



State of West Virginia
Office of the Attorney General

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May 7, 2018

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Dear Prosecutor Delligatti:

You have asked for an Opinion of the Attorney General about the permissible use of funds raised through the county fire service fee established in W. Va. Code § 7-17-12. This Opinion is issued pursuant to W. Va. 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 in your correspondence with the Office of the Attorney General.

Your letter raises the following legal question:

In what manner, and to what extent, may the fire service fees imposed under W. Va. Code § 7-17-12 be used to pay salaries and attendant costs of fire protection personnel employed by fire departments?

We conclude that using Section 7-17-12 fire service fees for expenses related to fire protection personnel is consistent with the statutory text and the Legislature’s directive that these fees may be used broadly to accomplish the purposes of a county fire board.

DISCUSSION

West Virginia Code Chapter 7, Article 17, allows for the creation of county-wide fire associations and county fire boards. W. Va. Code §§ 7-17-3, 6; *see also Scott v. Marion Cty. Comm’n*, 180 W. Va. 483, 484, 377 S.E.2d 476, 476 (1988). County fire associations are

comprised of members of county fire departments, and are designed to “discuss fire protection services to address fire protection problems at the county level.” W. Va. Code § 7-17-3. County fire boards, which are formed after a vote of a county fire association and by approval of the county commission, are tasked with establishing “the funding priorities for the fire departments forming the fire association.” *Id.* § 7-17-6. The Legislature’s creation of these entities reflects its determination that “fire protection and saving lives and property are important to the health and welfare of the citizens of the State and that it is desirable for county governments to provide fire protection services to county residents.” *Id.* § 7-17-1.

In addition to any funding from a county commission or municipality, W. Va. Code § 7-17-16, county fire boards are funded through a “fire service fee.” *Id.* § 7-17-12. This fee is established by county-commission ordinance after a petition from qualified voters, and is paid by the residents who receive county firefighting services. *Id.*; *see Putnam Cty. Fire Serv. Bd., Inc. v. Kelly*, 192 W. Va. 37, 40, 449 S.E.2d 508, 511 (1994). While the procedure for setting and implementing fire service fees has been the subject of litigation, *see, e.g., Kelly*, 192 W. Va. at 40, 449 S.E.2d at 511; *Scott*, 180 W. Va. at 484, 377 S.E.2d at 476, the Supreme Court of Appeals has not had occasion to address the purposes for which the funds raised from this fee may be used. Nevertheless, we conclude that there is no statutory limitation on using the funds for the purposes described in your letter.

Section 7-17-12 provides that “[a]ny fees imposed under this article are dedicated to the county fire board for the purposes provided in this article.” W. Va. Code § 7-17-12. Consistent with this broad authority, Section 7-17-20 makes clear that the article’s “purpose” is “to provide for the improvement, development and advancement of fire protection services within the counties,” and directs that “this article *shall be liberally construed* as giving to the county fire board full and complete power reasonably required to give effect to the purposes hereof.” *Id.* § 7-17-20 (emphasis added). Together, these provisions make clear that a county fire board has discretion to apportion its funds—including revenue raised from the fire service fee—in any manner reasonably designed to advance the development and quality of firefighting services at the county level.

No other provision of Article 17 limits these general principles in the specific context of salaries and other costs for fire protection personnel. To the contrary, Section 7-17-10, which sets forth the enumerated powers of a county fire board, confirms that fire service fee revenues may be used to pay personnel costs. A county fire board may “[e]xpend its funds” when executing any of “the powers and authority herein given,” and these expenditures are “determined and declared as a matter of legislative finding to be for a public purpose and use, in the public interest and for the general welfare of the people of West Virginia.” W. Va. Code § 7-17-10(9). A board’s “powers and authority” include power to “[g]enerally do *any and all things necessary or convenient* for the purposes of improving fire service protection within the area to be served.” *Id.* § 7-17-10(4) (emphasis added). Boards also have express authority to “employ and fix compensation for

personnel necessary for [their] operation,” *id.* § 7-17-10(2), and to “contract[] with *any* person, agency, governmental department, firm or corporation,” *id.* § 7-17-10(3) (emphasis added). And with approval of the county commission, a board may even contract with “*any municipal* fire department for fire protection services rendered to the county.” *Id.* § 7-17-3 (emphasis added).

