is not a contract with the State or a county. On the other hand, Section 15 restrains state Senators from maintaining any interest, direct or indirect, in state or county contracts authorized by a law passed during their terms.

We can imagine certain factors that would affect whether a particular municipal position violates Section 15. The clearest concern would arise if a municipal position’s salary were funded by a contract with the State or a county authorized by a law passed during the Senator’s term. A position that required the Senator to seek or administer such contracts on the municipality’s behalf could raise the same concern, depending on whether the Senator’s stake rises to an “interest” in the contract.

The question of whether Section 15 applies will be a fact-intensive and circumstance-specific inquiry. *See, e.g.*, Hunt Letter, *supra*, at *2. So as with the separation-of-powers considerations addressed above, the limited information you have given us prevents us from offering more specific guidance than these general warnings.

II. The Incompatibility Doctrine Does Not Apply to Municipal Employees, but It Could Bar Legislators from Holding Municipal Offices.

Beyond these specific constitutional prohibitions, a person also may not hold two offices whose “inconsistent nature” and “relation to each other” make it “improper, from considerations

of public policy for one person to perform the duties of both.” *State ex rel. Thomas v. Wysong*, 125 W. Va. 369, 373, 24 S.E.2d 463, 466 (1943) (citing *Bryan v. Cattell*, 15 Iowa 538 (1864)).

Municipal employment does not raise incompatibility concerns. The doctrine applies to offices, not employment, and West Virginia distinguishes the two by asking whether a position is created by law; is designated an office; has prescribed qualifications; is assigned specific duties, tenure, salary, bond, or oath; or involves the exercise of some portion of the sovereign power. *State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276 (1923); syl. pt. 5, *State ex rel. Carson v. Wood*, 154 W. Va. 397, 175 S.E.2d 482 (1970). Teachers, for example, are employees—so the incompatibility doctrine does not cover them. Kiss Letter, *supra*, at *3 n.5; *see also, e.g.*, Off. of the W. Va. Att’y Gen., Opinion Letter to the Hon. Thomas H. Newbraugh (June 5, 1981), 1981 WL 157189, at *3 (explaining that incompatibility doctrine did not apply to county commissioner who served as beer investigator).

A municipal office is different. Where a municipal position is an office, the question is whether one office supervises, audits, appoints, removes, or pays the other, or whether their duties inherently conflict. Incompatibility primarily turns on the scope, duties, and powers of both positions. *See* Kiss Letter, *supra*, at *2-3. The Legislature’s general authority over municipalities as a body, *see* W. VA. CONST. art. VI, § 39a, does not by itself render every municipal office incompatible with a Senate seat; if it did, no municipal officer could serve in the Legislature, a result the Constitution’s text does not support. The inquiry instead focuses on the particular office. “Public policy demands that an officer exercise his best efforts, free from any taint of bias in the discharge of his duties as a public officer.” Off. of the W. Va. Att’y Gen., Opinion Letter to the Hon. Ken Hechler (Dec. 28, 1990), 1990 WL 596836, at *1. So when “the responsibilities of one office can in any manner influence the actions of the public officer in the discharge of the duties of his second office,” the two are incompatible. *Id.* (cleaned up).

We have concluded before that if a county *office* has the authority to contract with a municipal office, to make grants to that office, and to finance acquisitions by that office, the two offices are incompatible. Dec. 1990 Hechler Letter, *supra*, at *2; *see also* Kiss Letter, *supra*, at *3. But without more specific information, we cannot say whether a particular municipal office would be incompatible with serving as a state Senator.

III. The Ethics Act Permits and Regulates Such Arrangements.

We are not aware of any provision of the West Virginia Code that automatically prohibits a legislator’s municipal employment. But certain statutory provisions would impose important limits. The statute most directly on point is the Ethics Act, which applies to officials and employees “in state, county, municipal governments and their respective boards, agencies, departments, and commissions.” W. VA. CODE § 6B-2-5(a). A Senator who takes a municipal position is therefore subject to the Act in both roles.

