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The Honorable Lucas J. See
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Dear Prosecutor See:

You have asked for an Opinion of the Attorney General regarding potential conflicts of interest when ambulance authority board members vote to contract with entities for which they work as either paid employees or volunteers. This Opinion is being issued pursuant to 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.” To the extent this Opinion relies on facts, it is based solely on the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you explain that the Hardy County Commission (“Commission”) appointed the board members of an ambulance authority (“Board”) pursuant to W. Va. Code § 7-15-5. Some of those board members are local emergency medical service providers who volunteer or work for either non-profit or for-profit ambulance companies. The Board is responsible for setting up and providing emergency ambulance service in Hardy County. Consistent with this task, the Board voted to enter into contracts with non-profit and for-profit entities for which some of the board members work, which are paid using part of the revenue from an ambulance-service fee the Commission assesses on local taxpayers.

Your letter raises the following legal questions, which we address in turn:

- (1) Do members of an ambulance authority board have a conflict of interest under West Virginia Code § 7-15-15 if they vote to contract with either a for-profit company for which they work, or a non-profit entity for which they volunteer?*

- (2) *Can a conflict of interest under West Virginia Code § 7-15-15 be avoided if the conflicted member recuses himself or herself from the vote?*
- (3) *Does the Commission have authority to replace conflicted board members before the end of their term?*

We conclude that a board member who works for a for-profit ambulance service company has a conflict of interest for purposes of Section 7-15-15, regardless whether that company has a contract with the Board. A member who volunteers for a non-profit is unlikely to have a conflict of interest, however, unless the member stands to gain personally from any contract between the Board and the entity. In either circumstance, recusal from a vote involving the company or non-profit will not cure a conflict of interest. Finally, although the Commission may not unilaterally remove a conflicted board member, it may appoint an immediate replacement for any member who resigns or is otherwise removed as a result of a conflict of interest.

Question One: Conflicts Based On Board Members' Employment Or Volunteer Activities

West Virginia Code § 7-15-15 provides that “[n]o member of any authority . . . shall have any interest in any firm, partnership, corporation, company, association or joint-stock association engaged in the business of providing ambulance service or in the manufacture, sale or lease of ambulance equipment or facilities.” W. Va. Code § 7-15-15. Further, “[n]o member of any authority . . . shall contract with the authority or be interested in, either directly or indirectly, any contract with the authority . . .” *Id.* Your letter asks whether a board member has a prohibited conflict under either or both of these provisions where the Board contracts with the member’s for-profit employer, or with a non-profit entity for which the member volunteers.

First, we conclude that a board member would have a conflict of interest if the member works for a for-profit company that provides ambulance service. Although the Supreme Court of Appeals has not interpreted this language in Section 7-15-15, there is little doubt that a for-profit ambulance company is a “firm, partnership, corporation, company, association or joint-stock association engaged in the business of providing ambulance services.” The term “business” is defined as “[a] commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain.” Black’s Law Dictionary 239 (10th ed. 2014). Similarly, the Supreme Court of Appeals has explained that the term “business” “embrace[s] everything with respect to which a person can be *employed*,” and “relate[s] to[] an occupation or an employment engaged in *for the purpose of obtaining a livelihood or for profit or gain*.” *Weatherford v. Arter*, 135 W. Va. 391, 395, 63 S.E.2d 572, 574 (1951) (emphases added).

Employment with a for-profit ambulance company thus falls easily within Section 7-15-15’s ambit. Further, a conflict exists whenever a board member works for a for-profit ambulance company, regardless whether the Board has any contracts involving that company. Section 7-15-15’s first sentence bars members from having “*any* interest” in a company “engaged in the business of providing ambulance service.” W. Va. Code § 7-15-15 (emphasis added). “Any,” in turn, means “indifference as to the particular one or ones that may be selected,” and applies to interests “of whatever kind” or “whatever quality.” *Thomas v. Firestone Tire & Rubber*

Co., 164 W. Va. 763, 768, 266 S.E.2d 905, 908 (1980) (citation omitted). Drawing a paycheck from an ambulance company would almost certainly constitute “any interest” for purposes of Section 7-15-15. Cf. *Summers Cnty. Citizens League v. Tassos*, 179 W. Va. 261, 270, 367 S.E.2d 209, 218 (1988) (holding under separate statute that an officer is “pecuniarily interested” in the proceeds of a contract where the officer “is an employee of a private entity” that is a party to the contract, regardless whether the “officer is also a shareholder, director or officer of such private entity”). Accordingly, we conclude that working for a for-profit ambulance company while simultaneously serving as a board member is a conflict of interest under Section 7-15-15.

