State of West Virginia
Office of the Attorney General

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The Honorable James W. Courrier, Jr.
Prosecuting Attorney
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P.O. Drawer 458
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Dear Prosecutor Courrier,

You have asked for an Opinion of the Attorney General about whether the Mineral County Ambulance Authority's practices comply with the Emergency Ambulance Service Act of 1975, W. Va. Code § 7-15-1, *et seq*. 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 Attorney General.

Your letter raises a number of legal issues, which are addressed in turn below:

> *(1) How should a new member be appointed to an ambulance authority's board? (2) Must all ambulance authority board members be appointed for staggered three-year terms? (3) May ambulance authority board members vote by proxy? (4) Must an ambulance authority's officers be board members? (5) May ambulance authority squads use private billing companies to charge users for services rendered? (6) May an ambulance authority assign its squads different ambulances that the squads then mark in their own names?*

The Opinion focuses only on the application of and compliance with the Emergency Ambulance Service Act of 1975. We do not address compliance with other aspects of West Virginia law, including other statutes or any applicable agency regulations.

Question One: How Should a New Member Be Appointed to the Ambulance Authority's Board?

You first ask about the addition of a new member when the Authority's Board already has its maximum number of members. According to your letter, the Authority Board currently

has its maximum fifteen members: eight EMS squad members (one from each volunteer squad in Mineral County); five at-large community members; the Potomac Valley Hospital Medical Director ("Medical Director"); and one County Commissioner. Your letter explains that a new volunteer squad is organizing, that the bylaws require that each volunteer squad be granted a voting member, and that the formation of the new squad would therefore require removal from the Board of one non-squad member.

Under the Emergency Ambulance Service Act of 1975, county commissions may create ambulance authorities—governed by a board of members—to fulfill their statutory duty to provide ambulance service. W. Va. Code § 7-15-4. The Act provides that an "authority shall be created upon the adoption, by the governing body of each participating government, acting individually, of an appropriate ordinance or order." *Id.* Each ambulance authority's "management and control," as well as its "operations, business and affairs," must be lodged in a board of members. *Id.* § 7-15-5. By statute, an ambulance authority board may have no fewer than five members and no more than fifteen. *Id.* ("The management and control of any authority . . . shall be lodged in a board of not less than five nor more than fifteen individuals").

Members of an ambulance authority board "shall be appointed . . . by the governing bodies of the participating governments." *Id.* If a single county commission creates the authority, that county commission is to appoint every member of the board. If multiple counties or municipalities create the authority, they are to appoint the members between them. *See id.* § 7-15-4 ("[A]ny municipality or county, or both, or any two or more municipalities within any county or contiguous counties or any two or more contiguous counties, or any combination thereof, may create an authority."); *cf. id.* § 7-15-3 ("'Participating government' means any municipality or county establishing or participating in an emergency ambulance service authority."). Based on the facts you have provided, we understand that the Mineral County Ambulance Authority was created solely by the Mineral County Commission.

The Act makes clear that no entity or individual other than the governing body of the participating governments—here, the Mineral County Commission—has authority to appoint a member of an ambulance authority board. At several points, the Act expressly reiterates that the *governing body of each participating government* must take steps to make and effectuate board appointments. For example, the Act specifically requires that "the governing body of the participating government" make any replacement appointments in the case of death or resignation. *See id.* § 7-15-5 ("If 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."). Moreover, "[t]he governing body of the participating government" must deliver a certified order to the ambulance authority on the occasion of each appointment or reappointment. *Id.* ("The governing body of each participating government shall inform the authority of its appointments or reappointments to the board by delivering to the authority a certified copy of the ordinance or order making the appointment or reappointment."). In light of these provisions, it is plainly inappropriate simply to designate a seat on an authority's board to be filled according to certain criteria or to leave to other parties the power to appoint members to the board.

Accordingly, we conclude that only the Mineral County Commission may appoint any new member of the Mineral County Ambulance Authority's Board. Your letter suggests that the Commission appoints the Board's at-large community members and the one member representing the Commission, but that the various ambulance squads are permitted to select their own representatives and that the Medical Director is always a member. These practices do not appear to conform with the Act. As we have explained, the law requires that the *Commission* make each appointment at the time of each vacancy by "ordinance or order."

To the extent the Board's bylaws provide otherwise, they are inconsistent with the Act and should not be followed. You have not provided us with a copy of the Board's bylaws, but you represent that the bylaws guarantee each volunteer EMS squad a voting member and that each squad typically chooses its own representative. If that is true, the bylaws are inconsistent with the Act, insofar as they purport to alter or limit the County Commission's exclusive discretion to appoint members of the Board. In that circumstance, the Act must govern because an authority's bylaws are required to be consistent with and further the provisions of the Act. *See id.* § 7-15-10 (granting ambulance authorities the power "[t]o make and adopt all rules and regulations and bylaws as may be necessary or desirable to enable it to exercise the powers and perform the duties conferred or imposed upon it by the provisions of this article").