The only limitation on compensation in Article 17 is a prohibition on compensating “member[s] of the board” for their board-related services. W. Va. Code § 7-17-8. This bar on compensation for some individuals but not others further indicates that the Legislature did not intend to limit boards’ ability to compensate fire protection personnel. *See Phillips v. Larry’s Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 491, 647 S.E.2d 920, 927 (2007) (courts will not “add to statutes something the Legislature purposefully omitted”); *Mangus v. Ashley*, 199 W. Va. 651, 658, 487 S.E.2d 309, 316 (1997) (“courts must presume that a legislature says in a statute what it means and means in a statute what it says there”); *cf. Sebelius v. Cloer*, 569 U.S. 369, 378 (2013) (“where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion” (alteration and citation omitted)). Indeed, Section 7-17-19 requires a board to pay workers compensation premiums for all eligible employees; it would be an odd result if a board were required to pay fees incidental to employment yet could not pay an individual’s salary.

To be sure, the Supreme Court of Appeals noted in *Scott* that the purpose of the fire service fee is to “allow counties to subsidize rural, *volunteer* fire departments.” 180 W. Va. at 484, 377 S.E.2d at 476 (emphasis added). But this language does not alter our conclusion. *Scott* considered the definition of “qualified voters” for purposes of Section 7-17-12, not permissible uses of the fire service fee. Thus, while *Scott*’s passing reference to the purpose of Section 7-17-12 reflects the reality that most counties use all-volunteer fire departments, it does not hold that they must do so. As discussed above, nothing in the statutory text supports this limitation.

Further, the Legislature has chosen to treat county fire associations different than municipal fire departments. West Virginia Code Chapter 8, Article 15 contains separate requirements for municipal “Volunteer Fire Companies” and “Paid Fire Departments”. *See* W. Va. Code § 8-15-4 to -8c; *id.* § 8-15-9 to -27. In the volunteer context, it also provides specific limits on the use of municipal funding. For example, revenues for municipal volunteer fire departments “may be expended *only* for the items listed in [the statute],” such as protective equipment and capital improvements. *Id.* § 8-15-8b(1)-(15) (emphasis added). Similarly, a municipality may only “contribute to the support of its volunteer fire company by providing a firehouse, fire-fighting equipment, *necessary paid personnel* and incidental requirements to maintain such company upon an efficient basis.” *Id.* § 8-15-8 (emphasis added). Article 17, by contrast, neither separates paid and volunteer county fire departments, nor contains any similar limits on permitted expenses. The reason for this disparate treatment is not clear—the Legislature may, for example, have given county fire boards greater latitude to use fire service fee revenues in light of the requirement that

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such fees be imposed only in response to a petition signed by qualified voters, W. Va. Code § 7-17-12. What *is* clear from the relevant statutes, however, is that the Legislature knows how to restrict spending so as to retain the volunteer nature of a particular fire department, yet declined to do so at the county level.

In sum, a plain-text reading of Article 17 makes clear that county fire boards have discretion to spend fire service fee revenues for any purposes consistent with a board's statutory powers and authority, including salaries and other costs for fire protection personnel.* Similarly, consistent with the requirements of W. Va. Code §§ 7-17-10(3), 3, a county fire board may use these funds to contract for services provided by municipal firefighters for the benefit of county residents.

Sincerely,



Patrick Morrissey
Attorney General

Gordon L. Mowen, II
Assistant Attorney General

* Restrictions on compensation for "volunteer" firefighters (as opposed to full- or part-time firefighters) may implicate additional concerns, such as the applicability of the West Virginia Wage Payment and Collection Act, W. Va. Code § 21-5-1, *et. seq.*, and compliance with the Fair Labor Standards Act and related regulations, *see* Department of Labor, Wage and Hour Division, Opinion Letters, FLSA2008-15, December 18, 2008, https://www.dol.gov/whd/opinion/FLSA/2008/2008_12_18_15_FLSA.htm. These issues are beyond the scope of this Opinion.