



State of West Virginia
Office of the Attorney General

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The Honorable Scott R. Smith
Ohio County Prosecuting Attorney
Ohio County Courthouse
1500 Chapline Street
Wheeling, WV 26003

Dear Prosecutor Smith:

Your office has asked for an Opinion of the Attorney General about compensating professional-exempt employees for additional job duties performed outside their existing contractual arrangement. This Opinion is being issued under West Virginia Code § 5-3-2, which provides that the Attorney General “may consult with and advise the several prosecuting attorneys in matters relating to the official duties of their office.” When this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

You explain that the Ohio County Board of Education has compensated its employees for additional duties performed outside their existing contractual arrangement for several years. Most recently, the Board has determined that it would be better to have a Board-approved guideline in place. The proposed guideline would be considered by the Board only if the practice is deemed permissible and would apply to professional-exempt employees with contracts ranging between 200 and 261 days. The guideline would expressly exempt both the superintendent and the assistant superintendent from eligibility.

With these facts in mind, your letter raises the following legal question:

Is compensation for additional duties performed by professional employees outside their existing contractual agreements prohibited by the West Virginia Constitution, Article VI, § 38, West Virginia Code § 18A-2A-1, and/or West Virginia Code § 6-7-7?

We conclude that, under the facts you have described, the Board's plan to provide extra compensation for additional duties is permissible under the West Virginia Constitution, Article VI, § 38 and West Virginia Code § 6-7-7. We further conclude that West Virginia Code § 18A-2A-1 and other statutory provisions impose various requirements with which the Board must comply when it provides additional compensation.

Discussion

I. The Board May Compensate School Employees For Additional Duties Without Violating The West Virginia Constitution Or West Virginia Code Section 6-7-7.

Article 6, Section 38 of the West Virginia Constitution includes two separate prohibitions relating to the pay of public employees. As relevant here, the provision states: “[1] [n]o extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after the services shall have been rendered or the contract made . . . [2] [n]or shall the salary of any public officer be increased or diminished during his term of office.” W. VA. CONST. art. VI, § 38. The same prohibitions also exist by statute. *See* W. VA. CODE § 6-7-7 (identical language to W. VA. CONST. art. VI, § 38). These provisions serve to “safeguard the independence, the security, and the efficiency” of public offices. *Harbert v. Harrison Cnty. Ct.*, 129 W. Va. 54, 62, 39 S.E.2d 177, 185 (1946). They also “assure[] the people” that public officers “give their services” for the “compensation for which they were willing to serve.” *Id.*

Your letter acknowledges that our 2015 Opinion Letter directly addresses both provisions. *See* Off. of the W. Va. Att’y Gen., Opinion Letter Concerning a Temporary Salary Enhancement (Aug. 17, 2015), 2015 WL 4977862. We thus revisit the 2015 Opinion in answering your question.

Take the second prohibition, called the salary clause, first: “Nor shall the salary of any public officer be increased or diminished during his term of office.” W. VA. CONST. art. VI, § 38. Our 2015 Opinion explains that the salary clause’s prohibition is quite limited. *See* Op. Letter, 2015 WL 4977862, at *2-3. It bars additional compensation only for public officers—positions that have a fixed term, a fixed salary, and involve an exercise of sovereign power. *Id.* “[M]ere employee[s]” are beyond the clause’s reach. *Syl., State ex rel. Key v. Bond*, 94 W. Va. 255, 118 S.E. 276 (1923) (cleaned up). And even when an individual is a public officer, the prohibition against additional pay does not apply when a public officer takes on new responsibilities. Op. Letter, 2015 WL 4977862, at *2-3.

