



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

(304) 558-2021
Fax (304) 558-0140

September 1, 2015

Hon. Joshua W. Downey
Roane County Prosecuting Attorney
Roane County Courthouse
200 Main Street
Spencer, WV 25276

Dear Prosecutor Downey:

You have asked for an Opinion of the Attorney General regarding the authority of the Roane County Commission to deny the Roane County Sheriff's request to pay deputy sheriffs for their accumulated vacation time while those deputies are still employed by the Sheriff. 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.

According to your letter, questions arose when Roane County Sheriff Mike Harper submitted "payment vouchers" to the Roane County Commission, requesting "payment" for unused vacation days to be made to six law enforcement deputies employed by the Sheriff. You state that the requested payments totaled \$10,612.71, although you do not explain how the Sheriff arrived at this figure. At the time the vouchers were submitted, the Sheriff had a "projected carryover in his salary budget line for law enforcement . . . in an amount sufficient to cover" the entire payment. The letter further relates that the projected carryover in the Sheriff's "salary budget line" was attributed primarily to an unfilled deputy position that was the result of an officer receiving workers compensation after being shot in the line of duty. You also note that "[s]imilar payment vouchers" submitted by the Sheriff on "prior occasions" had been approved by the Commission. Although the Commission initially declined to approve the requested payment vouchers, arguing in part that the "County Employee Personnel Manual" specifically states that "employees may not choose to forego their vacation and elect to receive additional pay instead of time off," the Commission later agreed to the request.

Your letter raises the following legal question:

Does a County Commission have authority to deny a County Sheriff's request for payment to sheriff deputies in exchange for accrued vacation time where the payment would be made from excess funds remaining in the Sheriff's budget line?

Subject to one important constitutional restriction on extra compensation, we believe that the Commission may deny the specific request to exchange vacation time for additional pay, but may not deny a general request by the Sheriff for supplemental payment to his deputies from excess funds remaining in the Sheriff's budget line for staff compensation. As we explain below, county commissions have wide discretion over the internal police and fiscal affairs of their counties. At the same time, a sheriff has discretion over how to spend his budget once it has been appropriated by a county commission. The discretion of both county commissions and sheriffs are limited, however, by the restrictions on extra compensation for public employees set forth in Section 38 of Article 6 of the West Virginia Constitution.

1. County commissions are created by the West Virginia Constitution, *see* W. Va. Const. art. IX, §§ 9, 11, and act as “the central governing body of [each] county,” *State ex rel. Dingess v. Scaggs*, 156 W.Va. 588, 590, 195 S.E.2d 724, 726 (1973). Though their powers are limited to those “expressly conferred by the West Virginia Constitution and our State Legislature, or powers reasonably and necessarily implied for exercise of those expressed powers,” *Berkeley Cnty. Comm'n v. Shiley*, 170 W. Va. 684, 685, 295 S.E.2d 924, 926 (1982), it is recognized that they are generally “vested with a wide discretion,” *Cnty. Comm'n of Greenbrier Cnty. v. Cummings*, 228 W. Va. 464, 469, 720 S.E.2d 587, 592 (2011) (quoting Syl. Pt. 1, in part, *Meador v. County Court*, 141 W.Va. 96, 87 S.E.2d 725 (1955)). “The constitution and laws of this State have committed to county [commissions] . . . certain legislative, executive and judicial powers directly connected with the local affairs of the county.” *Scaggs*, 156 W.Va. at 590, 195 S.E.2d at 726; *see, e.g.*, W. Va. Code § 7-1-3 (general powers and duties of county commissions).

