



State of West Virginia  
Office of the Attorney General

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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 about the rate and tax implications for conservation district supervisors' per diem compensation. 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), the State Conservation Committee shall set "[t]he expense and per diem rate" for district supervisors. Last year the Committee set that rate at the statutory maximum of \$150. Earlier this year, you asked us whether the statute allowed for prorating the per diem or if a per diem truly refers to a flat, daily rate. We advised that "per diem" has its ordinary meaning in Section 19-21A-7(c): It means a rate for each day worked, and prorating would effectively turn a per diem into an hourly wage. *See* Letter from Patrick Morrissey, W. Va. Att'y Gen., to Kent A. Leonhardt, W. Va. State Conservation Comm. Chairman (June 8, 2023), <https://bit.ly/3sTBDLT>.

Your second letter now raises similar questions:

- (1) *Is the per diem a flat rate, or is a range within the \$30 to \$150 statutory range permitted?*
- (2) *For tax purposes, is a W-2 or a 1099 form appropriate for reporting the per diem?*

For the first question, we reiterate our previous conclusion that a per diem is a single daily rate. For the second question, we conclude that W-2 forms are appropriate to report supervisors' per diems as the per diem is a wage and supervisors are not independent contractors.

### *Discussion*

#### **I. Under West Virginia Code § 19-21A-7(c), A Per Diem Means A Single Rate.**

The June 2023 Opinion answers your first question. There, we explained that because a per diem rate is a rate “by the day” or “for each day,” the Committee may not prorate it by calculating how many hours a supervisor worked on a given day. Letter, *supra*, at 1. Though we gave this answer in the context of prorating by the hour, the same result holds for any approach that would allow paying some supervisors more than others each day. As we also explained in the previous letter, Section 91-21A-7(c) refers to a singular per diem rate—“a per diem” versus “per diems,” and “[t]he ... per diem rate” versus “per diem rates.” See Letter, *supra*, at 3. The Legislature’s choice confirms that the per diem may be any amount between \$30 and \$150, but it must be a single rate and cannot vary among supervisors—including by setting a range instead of one rate. A per diem is *daily* compensation as opposed to an hourly rate or an annual salary.

#### **II. Per Diem Payments Should Be Included On Supervisors’ W-2 Forms.**

Your next question turns to tax reporting. To begin, your letter appears to assume that Section 19-21A-7(c) per diems are taxable income. That’s correct. The term “per diem” can also refer to a reimbursement for expenses like meals and lodging, and under certain circumstances that type of per diem is not taxable. See *Frequently Asked Questions: Per Diem Payments*, IRS, <https://bit.ly/3T5cM2B> (last visited Dec. 13, 2023) (explaining that expense-based per diems are not taxable income when the per diem is “equal to or less than the federal per diem rate” and the employee submits “an expense report” for the specific trip). Here, however, the statute says supervisors are “entitled to reasonable and necessary expenses *and* a per diem.” W. VA. CODE § 19-21A-7(c) (emphasis added). In this context, then, payments for expenses and per diem compensation are distinct.

So your question is about where to report per diem compensation. W-2s and 1099s are both IRS tax forms, and thus we start by looking to how the IRS defines who should receive which form. For W-2s, the IRS says they should be given to “employee[s].” *About Form W-2, Wage and Tax Statement*, IRS (July 14, 2023), <https://bit.ly/47QIX9T>. And 1099s are given to anyone who performs services but “is not your employee.” *Am I Required to File a Form 1099 or Other Information Return?*, IRS (Nov. 2, 2023), <https://bit.ly/3Gj6Ues>. In other words, W-2s go to employees and 1099s go to independent contractors.

Sticking with federal law for the moment, the federal tax code provides that the “term ‘employee’ includes an ... elected official of the United States, a State, or any political subdivision thereof.” 28 U.S.C. § 3401(c). District supervisors are employees under this definition since

“voters in each county in a district shall elect” their supervisors. W. VA. CODE § 19-21A-6(a). As such, their per diems should go on W-2 forms for tax purposes.

State law says the same. The crux of the inquiry is whether “the right to control or supervise the work in question is retained by the person for whom the work is being done.” Syl. pt. 3, *Myers v. Workmen’s Comp. Comm’r*, 150 W. Va. 563, 148 S.E.2d 664 (1966). If someone other than the individual worker retains that control, then “the person doing the work is an employee and not an independent contractor.” *Id.* Further, “the determining factor” is “the existence” of control or supervision and not whether it is exercised in a given case. *Id.*

Here, numerous statutory constraints show that district supervisors are employees under this “determinative” factor. Syl. pt. 5, *Paxton v. Crabtree*, 184 W. Va. 237, 400 S.E.2d 245 (1990). The statute contains an entire section enumerating the “[p]owers and duties of conservation[] districts and supervisors.” W. VA. CODE § 19-21A-8. This section says that supervisors “shall have the following powers and duties, in addition to the others granted in other sections of this article.” *Id.* In other words, the statute lays out directly what supervisors are expected to do. The statute also explains some of the particulars when it comes to how supervisors must exercise these duties. *See id.* § 19-21A-7(f)(1)-(3) (supervisors must require “surety bonds” in certain circumstances, keep “full and accurate record of all proceedings and of all resolutions, rules and orders,” and “[p]rovide for an annual audit”).

Further, the Legislature made the supervisors responsible to the State Conservation Committee. One section entitles the Committee to keep the supervisors “organized under the provisions of this article.” W. VA. CODE § 19-21A-4(g)(3). Another demands that supervisors get the “approval of the State Conservation Committee” before hiring any “officers, agents and employees, permanent and temporary, either with or without compensation.” *Id.* § 19-21A-7(d). Though less demanding, yet another mandates that “upon request,” the supervisors must “furnish to the State Conservation Committee” a number of “documents they adopt or employ ... concerning their activities required in the performance” of their “duties under this article.” *Id.* § 19-21A-7(e). All of this indicates “a level of control over [supervisors] such that [they are] ... employee[s].” *Cunningham v. Herbert J. Thomas Mem’l Hosp. Ass’n*, 230 W. Va. 242, 252, 737 S.E.2d 270, 280 (2012).

So at both a statutory- and Committee-level, a district supervisor does not retain “the right to control or supervise the work in question.” *Spencer v. Travelers Ins. Co.*, 148 W. Va. 111, 117, 133 S.E.2d 735, 739 (1963). He or she “is an employee and not an independent contractor.” *Id.* Declining to exempt taxes and instead reporting per diems on a 1099 is not appropriate.

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We understand that one of the concerns driving both of your letters is lack of funds to pay all supervisors for all days worked at a \$150 per diem rate. We reiterate that the Committee has statutory discretion to set a different per diem rate within the \$30-to-\$150 range—indeed, the Legislature said the Committee should base this decision on “availability of funds.” W. VA. CODE § 19-21A-7(c). So the Committee remains free to return to last year’s \$80 per diem or to establish

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any other appropriate rate. Similarly, the Committee can seek the Legislature's involvement to either increase funding or amend the Code to allow for multiple per diem rates. In the meantime, the Committee must follow the law as written and allow for a single per diem reported as taxable income to an employee.

Sincerely,



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