The salary clause does not bar the Board’s proposed additional compensation scheme. Your request clarifies that the superintendent and assistant superintendent—“public officers” covered by the prohibition, *Springer v. Bd. of Educ. of Ohio Cnty.*, 117 W. Va. 413, 418, 185 S.E. 692, 694 (1936)—will be ineligible for additional compensation. Thus, those eligible for additional compensation are “mere employees,” to whom the prohibition does not apply. *Syl., Key*, 94 W. Va. 255, 118 S.E. 276 (cleaned up). And, as further explained below, these employees are also performing additional duties—which can appropriately justify additional pay.

The first prohibition—the extra-compensation clause—is broader. It states: “[n]o extra compensation shall be granted or allowed to any public officer, agent, servant or contractor, after

the services shall have been rendered or the contract made.” W. VA. CONST. art. VI, § 38. Unlike the salary clause, “the state supreme court has never so limited the extra compensation clause.” Op. Letter, 2015 WL 4977862, at *3. The extra-compensation clause applies to any “public official, agent, employee, or contractor.” *Id.* at *4. The “ban on extra compensation [also] falls unevenly on contractual and non-contractual employees.” *Id.* at *7. So, while contractual employees cannot receive extra compensation after “the contract [is] made,” non-contractual (at-will) employees, cannot receive extra compensation after their services “have been rendered.” W. VA. CONST. art. VI, § 38; *see* Op. Letter, 2015 WL 4977862, at *7.

But what qualifies as impermissible “extra compensation” is the same for contractual and non-contractual employees. First, “an employer does not grant extra compensation when it pays an employee the originally agreed-upon compensation.” Op. Letter, 2015 WL 4977862, at *4 (cleaned up). So, negotiating for the possibility of additional compensation at the outset of employment does not violate the clause. *Id.* Second, “extra pay for additional consideration” is not extra compensation. *Id.* at *5; *see* syl., *State ex rel. Bd. of Governors of W. Va. Univ. v. Sims*, 136 W. Va. 789, 68 S.E.2d 489 (1952) (holding retired employees can simultaneously receive retirement allowance and payment for new services). Thus, an employee receiving additional pay for “newly imposed” duties is not “extra compensation.” Syl., *Springer*, 117 W. Va. 413, 185 S.E. 692; *see* Op. Letter, 2015 WL 4977862, at *5.

Here, the Board’s compensation scheme is not forbidden extra compensation within the clause’s meaning. Based on the facts your letter presents, the additional compensation falls into one of the limitations enumerated above. If the additional compensation is negotiated before the employment term, then it is the “originally agreed-upon compensation.” Op. Letter, 2015 WL 4977862, at *4. And if the additional duties arise after employment begins, then it falls into the second category—“extra pay for additional consideration.” *Id.* at *5. The examples your letter provides of “additional duties beyond those originally contemplated”—such as providing additional tutoring services, leading robotics programs, handling operations emergencies, and filling in after an unanticipated employee departure—at least seem to fall firmly into that category. So, although the clause applies to the “employee[s]” and “contractor[s]” at issue, the extra-compensation clause is not implicated because this is not extra compensation. *Id.* at *4.

The Board’s proposal for providing additional compensation to professional employees who perform additional duties outside their contract does not violate the salary or extra compensation clause of the West Virginia Constitution or West Virginia Code.

II. The Board Must Comply With Various Statutory Provisions In Providing Additional Compensation.

West Virginia Code § 18A-2A-1 and other statutory provisions set forth various requirements for how a school board can provide additional compensation. The starting point for ensuring the Board’s compliance with these provisions is determining which category each additional duty falls into.

The West Virginia Code creates three categories of additional work: an extracurricular assignment, a supplemental duty, or an extra-duty assignment (also called an additional

noninstructional duty). Each category imposes different requirements that the Board must comply with.