Second, volunteer service for a non-profit entity providing ambulance services does not automatically violate Section 7-15-15; any conflict would turn on the specific facts at issue. In a 1985 Opinion, this Office previously concluded that membership on an ambulance authority board and a non-profit corporation formed to provide ambulance services did not constitute a conflict of interest. 61 W. Va. Op. Atty. Gen. 37, 1985 WL 257932 (Sept. 10, 1985). Relying on *Weatherford*, the Opinion explained that the statute’s use of the term “business” “generally relates to an occupation or employment engaged in for profit or gain.” *Id.* at *1. The Opinion further explained that the corporation’s non-profit status meant it did not provide services for gain and “its members d[id] not receive any pecuniary benefit” from contracts with the ambulance authority. *Id.* Further, the Opinion recognized the general principle that conflict of interest statutes are generally designed to prohibit public officials from becoming financially interested in the proceeds of a contract, and that Section 7-15-15’s purpose “would not be served by prohibiting membership on the Authority of persons who are not seeking to contract with the Authority for personal gain, but rather to voluntarily serve the public purpose of providing ambulance service.” *Id.* at *2.

We reaffirm that conclusion here. As discussed above, the text and purpose of the prohibition against interests in entities “engaged in the business of providing ambulance service” extends to for-profit companies only. Volunteering with an organization that provides not-for-profit ambulance services is thus not a prohibited conflict under Section 7-15-15’s first sentence.

Nevertheless, a board member who volunteers for a non-profit may have a conflict under Section 7-15-15’s second provision, which bars members from “contract[ing] with the authority or be[ing] interested in, either directly or indirectly, any contract with the authority.” Unlike the first provision, which bars “any” interest in a for-profit ambulance company, this second provision focuses on particular contracts that may affect board members. Although in most cases an interest in a contract will be financial, as discussed above, we agree with the analysis from the 1985 Opinion that Section 7-15-15 is intended to “remove from public officers any and all temptation for *personal* advantage”—even if the potential gain is not financial. 61 W. Va. Op. Atty. Gen. 37 at *1 (emphasis added; quoting *Alexander v. Ritchie*, 132 W. Va. 865, 871, 53 S.E.2d 735, 739 (1949)). This conclusion is consistent with the fact that the Legislature chose not to limit Section 7-15-15 to “pecuniary interest[s]” only, as it did in a similar conflict-of-interest statute in West Virginia Code § 61-10-15 concerning members of county commissions and public school officials. Thus, while in most cases contracts with a non-profit for which a board member volunteers will not cause conflicts of interest, members may run afoul of Section 7-15-15 if they have a personal, non-financial interest in the contract.

Question Two: Ability To Avoid Conflict By Recusal From Vote

Your second question asks whether board members may avoid a conflict by recusing themselves from the vote on any contract concerning an ambulance service company for which they work or volunteer. We conclude that Section 7-15-15 does not allow this remedy for either type of conflict it describes.

The first type of conflict, as described above, prohibits a board member from having “any interest” in an organization that is “engaged in the business of providing ambulance service or in the manufacture, sale or lease of ambulance equipment or facilities.” W. Va. Code § 7-15-15. By its terms, this broad language encompasses all interests in for-profit ambulance providers, not only conflicts related to particular interactions with the company in which a member has an interest. In other words, a member may not have an interest in a for-profit ambulance company even if no contract involving that company is ever proposed throughout the member’s tenure. Recusal from a vote could not cure this type of ongoing conflict.

We conclude the same is true for the second type of conflict, which bars board members from “contract[ing] with the authority or be[ing] interested in, either directly or indirectly, any contract with the authority.” W. Va. Code § 7-15-15. The Supreme Court of Appeals has not addressed this question in the context of Section 7-15-15. Nevertheless, the plain text of the provision encompasses not only the act of entering into a “contract with the authority,” which might be interpreted narrowly to include simply the vote itself, but also “be[ing] interested in . . . any contract with the authority”—a state that would continue after the vote is cast. *Id.*

Further, we believe the Court would likely adopt the same analysis from a decision involving a similar statute, Section 61-10-15, which held that a member of a county school board had a conflict when the board entered a contract with the member’s private employer, even though the member abstained from the vote awarding the contract. *Summers Cnty. Citizens League v. Tassos*, 179 W. Va. 261, 268-69, 367 S.E.2d 209, 216–17 (1988) (citing *Fisher v. Jackson*, 147 S.E. 541, 542 (1929)). Similar to Section 7-15-15, Section 61-10-15(a) prohibits county board members from “be[ing] or becom[ing] pecuniarily interested, directly or indirectly, in the proceeds of any contract or service . . . or the awarding or letting of a contract if, as a member . . . , he or she may have any voice, influence or control.” The Court explained that to allow the member to receive a financial benefit from such a contract “would defeat the very purpose of the statute, for it would permit connivance on the part of the several members and the awarding of contracts so as to inure indirectly to their benefit.” *Id.* Given the similarity between Section 61-10-15 and Section 7-15-15, the Court would likely reach the same result here.

