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The Honorable Kent A. Leonhardt
Chairman
West Virginia State Conservation Committee
1900 Kanawha Blvd. E., Bldg. 1, Rm 28E
Charleston, WV 25305

Dear Chairman Leonhardt:

You have asked for an Opinion of the Attorney General regarding the provision in West Virginia's Conservation District Law that allows the State Conservation Committee (the Committee) to set conservation district supervisors' per diem compensation rate. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law ... whenever required to do so, in writing, by ... any ... state officer, board or commission." Where this Opinion relies on facts, it depends solely on the factual assertions in your correspondence with the Office of the Attorney General.

Under West Virginia Code § 19-21A-7(c), conservation district supervisors may be paid a per diem of \$30 to \$150. Your letter explains that the Committee has set the rate at \$150. But given questions about "the duration of a 'work day,'" the Committee wants to prorate this rate hourly "to make the rate account for actual time increments in [a] workday" instead of paying a "flat rate of \$150" in all circumstances.

Your letter raises the following legal question:

For purposes of West Virginia Code § 19-21A-7(c), may the Committee prorate conservation district supervisors' per diem rate by the hour so long as the total rate paid stays within the statutory range?

We conclude that "per diem" means "by the day" or "for each day"—in contrast to an hourly wage. The Legislature's choice to use a per diem reimbursement scheme thus means the Committee may not prorate the per diem rate.

Discussion

In 2006, the Legislature amended the Conservation District Law’s then-existing per diem provision to read:

A supervisor is entitled to reasonable and necessary expenses and a per diem of not more than \$150 nor less than \$30 when engaged in the performance of his or her duties. The expense and per diem rate shall be established by the state committee based on availability of funds.

W. Va. Code § 19-21A-7(c).

The Supreme Court of Appeals has not weighed in on the meaning of “per diem” in this context. And the precise line between what is included within the categories of “expenses” and “per diem” is beyond the scope of this Opinion. But when it comes to your question about potential proration, the ordinary definition of the term is straightforward. While neither the Conservation District Law, W. Va. Code § 19-21A-3 (defining many other terms), nor other West Virginia statutes that use the term define it, *see, e.g., id.* § 51-9-10, other authorities do. Black’s Law Dictionary (11th ed. 2019), translating the Latin phrase, says “per diem” means “[b]y the day; for each day.” A 1970 Attorney General Opinion defined “per diem” using nearly identical dictionary definitions. *See* 53 W. Va. Op. Att’y Gen. 375 (1970) (defining “per diem” as “‘for the day,’ or ‘by the day’”). Nothing in Section 19-21A-7(c) suggests the Legislature intended a more specialized meaning. “Per diem” thus means *by the day* or *for each day*.

By contrast, prorated per diem compensation is conceptually the same as hourly compensation. Prorating a per diem takes a longer way around—it requires dividing the per diem rate by the standard number of hours in the workday and then multiplying by the number of hours actually worked, rather than just multiplying a set hourly rate by the number of hours worked. But it comes out to the same thing in the end. Here, the Committee has settled on a \$150 per diem. Dividing \$150 by eight hours for a standard workday is \$18.75 per hour. Flexibility to prorate the per diem would effectively mean authority to pay supervisors \$18.75 an hour for anything above Section 19-21A-7(c)’s absolute floor of \$30 a day.

So a reviewing court would likely say that the plain meaning of “per diem” forecloses proration. “The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.” Syl. pt. 3, *State v. McClain*, 247 W. Va. 423, 880 S.E.2d 889 (2022). Courts therefore begin statutory analyses with the statute’s “plain language,” giving that text its ordinary and straightforward meaning. *Alan Enterprizes LLC v. Mac’s Convenience Stores LLC*, 240 W. Va. 250, 254, 810 S.E.2d 61, 65 (2018). Here, an ordinary person would almost certainly understand “per diem” compensation to be paid for all work done in a 24-hour period—no matter the actual hours spent. And as noted above, the definitions of per diem are “by the day” or “for the day”—meaning the relevant block of time in the per diem context is a day, not an hour. Reading proration into “per diem” would likely strike most ordinary readers as unusual because paying someone “by the day” is fundamentally different than paying someone “by the hour.”

It's also grammatically important that this statute uses the article "a" alongside the singular "per diem": "A supervisor is entitled to ... a per diem of not more than \$150 nor less than \$30." W. Va. Code § 19-21A-7(c). In this "context," the "indefinite article 'a'" should be read restrictively to "mean [just] one" thing. *Maupin v. Sidiropolis*, 215 W. Va. 492, 497-98, 600 S.E.2d 204, 209-10 (2004) (explaining how "a" can behave differently when describing a singular or plural word). So "a" means a singular flat rate—not the multiple rates that would result from proration. See *DeGasperin v. Ballard*, No. 16-0133, 2017 WL 663577, at *20 (W. Va. Feb. 17, 2017) (finding that "a" referred to a "singular deceased human body" (citing *Wikimedia Found. v. Nat'l Sec. Agency/Cent. Sec. Serv.*, 14 F.4th 276, 293 (4th Cir. 2021))).