A few definitions help determine how these requirements apply. “School personnel” is a broad term encompassing “all personnel employed by a county board.” W. VA. CODE § 18A-1-1. It “is comprised of two categories: [p]rofessional personnel and service personnel.” *Id.* The first category, “[p]rofessional personnel,” describes employees who meet the “certification” or “licensing requirements of the [S]tate.” *Id.* § 18A-1-1(b). Teachers are professional personnel, as are registered nurses and licensed counselors. *Id.* § 18A-1-1(b), (c). “Teacher” also encompasses any “person regularly employed for instructional purposes,” which includes any “supervisor, principal, superintendent, [or] public[-]school librarian.” W. VA. CODE § 18-1-1. By contrast, “service personnel” are “nonteaching school employee[s].” W. VA. CODE § 18A-1-1(e). Secretaries, custodians, maintenance and transportation employees, and school lunch workers and aides are all service personnel. *Id.* These statutory definitions establish the framework to understand the types of additional duties discussed below.

1. Extracurricular Assignments.

Extracurricular assignments are “activities that occur at times other than regularly scheduled working hours” “on a regularly scheduled basis.” W. VA. CODE § 18A-4-16. These activities include “instructing, coaching, chaperoning, escorting, providing support services or caring for the needs of students.” *Id.* Both “teachers and service personnel” can be given “extracurricular assignments.” *Id.* All assignments given to service personnel must be “considered extracurricular assignments” unless they are regular positions or extra-duty assignments. *Id.*

Extracurricular assignments are subject to several requirements. *See* W. VA. CODE § 18A-4-16. First, the employee and superintendent must “mutually agree upon the maximum number of hours” per extracurricular assignment per year. *Id.* Second, the maximum hours agreed to by the employee and superintendent is “subject to board approval.” *Id.* Third, the terms of the extracurricular assignment must be “in writing and signed by both parties.” *Id.* And fourth, the extracurricular contract must be separate from the employment contract. *Id.* Procedural safeguards that apply to employees’ standard contracts also protect extracurricular contracts. *Syl. pt. 2, Smith v. Bd. of Educ. of Logan Cnty.*, 176 W. Va. 65, 341 S.E.2d 685 (1985) (“The procedural requirements . . . clearly apply . . . to all school personnel positions.”). For “extracurricular school service personnel assignments,” the same hiring process as laid out for extra-duty assignments applies. W. VA. CODE § 18A-4-16(5). And these service personnel “have the option of retaining the [extracurricular] assignment” if it continues to exist the following year. *Id.* § 18A-4-16(6). Any regularly occurring duty performed outside the standard workday is an extracurricular assignment, and all extracurricular assignments are subject to the requirements of this provision.

Based on the description in your letter, several duties are likely extracurricular assignments. Tutoring is one. Tutoring “occur[s] [on a regularly scheduled basis] at times other than regularly scheduled working hours,” making it an extracurricular assignment. W. VA. CODE § 18A-4-16. The building-administrator duty may also be an extracurricular assignment, if it “occur[s] [on a regularly scheduled basis] at times other than regularly scheduled working hours.” *Id.* Extracurricular assignments must be given in compliance with the requirements above. The

Board should pay special attention to the requirements for forming extracurricular contracts (that the contracts be in writing, signed, and in a separate agreement than the employment contract) and setting hours limits (agreed to by the superintendent and employee and approved by the Board) as these requirements must be met before any employee undertakes extracurricular assignments.

2. Supplemental Duties.

Supplemental duties are any “duty other than [one] assigned under an employee’s contract that [are] generally expected to be performed during an educational day.” W. VA. CODE § 18A-2A-1. But supplemental duties may sometimes “exceed[] the eight[-]hour contracted day.” *Id.* The Board should keep several things in mind when assigning supplemental duties.