Question Three: Authority To Remove Conflicted Board Members

Your letter also asks whether the Commission has authority to immediately replace any conflicted board members before the expiration of their terms. This Office addressed a similar question in a November 12, 2015 Opinion of the Attorney General. *See* 2015 WL 7431400 (Nov. 12, 2015). As there have been no intervening developments in the law since that Opinion was issued, we reaffirm its conclusion here.

As we concluded in the 2015 Opinion, West Virginia Code § 7-15-5 provides that ambulance authority board members are appointed to fixed terms, and there is no provision authorizing a county commission to unilaterally remove a board member, for cause or otherwise, before the end of his or her term. This lack of removal authority differs from other provisions throughout Chapter 7 where the Legislature granted county commissions express authority to remove members of various offices, boards, and authorities.* As a result, the Commission may not remove a board member before the expiration of the member's term.

Precedent from the Supreme Court of Appeals confirms this conclusion. In *Helmick v. Tucker County Court*, 64 S.E. 17 (1909), the Court held that a county court lacked authority to remove a road surveyor before the end of his term because, by fixing the term of office, the Legislature had “left the county court without any such implied power.” *Id.* at 18. By contrast, the Court has also held that where a statute “fixes no definite term of office, but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised.” *Syl., Barbor v. Cnty. Court of Mercer Cnty.*, 85 W. Va. 359, 101 S.E. 721 (1920). Although these cases are roughly a century old, they have been cited approvingly by the Court on several occasions since and continue to reflect the law governing removal in similar contexts. *See, e.g., Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 94, 479 S.E.2d 602, 604 (1996) (citing *Barbor*); *Schwartz v. Cnty. Court of Hancock Cnty.*, 136 W. Va. 626, 642–43, 68 S.E.2d 64, 73 (1951) (citing *Helmick*).

Nevertheless, as we also explained in our 2015 Opinion, the Commission may be able to pursue mid-term removal under the process set forth in West Virginia Code § 6-6-7. 2015 WL 7431400, at *3. This statute provides that “[a]ny person holding any county . . . office” whose term of “office is fixed by law” may be removed “for official misconduct, neglect of duty, incompetence or for any of the causes or on any of the grounds provided by any other statute.” W. Va. Code § 6-6-7(a). A county commission may file charges “in the form of a petition duly verified by at least one of the persons bringing the same with a circuit court,” and the charges are heard by a three-judge court convened by the Supreme Court of Appeals. *Id.* §§ 6-6-7(c), (g). In appropriate circumstances a county commission may be able to seek removal of a board member under this procedure. *See Summers Cty.*, 179 W. Va. at 265, 367 S.E.2d at 213 (1988).

Finally, although the Commission may not unilaterally remove a board member, it does have authority to appoint an immediate replacement for any member who resigns or is lawfully

* *See, e.g.,* W. Va. Code § 7-3-15 (“Any trustee [for a hospital, clinic or long-term care facility] may be removed by the county commission for incompetency, neglect of duty or malfeasance in office after an opportunity to be heard at a public hearing before the county commission.”); *id.* § 7-4-3 (“Any counsel so employed may be removed at the pleasure of the county commission.”); *id.* § 7-12-3 (“The county commission may at any time remove any member of the [county development] board by an order duly entered of record and may appoint a successor member for any member so removed.”); *id.* § 7-14-3 (authorizing removal of deputy sheriffs “for good cause”); *id.* § 7-146-3 (authorizing removal of correctional officers “for good cause”); *id.* § 7-16-3 (“The county commission may at any time remove any member of the [county solid waste] authority by an order duly entered of record and may appoint a successor.”).

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removed as a result of a conflict of interest. Section 7-15-5 provides that when “any member of the board dies, resigns or for any other reason ceases to be a member of the board, the governing body of the participating government which such member represented shall appoint another individual to fill the unexpired portion of the term of such member.” This provision ensures that the Commission may minimize disruption to the Board by quickly replacing a board member who “ceases to be a member of the board” for any reason, including for a conflict of interest.

Sincerely,



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