Relevant here, the West Virginia Constitution charges county commissions—not the county sheriffs—with “the superintendence and administration of the internal police and fiscal affairs of their counties,” subject to “such regulations as may be prescribed by law.” W. Va. Const. art. IX, § 11. Though also created by the Constitution and “an important law enforcement officer,” the sheriff “does not have the complete or the exclusive control of the internal police affairs of the county.” Syl. Pt. 5, in part, *State ex rel. Farley v. Spaulding*, 203 W. Va. 275, 277, 507 S.E.2d 376, 378 (1998) (quoting *Hockman v. Tucker Cnty. Court*, 138 W.Va. 132, 137, 75 S.E.2d 82, 85 (1953)). Rather, “[t]he county commission is the chief law enforcement agency of a county.” *Butler v. Tucker*, 187 W. Va. 145, 150, 416 S.E.2d 262, 267 (1992).

As to the accrual of vacation time by deputy sheriffs, the Legislature has imposed certain specific requirements on county commissions. West Virginia Code § 7-14-17a requires county commissions to “allow” sheriff's deputies to accrue “vacation time” according to a specific formula. The provision also expressly limits the ability of a deputy sheriff to “carr[y] forward” accrued vacation time from one calendar year to the next to no more than thirty days, *id.*, thus limiting the amount of time that deputy sheriffs can take off of work. In addition, West Virginia

Code § 7-14D-10 authorizes deputy sheriffs to use accrued vacation time “at the time of retirement to acquire additional credited service in the deputy sheriff’s retirement system.”

In light of the foregoing, we believe that it is generally within the discretion of a county commission whether to approve the exchange of accrued vacation time by deputy sheriffs for cash payments. While they define the accrual formula and limit the number of days that may be carried forward, neither Section 7-14-17a nor Section 7-14D-10 specifically mentions the option of exchanging vacation time for cash payments, much less requires county commissions to approve or disapprove such transactions. Absent specific legislative instruction, the decision whether to permit the exchange of unused vacation time for cash payments seems well within the “wide discretion” granted to county commissions over the “the superintendence and administration of the internal police and fiscal affairs of their counties.” Syl. Pt. 1, in part, *Cummings*, 228 W. Va. at 466, 720 S.E.2d at 589 (quoting Syl. Pt. 1, in part, *Meador*, 141 W.Va. 96, 87 S.E.2d 725)). As discussed further below, however, that discretion is cabined by the state constitution’s restrictions on extra compensation for public employees.

2. Regardless of whether the Commission could refuse to approve the exchange of vacation time for cash payments, we believe the Sheriff had the general right to request stand-alone supplemental payments to his deputies in light of the excess funds in his budget. While the county commission generally has wide discretion over the superintendence and administration of the internal police and fiscal affairs of their counties, the Supreme Court of Appeals has long made clear that county officials have broad discretion over their budgets once an aggregate sum has been approved by the county commission.

West Virginia Code § 7-7-7 governs the manner in which funds for county officials—including the sheriff—are appropriated. W. Va. Code § 7-7-7(b)-(g). Every year, each county official must “file” with the county commission a “detailed request for appropriations for anticipated or expected expenditures, . . . including the compensation for their assistants, deputies and employees, for the ensuing fiscal year.” *Id.* § 7-7-7(b); *see also Cummings*, 228 W. Va. at 469–70, 720 S.E.2d at 592–93 (explaining the “annual process that involves a review of the needs and requests of county officials”). Then, the county commission must “fix the total amount of money to be expended by the county for the ensuing fiscal year, which amount shall include the compensation of county assistants, deputies and employees.” *Id.* § 7-7-7(c). This means that the county commission must “determine the aggregate sum to be expended on staff compensation in each of the named county offices.” *State ex rel. Lambert v. Cortellessi*, 182 W. Va. 142, 146–47, 386 S.E.2d 640, 644–45 (1989).