At the same time, no provision prohibits a hospital or squad from recommending to the Commission candidates for membership or prevents the Commission from exercising its discretion to repeatedly appoint certain officials, such as ambulance squad leaders and local medical directors, to the Board. Any individual who is a resident of, or member of the governing body of, any participating government is eligible to serve as a member of an authority's board. *Id.* § 7-15-5. In fact, a previous Attorney General Opinion specifically concluded that individuals who are part of non-profit emergency squads may serve as members of ambulance authority boards if they comply with the Act's procedures and other requirements, such as its conflict-of-interest provisions. *See* 61 W. Va. Op. Att'y Gen. 37 (1985) ("The purpose of [the Act] would not be served by prohibiting membership on the Authority of [Squad members] who are not seeking to contract with the Authority for personal gain, but rather to voluntarily serve the public purpose of providing ambulance service to the county."); *see also* W. Va. Code § 7-15-15 (setting forth conflict-of-interest prohibitions).

Question Two: Must All Ambulance Authority Board Members Be Appointed for Staggered Three-Year Terms?

The Act clearly provides that the members of an ambulance authority board "shall be appointed for terms of three years each," which must be staggered so that one-third of the members' terms expire every year. *Id.* § 7-15-5. At the outset, "initial appointments" are to be made such that "approximately one third of the total number of the members to be so appointed shall be appointed for a term of one year, approximately one third of such total number of the members shall be appointed for a term of two years and approximately one third of such total number of the members shall be appointed for a term of three years." *Id.* Successive appointments are to be made in a way that retains these three groups on three-year terms. Thus, "[a]s the term of each . . . initial appointee expires, the successor to fill the vacancy created by

such expired term shall be appointed for a term of three years." *Id.* Moreover, if a vacancy occurs during the middle of a term, the individual appointed by the participating government to fill the vacancy may only be appointed "to fill the unexpired portion of the term." *Id.* ("If 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."). The statute does not permit terms of less than three years, or terms that are contingent upon external events, such as the expiration of other offices or employment.

The Board's structure appears to be contrary to the Act. Your letter suggests that Board members currently do not serve staggered three-year terms. While you state that the County Commission appoints the at-large community members on the Board for staggered three-year terms, your letter does not indicate whether the Medical Director's three-year term is staggered with those other members' terms. Furthermore, the letter suggests that several members of the Board may not even serve three-year terms. You state that the Commission's representative serves either "until his term is up or until another Commissioner is reassigned to the Authority Board," and that members selected by the EMS squads "serv[e] various terms, usually one or two years."

Question Three: May Ambulance Authority Board Members Vote By Proxy?

You next ask about the permissibility of voting by proxy or alternates. As you explain in your letter, many members use proxies or alternates. Each of the volunteer EMS squads "typically assigns an alternate/proxy to attend and vote at meetings if the appointed member will be absent." The at-large community members "typically designat[e] their own proxy to attend and vote in their place when they cannot attend meetings." The Medical Director "has never sent a proxy," but the Commission's representative is "[n]ormally" replaced by "another Commissioner or the County Coordinator" if the appointed representative cannot attend.

The use of proxy voting or alternates is not expressly permitted by the Act and appears to run contrary to the Act's intent. In particular, proxy voting and the use of alternates seems inconsistent with the Act's requirement that a quorum is constituted by "[a] majority of the members of the board" and that the "vote of a majority of *all members present* at any meeting of the board shall be necessary to take any action." *Id.* § 7-15-8 (emphasis added). The term "present" strongly suggests that a member may not permit another individual to cast his or her vote in that member's absence. Furthermore, although the West Virginia Supreme Court of Appeals has previously permitted the use of alternates for the Board of the Regional Jail and Correctional Authority, that board's enabling statute "express[ly] authorize[d] . . . voting by a designated representative." *State ex rel. Regional Jail & Correctional Auth. v. County Comm'n of Cabell County*, 222 W. Va. 1, 12, 657 S.E.2d 176, 187 (2007). In that case, the statute provided that voting members of the Board included "the secretary of the department of administration, *or his or her designated representative*." W. Va. Code § 31-20-3 (emphasis added). No such statutory language exists here. The Act provides only that "[e]ach member of the board shall have one vote on all matters coming before it," and makes no provision for a designee or alternate to attend and vote in a member's stead. *Id.* § 7-15-5.

Question Four: Must an Ambulance Authority's Officers Be Board Members?

The next issue in your letter concerns the Authority Board's officers. According to your letter, "[a]ny of the 15 members on the Board can be elected president or vice-president of the Authority Board." Furthermore, "[s]ince the Authority's founding in 1975, the secretary of the Mineral County Emergency Services has served as secretary/treasurer of the Authority, now as a non-voting member."