First, only teachers may perform supplemental duties. The supplemental duties provision is found in Article 2a, entitled “Teachers Bill of Rights.” W. VA. CODE § 18A-2A. Though “a subchapter heading cannot substitute for the operative text of the statute,” “statutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute.” *Fla. Dep’t of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 47 (2008) (cleaned up). The statute’s text confirms that supplemental duties are for teachers: requiring the county board to “adopt and provide to each classroom teacher, full-time counselor, and full-time librarian . . . the days each employee is expected to work for that school year.” W. VA. CODE § 18A-2A-1. And recall the statutory definition above encompasses professional personnel beyond classroom teachers. *See id.* § 18A-1-1 (“The definitions contained in [this section] . . . apply to this [entire] chapter.”); *see also Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) (“[R]easonable statutory interpretation must account for both “the specific context in which . . . language is used” and “the broader context of the statute as a whole.”). So only “teachers”—including supervisors, principals and librarians—can take on supplemental duties. W. VA. CODE § 18A-2A-1.

Second, supplemental duties performed exclusively during the eight-hour workday “may be governed by an agreement.” W. VA. CODE § 18A-2A-1. But if these duties are governed by an agreement, the agreement must be one “other than the employee’s contract.” *Id.* Otherwise, they would not be a supplemental duty at all. *See id.*

Third, supplemental duties that occur outside the workday require an agreement governing the supplemental duty and must be “preapproved by the county superintendent or by his or her designee.” W. VA. CODE § 18A-2A-1. The statute’s text does provide a carveout for duties that arise from “unanticipated emergenc[ies]”: in those situations, an agreement is still required but does not need to be preapproved. *Id.*

Several of the duty descriptions in your letter appear to constitute supplemental duties. Take, for instance, the student-teacher mentor. It seems that mentoring student teachers is “generally expected to be performed during an educational day” because student teachers would likely be at the school only during contracted work hours. W. VA. CODE § 18A-2A-1. If that is true, the student teacher mentor would be a supplemental duty. To ensure compliance, however, we recommend that the Board creates an agreement regardless of whether the supplemental duties occur exclusively within the workday. Because any supplemental duty “exceeding the eight[-]hour contracted day” *must* be governed by an agreement, it would be simplest to have contracts

governing all supplemental duties—or at least contracts for all supplemental duties that *might* require additional hours outside the workday.

3. Extra-duty Assignments.

Extra-duty assignments are “irregular job[s]” that occur “periodically,” such as “field trips, athletic events, proms, banquets and band festival trips.” W. VA. CODE § 18A-4-8b. The extra-duty assignment provision is found in Section 8b, entitled “Seniority rights for school service personnel.” *Id.* No other statutory provision defines the term. Based on the provision’s statutory location, only service personnel can have extra-duty assignments. The statute dictates how these assignments must be given. The most senior service personnel are given “priority in accepting extra-duty assignments,” followed by other service employees “according to the length of their service.” *Id.* This process continues “until all employees have had an opportunity to perform similar assignments,” at which point the “cycle then is repeated.” *Id.*

Although the term “extra-duty assignments” refers to only service personnel, other provisions of the West Virginia Code indicate that teachers can be compensated for similar duties. *See* W. VA. CODE § 18A-4-5a. The “County salary supplements for teachers” provision states: “[c]ounties may provide additional compensation for any teacher assigned duties in addition to the teacher’s regular instructional duties wherein such noninstructional duties are not a part of the scheduled hours of the regular school day.” *Id.* Thus, teachers (which again includes supervisors, principals, and librarians, *see* W. VA. CODE § 18A-1-1) can receive additional compensation for duties that are (1) noninstructional and (2) performed outside the regular school day. *Id.* By its terms, this definition encompasses the same types of duties covered by the extra-duty assignment provision for service personnel —“field trips, athletic events, proms, banquets and band festival trips.” *Id.* § 18A-4-8b. So, teachers too may undertake “irregular job[s]” that occur “periodically,” *id.*, but these “additional” “noninstructional duties” are governed by Section 18A-4-5a instead of Section 18A-4-8(b).