The Legislature's choice to use "per diem" in the singular—"a per diem" and "[t]he ... per diem rate," W. Va. Code § 19-21A-7(c)—confirms that reading, too. Indeed, making that choice "on two subsequent occasions" in the statute made it more "apparent that the legislature intended ['per diem'] to have a singular meaning." *Copier Word Processing Supply, Inc. v. WesBanco Bank, Inc.*, 220 W. Va. 39, 48, 640 S.E.2d 102, 111 (2006) (concluding that two singular nouns confirmed the Court's statutory interpretation based on the term "an").

Other tools of statutory construction beyond plain-text analysis get to the same result. When a statutory term is unclear, courts often discern legislative intent by examining how the Legislature uses the term in other laws. *Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 768 (2019). Considering other statutes here shows that the Legislature routinely treats hourly and per diem compensation as two distinct methods of compensation. W. Va. Code § 5-10-22c(c), for example, differentiates between "salary, wage or per diem compensation" in the legislative employee context. See also *id.* § 18-7A-35b(b) (same). The Consolidated Public Retirement Board's record-keeping requirements for "type of pay" offer as examples "salary, hourly or per diem." *Id.* § 5-10D-12. Similar statutes abound. See, e.g., *id.* § 5-10-48(b) (defining "regular" legislative employees by using their hours worked as compared to "reemployed" legislative staff, who come out of retirement to work "per diem" for no more than 175 days a year); *id.* § 21-5C-1(f)(18) (defining "employee" for purposes of the minimum wage law in part by differentiating regular legislative employees and those paid "per diem"). In fact, even requirements that counties and municipalities pay a "per diem" charge for incarcerating inmates speak in terms like "per day" and "intervals of 24 hours." *Id.* § 15A-3-16(g), (h).

Out-of-state authorities appear to agree with this analysis. Some state courts say hourly and per diem compensation are mutually exclusive. See, e.g., *Grubel v. City of Philadelphia*, No. 1307 C.D. 2014, 2015 WL 7736941, at *4 (Pa. Commw. Ct. Nov. 30, 2015) ("[A]n hourly wage and a per diem are two different methods of compensation."). And even when state courts do allow per diem proration, it's often because whatever text they're interpreting explicitly contemplates it. See, e.g., *Newman v. Advanced Tech. Innovation Corp.*, 749 F.3d 33, 37 (1st Cir. 2014) (handbook permitting prorated per diem); *Myres v. Strom Aviation, Inc.*, 255 N.C. App. 309, 313, 804 S.E.2d 785, 789 (2017) (same with employee agreement); *City of Fairbanks v. Rice*, 628 P.2d 565, 567 n.4 (Alaska 1981) (allowing proration because the Fairbanks ordinance said "[p]er diem may be pro-rated for a period of not less than one-quarter (1/4) day"). That our Legislature did not include that sort of explicit language in Section § 19-21A-7(c)'s text is strong evidence

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that it never intended the Committee to prorate per diem compensation. In short, the Legislature appears to view “per diem” compensation as a single lump sum owed once every 24 hours.

To be sure, there are some potential counterarguments. First, at least one statute says that certain commission members “shall be paid \$50 per diem for actual time spent in the performance of duties.” W. Va. Code § 5-11-5. At first blush, someone could take the “time spent” language to mean “hours spent.” But there’s no reason to assume that “time” means hours rather than days. Especially given the use of “per diem” in other statutes, it makes more sense to conclude that the Legislature was reflecting the intrinsic nature of per diem compensation as time-based, not task-based. And in any event, Section 19-21A-7(c) does not talk of “time spent.”

Second, the Supreme Court of Appeals has several times discussed a prohibited form of calculating pain-and-suffering damages it calls the “per diem” method. *Crum v. Ward*, 146 W. Va. 421, 427, 122 S.E.2d 18, 23 (1961) (saying this method is “sometimes referred to as the ‘per diem’, ‘unit of time’, ‘blackboard’, or ‘mathematical formula’ basis ... for determining the value of pain and suffering”). That “per diem” method *does* allow “hourly” damages calculations. Douglas L. Price, *Hedonic Damages: To Value A Life or Not to Value A Life?*, 95 W. VA. L. REV. 1055, 1090 n.34 (1993). Yet the Court didn’t come up with the label (others did), and it uses it only to explain a certain argument in a particular, non-employment-based context. It does not use it to interpret statutes. So this example shows only that it is possible to use “per diem” in some contexts to include hour-by-hour calculations. But your question is about the Legislature’s intent in *this* context, and the Legislature did not tie Section 19-21A-7(c) to that separate doctrine. And if that choice leads to objectionable results in certain circumstances depending on the volume of district supervisors’ work at different times, the solution belongs to the Legislature, too.

Finally, nothing in this Opinion calls into question the Committee’s broad discretion over conservation districts—and especially their finances. The Committee must administer any law “appropriating funds for expenditures in connection with the activities of conservation districts,” “distribute to conservation districts funds,” “adopt rules” for using “such funds,” review districts’ administrative procedures and operations, and “advise the districts concerning their conformance with applicable laws and rules.” W. Va. Code § 19-21A-4(10)-(11). The Committee may also allocate any money it receives from any source to districts, *id.* § 19-21A-4(12), and must “[e]stablish by rule, adequate and reasonably uniform accounting and auditing procedures,” *id.* § 19-21A-4(17). So even though the Legislature set a particular method of compensation in this context, the Committee retains significant power over districts and their finances.

Sincerely,



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Lindsay See
Solicitor General