We believe that these procedures comply with the Act. *First*, the Act appears to require that the president be a member of the Board. At the start of its existence, the Board was required to elect a president "from among its membership." *Id.* § 7-15-7. That individual was to serve "until his successor is elected and qualified." *Id.* The word "qualified" suggests that any succeeding president must, like the first president, be a member of the Board.

Second, the Act also appears to require the election of a vice president, secretary, and treasurer, none of whom need be members of the Board. Specifically, the statute provides that the Board shall, at its first meeting, elect "a vice president, a secretary and a treasurer and such other officers as may be required, who need not be members of the board, whose duties shall be defined and whose compensation shall be fixed by the board and paid out of the funds of the authority." *Id.* We believe that the natural reading of the phrase "who need not be members of the board" is to modify all the positions in the sentence: the vice-president, secretary, treasurer, and all other necessary officers.

This reading is supported by several other statutory provisions. For example, the immediately-following statement in the statute requires "the treasurer, and such other officers and employees as the board shall direct, [to] furnish bond for the use and benefit of the authority . . . conditioned upon the faithful discharge by such treasurer and such other officers and employees so directed by the board of the duties of their respective offices or employment." *Id.* This bond-requirement provision makes sense as a security measure for ensuring that non-member officers carry out their duties. In addition, the statutory provisions regarding conflicts of interest refer separately to board "member[s]" and "officers," suggesting that at least some officers can be non-members. *Id.* § 7-15-15 (stating that "[n]o member of any authority, nor any of its officers, employees, agents or consultants, shall have any" of certain enumerated conflicts of interest).[1]

Question Five: May Ambulance Authority Squads Use Private Billing Companies to Charge Users for Services Rendered?

In your letter, you state that each individual squad bills for services rendered through billing companies. Seven squads use one company and the remaining squad uses a second

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[1] A person serving as an officer but not appointed to the Board is properly described as a "non-member officer," rather than a "non-voting member," because members by definition are entitled to vote.

company. The newly forming squad plans to utilize the billing company that the seven squads use. You further explain that "[p]rofits from the billing remain with the billing squad for its expenses."[2]

We conclude that an authority is permitted by the Act to use a billing provider. Under the Act, an authority may "employ, in its discretion, planning consultants, attorneys, accountants, superintendents, managers and such other employees and agents as may be necessary in its judgment and fix their compensation." *Id.* § 7-15-10(d). Furthermore, the Act permits an authority to "enter into contracts and agreements for superintendence and management services." *Id.* § 7-15-10(g). We read these provisions to grant an authority the power to employ or contract with an outside billing service. We note that the Act requires competitive bidding for the "purchase of or contract for all supplies, equipment and materials and a contract for the construction of facilities by any authority, when the expenditure required exceeds the sum of ten thousand dollars." *Id.* § 7-15-16. But based on the facts provided in your letter, we do not understand the outside billing providers to furnish supplies, equipment, and materials such that they would fall within this requirement.

Question Six: May an Ambulance Authority Assign Squads Different Ambulances That the Squads Then Mark in Their Own Names?

Finally, your letter provides several facts about the Authority's current ambulances. You state that there are two ambulances at each squad location, and that they vary in color, equipment, styles, and makes. The ambulances are up to 15 years old, but none has more than 86,000 miles, and most have 40,000 or less. You further explain that all ambulances have the name of the particular community location of the squad painted on them, but not "Mineral County Ambulance Authority" or "Mineral County" after the community name.

We believe that the Act entrusts an authority with broad discretion over the personal property it owns and uses for the purpose of providing emergency ambulance service. The Act empowers ambulance authorities "to hold, use, sell, lease or otherwise dispose of real and personal property of every kind and nature whatsoever" that are "necessary for the full exercise of its powers" or which "may be convenient or useful for the carrying out of such powers." *Id.* § 7-15-10(e). We read that broad provision to grant ambulance authorities a wide berth with respect to the ownership and management of personal property, including ambulances. No provision of the Act places any restrictions on how an authority is to select, allocate, replace, or

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[2] We assume that by "profits" you mean "proceeds." In a previous Opinion, the Office of Attorney General has explained that, in addition to a general levy authorized under West Virginia Code § 7-15-17, an ambulance authority may "impose and collect fees and charges upon users of their services for services rendered." 59 W. Va. Op. Att'y Gen. 161 (1982); *see also* Opinion of the Attorney General's Office Regarding the Collection of Unpaid Emergency Ambulance Service Fees (November 8, 2013), available at http://www.wvago.gov/public resource.cfm ("The Office reasoned that charging for *actual services provided* falls within an emergency ambulance authority's express statutory power . . . .") (emphasis in original).

mark its ambulances, so long as the authority continues to effectively fulfill its mission.

Sincerely,

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