Critically, once the “aggregate sum” for a county official’s staff compensation is appropriated by the county commission, the distribution and division of that sum is generally within the discretion of the county official. As explained by the Supreme Court of Appeals, “the manner in which the appropriated funds are distributed or allocated among the staff is, unless affected by any applicable civil service laws, entirely within the discretion of the named county official, so long as the aggregate amount approved by the county commission is not exceeded.” *Lambert*, 182 W. Va. at 146–47, 386 S.E.2d at 644–45 (citing W. Va. Code § 7-7-7(d)). This has been the interpretation of West Virginia Code § 7-7-7(d) since *State ex rel. Cooke v. Jarrell*, 154 W. Va. 542, 177 S.E.2d 214 (1970). Several previous opinions of the Attorney General have

also adhered to this reading of the statute. *See* 61 W. Va. Op. Atty. Gen. 13, 1985 WL 257936 (“[C]ounty department heads are not prohibited from granting in-year raises so long as they do not exceed the amount of funds budgeted for personal services.”); 56 W. Va. Op. Atty. Gen. 198, 1975 WL 171171 (same); 56 W. Va. Op. Atty. Gen. 332, 1976 WL 178197 (same).

Provided that the payments are otherwise lawful, we believe that a county commission may not decline a sheriff’s *stand-alone request* to use excess funds from his budget line for staff compensation to supplement his deputies’ compensation. One important limitation, discussed further below, is the state constitution’s limitations on extra compensation for public employees. Another restriction, the Supreme Court of Appeals has recognized, are “civil service laws” that interfere with the sheriff’s discretion. *See, e.g., Cooke*, 154 W. Va. at 547, 177 S.E.2d at 217. In particular, if “an increase in salary” for a deputy sheriff is considered a “promotion” by the county civil service commission, W. Va. Code, § 7–14–13, special civil service rules for deputy sheriffs apply. *See id.* § 7–14–1, *et seq.*

3. Section 38 of Article 6 of the West Virginia Constitution prohibits both the Commission and the Sheriff from paying bonuses to public employees. *See* W. Va. Const. art. VI, § 38; W. Va. Code § 6–7–7. In pertinent part, Section 38 states:

No 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. For non-contractual public employees, supplemental pay must be justified by the completion of additional duties beyond those originally anticipated or be given on a forward-looking basis for future work only. *See* 2015 WL 4977862 at *2 (W.Va. A.G. Aug. 17, 2015). For public employees under contracts, supplemental pay may be given only for past or future work that is outside the scope of the contractual agreement. *Id.* at *7.

This Office has previously opined that allowing public school teachers to cash-out accrued leave amounts may violate this provision if the teachers did not have the right to cash-out the leave at the time the leave accrued. 59 W. Va. Op. Atty. Gen. 86. Allowing employees to cash out accrued leave in such circumstances would amount to a bonus “paid after the employee had performed the very services he had contracted to perform, and it would be paid solely for ‘coming to work.’” *Id.* The circumstances might be different, the opinion suggested, if “the employee has rendered additional services over and above those he has contracted to perform” or if language were included in employment contracts for “prospective school years.” *Id.*

4. Applying these principles to the facts here, we conclude that Sheriff Harper was not required to exchange anything for the requested supplemental payments to his deputies given that the payments were to come from excess funds in his budget. According to your letter, the budget line for the Sheriff’s staff compensation included sufficient funds for the requested supplemental payments. As a general rule, they were entirely within the Sheriff’s discretion.

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We were not asked whether the payments would amount to impermissible “extra compensation” under the state constitution, but note that the answer to that question is not clear under the facts provided. On one hand, your letter relates that the County Personnel Manual states that “employees may not choose to forego their vacation and elect to receive additional pay instead of time off,” suggesting that the original terms of employment did not include the right to cash-out accrued vacation time. On the other hand, your letter states that the Sheriff’s excess funds were the result of an unfilled deputy position, suggesting that the deputies may have done more work than originally contemplated and were not being rewarded merely for coming to work instead of taking time off. *See, e.g., Cooke*, 154 W. Va. at 547, 177 S.E.2d at 217 (explaining that “the absence of a deputy for several months,” which “placed additional duties on those remaining,” can justify “additional compensation”).

Sincerely,

A handwritten signature in black ink that reads "Patrick Morrissey". The signature is written in a cursive, somewhat stylized font.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

J. Zak Ritchie
Assistant Attorney General