The Act does not forbid the arrangement. It provides that nothing in its contracts provision “shall be construed to prevent or make unlawful the employment of any person with any governmental body” or “to prohibit a member of the Legislature from entering into a contract with any governmental body.” W. VA. CODE § 6B-2-5(d)(1). The Ethics Commission has read the Act

the same way. See W. Va. Ethics Comm’n, Advisory Op. 1997-21 (July 10, 1997) (legislator may hold public or private employment absent misuse of office); W. Va. Ethics Comm’n, Advisory Op. 2023-09 (Sept. 7, 2023) (state college employee may serve in Legislature); W. Va. Ethics Comm’n, Advisory Op. 2024-02 (Apr. 4, 2024) (“[G]enerally, no provision in the Ethics Act prohibits a public official from holding another public office or having other public employment.”).

Nor do two neighboring restrictions apply. The Act’s vendor-employment restrictions reach only full-time officials, W. VA. CODE § 6B-2-5(h), and West Virginia Code § 61-10-15 reaches county officers, not legislators.

Still, the Act does regulate how the arrangement would operate. Four important limits appear:

- First, a Senator may not use the prestige of office to obtain the local position. W. VA. CODE § 6B-2-5(b)(1).
- Second, a Senator may not be paid by the municipality “for working the same hours” spent on legislative duties absent reduced pay, leave, or verified time records. *Id.* § 6B-2-5(l).
- Third, conflicts might arise in legislative voting. The Act recognizes that some conflicts are inherent in part-time public service and do not always require a member to step aside. *Id.* § 6B-1-2(c). Legislation affecting municipalities will thus not ordinarily disqualify a Senator who works for one. But when the conflict becomes personal, the Senator should seek to be excused from voting. *Id.* Examples include an appropriation to the employing municipality, a bill directed specifically at that municipality’s powers or revenues, and legislation affecting the Senator’s own position or pay. The request is then resolved under the Senate’s rules, and a Senator who asks to be excused but is required by the presiding officer to vote does not violate the Act by casting that vote. *Id.* § 6B-2-5(i); see Advisory Op. 2023-09, *supra*.
- Fourth, the Senator must disclose the employment. W. VA. CODE §§ 6B-2-6, 6B-2-7.

So long as the Senator respects these limits, we see nothing in the Ethics Act that would bar municipal employment of the kind your letter describes.

IV. A Senator Must Consider Other Sources of Law Before Undertaking Municipal Employment.

Finally, two sources of law outside the provisions discussed above may bear on a particular arrangement.

First, federal law. The Hatch Act provides that a state or local officer or employee may not be a candidate for elective office “if the salary of the employee is paid completely, directly or indirectly, by loans or grants made by the United States or a Federal agency.” 5 U.S.C. § 1502(a)(3). The prohibition does not apply to nonpartisan elections, *id.* § 1503, but elections to the West Virginia Senate are partisan. A Senator whose municipal salary is entirely federally

funded therefore could be barred under federal law from seeking reelection while holding that position, even though state law does not bar the employment itself.⁵ We express no view on the application of federal law to any particular position.

Second, the municipality's own law. Municipal charters, ordinances, and personnel rules—and, for police and fire departments, the civil-service provisions of Chapter 8 of the Code—may restrict outside employment, political activity, or leave. Those limits bind the Senator as a municipal employee rather than as a legislator, and they should be reviewed for any position.

* * *

All of the above suggests that sitting legislators should proceed cautiously before accepting a municipal position. Caution is especially warranted where the position involves duties under state law, state contracts, or state policy; requires direct dealings with state agencies; involves lobbying state officials; or carries a salary tied to a state or county contract authorized during the legislator's term, or to federal funds. Even where no constitutional bar applies, the Ethics Act's limits on dual compensation and its disclosure and recusal requirements, described in Part III, govern the day-to-day conflicts your second question raises. Given that, we again urge any Senator to consult with counsel, who can better advise him or her about any prospective municipal employment arrangement.

Sincerely,

A handwritten signature in black ink, appearing to read "John B. McCuskey". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

John B. McCuskey
West Virginia Attorney General

S. Hallie Hovey-Murray
Assistant Solicitor General

⁵ Section 1502(c)(4) exempts “an individual holding elective office,” but that exemption has been read to turn on the position that brings the person within the Act, so a Senator covered through a separate municipal job should not assume it applies. See *N. Va. Reg'l Park Auth. v. U.S. Civ. Serv. Comm'n*, 437 F.2d 1346, 1351 (4th Cir. 1971).