These noninstructional duties come with a few conditions. Unlike other types of salary modification, “a local board may withdraw or cancel these special supplements” without showing financial necessity for doing so. *Syl. pt. 7, Robbins v. McDowell Cnty. Bd. of Educ.*, 186 W. Va. 141, 411 S.E.2d 466 (1991). School boards must also offer additional pay evenhandedly. *See id.* So, if “a local board determines to decrease or abolish this type of special salary supplement, it must do so uniformly.” *Id.* And “once a county board of education pays additional compensation to certain teachers, it must pay the same amount of additional compensation to other teachers performing like assignments and duties.” *Syl. pt. 1, Weimer-Godwin v. Bd. of Educ. of Upshur Cnty.*, 179 W. Va. 423, 369 S.E.2d 726 (1988) (cleaned up).

This last category of assignments—extra-duty assignments if performed by service personnel and additional noninstructional duties if performed by teachers—is the broadest of the three categories. Where an extracurricular assignment is only an “activit[y] that occur[s] at times other than regularly scheduled working hours” “on a regularly scheduled basis,” W. VA. CODE § 18A-4-16, and a supplemental duty describes only a teacher’s duties “other than [those] assigned under [their] contract that is generally expected to be performed during an educational day,” *id.* § 18A-2A-1, this last category has a wider definition: any “irregular job” that occurs

“periodically,” or any “noninstructional duties [that] are not a part of the scheduled hours of the regular school day,” *id.* § 18A-4-8b; *id.* § 18A-4-5a. Thus, this last type of assignment serves as a catch-all for any duty that doesn’t fall cleanly into one of the other two categories.

Returning one last time to your letter—the remaining duties would fall into this extra-duty assignment/additional noninstructional duty bucket. The robotics tournaments organizer, professional administrator handling emergencies, the county administrators performing extra duties, and building administrator handling one-off school functions, don’t fit well within the extracurricular or supplemental duties categories. Based on the descriptions in your letter, these positions are not “activities that occur at times other than regularly scheduled working hours” “on a regularly scheduled basis.” W. VA. CODE § 18A-4-16. Neither are they supplemental duties that are “generally expected to be performed during an educational day.” *Id.* § 18A-2A-1. As such, based on the descriptions in your letter, these duties best fit in this last category. If the duty is performed by a service person, it is governed by the extra-duties provision. To comply with this provision, the Board must ensure that it follows the hiring protocol established in that section. *See id.* § 18A-4-8(b). If the duty is performed by a teacher, it is an additional noninstructional duty governed by the “County salary supplements for teachers” provision. *Id.* § 18A-4-5a. For additional noninstructional duties, the Board must ensure that if teachers are compensated for additional duties, all teachers performing “like” duties are also compensated. Syl. pt. 1, *Weimer-Godwin*, 179 W. Va. 423, 369 S.E.2d 726. And conversely, if “a local board determines to decrease or abolish this type of special salary supplement, it must do so uniformly.” Syl. pt 7, *Robbins*, 186 W. Va. 141, 411 S.E.2d 466.

In sum, the Board may provide additional compensation to employees who take on extra responsibilities but must do so in compliance with these statutory requirements. Though your letter states the Board is planning on calling the additional duties “overtime pay for professionals,” each duty is governed by the statute which best encapsulates it, regardless of how the Board labels it. The Board can ensure compliance with these provisions by identifying which category each additional duty falls into and fulfilling the requirements imposed for each. Of course, the Board may find it prudent to streamline its compliance—meeting the requirements for extracurricular, supplemental, *and* extra-duty assignments/additional noninstructional duties in assigning *any* duty—but the analysis above establishes the baseline for each type of additional duty.

The Ohio County Board of Education may provide extra compensation to employees who perform additional duties. As explained above, this additional compensation does not violate the salary clause or extra compensation clause of the West Virginia Constitution or West Virginia Code. If the Board decides to provide extra compensation, it must do so in accordance with the provisions above that govern extracurricular assignments, supplemental duties, and extra-duty assignments/additional noninstructional duties. We encourage the Board to continue working with the West Virginia Department of Education to ensure appropriate compliance with these provisions.

Sincerely,



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cc: Shawn R. Turak, Chief Assistant Prosecuting Attorney