

## Contract Exemption 2023-05

Issued on November 2, 2023, by

The West Virginia Ethics Commission

### Opinion Sought

The **Marion County Board of Health** seeks a Contract Exemption to contract with Lloyd R. White, a member of the Board of Health and former Health Department Administrator, to train the Board's new Administrator.

### Facts Relied Upon By the Commission

The Marion County Board of Health ("Health Department") is a county entity created pursuant to [W. Va. Code § 16-2-3](#). The Health Department provides a number of public health and clinical services including, for example, general health and wellness visits, breast and cervical cancer screenings; immunizations, and blood pressure checks.<sup>1</sup> The Health Department also provides a number of threat preparedness and environmental health resources related to food and consumer safety, water and land development, schools and daycares, and emergencies and disasters.<sup>2</sup>

The Marion County Commission appoints the five members of the Board of Health. [W. Va. Code § 16-2-7](#). The Board has the power to "employ... any technical, administrative, clerical, or other persons, to serve as needed and at the will and pleasure of the Board." [W. Va. Code § 16-2-11](#).

Lloyd R. White recently retired from the Health Department after working as its Administrator, Licensed Sanitarian, and in other roles for 32 years. After his retirement, the Marion County Commission appointed him to the Board of Health based on his experience, education, and credentials. The Board of Health recently hired a new Administrator to replace Mr. White. The new Administrator is a former Administrator of a Health Department in another county in West Virginia. Since Mr. White's retirement, he has been assisting the new Administrator with his job duties without compensation. The new Administrator will be taking a leave from work due to an illness in his family. The length of his absence is unknown. The Requester is seeking additional temporary assistance from an experienced former Administrator and Sanitarian to fill in for, and eventually, assist with and teach the new Administrator some of his new job duties and about matters that are particular to Marion County.

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<sup>1</sup> About Us-Marion County WV Health Department, <https://marionlhdwv.org/about/>, last visited on September 13, 2023.

<sup>2</sup> Id.

The Requester asserts that Mr. White is uniquely qualified to provide this training. In addition to his years of experience in Marion County, Mr. White holds a Masters in Public Health. He is currently the only person affiliated with the Board of Health that is certified to teach Narcan Administration and "Stop the Bleed" courses. He is serving as the Health Department's community liaison between all communities and the Health Department and has not completed a preventative health initiative he is working on with the state Department of Health and Human Resources. The Requester would like Mr. White to complete this health initiative project and to assist the new Administrator in his duties until the new Administrator becomes certified in Narcan Administration and Stop the Bleed courses and trained in his other duties.

Mr. White, as a Board member, has not participated in the review or evaluation of his contract with the Board of Health, has been recused from deciding, evaluating, and voting on the contract, and has fully disclosed the extent of his interest in the contract.

The Requester would like to retain Mr. White's services on a temporary, part-time basis to accomplish the tasks described above at the same wage he earned as the Administrator, \$49.19 per hour, not to exceed \$25,000 per calendar year. The Requester anticipates that Mr. White's services will be required until at least the end of this calendar year and possibly into 2024.

### **Provisions Relied Upon By the Commission**

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control . . . . Provided, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-2-5(d)(2) states, in relevant part:

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract

when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;. . . .

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code § 61-10-15(a) states, in relevant part:

It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control. . . .

W. Va. Code § 61-10-15(h) states, in relevant part:

Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission

pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

## **Opinion**

### **Ethics Act**

The Ethics Act prohibits public employees and officials from having more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control unless their governing body seeks, and receives, an exemption to contract with the public employee or official. W. Va. Code § 6B-2-5(d)(1). Mr. White, as a Board of Health member, has direct authority or control over the Health Department's contracts. [Advisory Opinion 2012-12](#). This provision of the Ethics Act, however, also contains an exception for a part-time appointed official to contract with his or her agency as long as he or she has "not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract." W. Va. Code § 6B-2-5(d)(1). The Board members of the Marion County Board of Health are part-time appointed officials, and therefore, they may contract with the Board under the Ethics Act, without a contract exemption, as long as they recuse themselves and do not participate in matters concerning in which they have a financial interest pursuant to W. Va. Code § 6B-2-5(d). [Advisory Opinion 2012-12](#). Mr. White, as a Board member, asserts that he has not participated in the review or evaluation of his contract with the Board of Health, has been recused from deciding or evaluating it, has been excused from voting on the contract, and has fully disclosed the extent of his or her interest in the contract. Therefore, the Ethics Act does not prohibit this contract.

### **W. Va. Code § 61-10-15(a)**

A member of a county board, however, must also abide by the stricter prohibitions in W. Va. Code § 61-10-15(a), a statute that imposes criminal penalties against a county official, including a Board of Health member, who has a pecuniary interest, either directly or indirectly, in the proceeds of a contract over which the official exercises voice, influence, or control. [Advisory Opinion 1999-31](#).<sup>3</sup> W. Va. Code § 61-10-15, unlike the Ethics Act, does not contain an exception for part-time appointed officials. Hence, to comply with § 61-10-15, it is necessary for the Requester to obtain a Contract Exemption in order to contract with Mr. White. [Advisory Opinion 2012-12](#).

### **Contract Exemption**

The Ethics Commission may only grant a contract exemption from the prohibitions in W. Va. Code § 61-10-15(a) if the prohibition would result in excessive cost, undue

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<sup>3</sup> After the issuance of Advisory Opinion 1999-31, the Legislature amended W. Va. Code § 61-10-15 to allow affected public agencies to apply to the Ethics Commission for an exemption to the restrictions when the requisite factors are satisfied.

hardship, or other substantial interference with the operation of a governmental body or agency.

The Requester asserts that Mr. White is uniquely qualified for this contract. The Board is very satisfied with the work performed by Mr. White over his tenure with the Health Department. He is currently the only person affiliated with the Board of Health that is certified to teach Narcan Administration and "Stop the Bleed" courses. He is serving as the Health Department's community liaison between all communities and the Health Department and has not completed a preventative health initiative he is working on with the state Department of Health and Human Resources. The Board asserts that it is in the best interest of the Marion County Health Department to enter into a contractual agreement with Mr. White to perform the services described herein. Given the unique qualifications of Mr. White, the Ethics Commission finds that the Board of Health will face undue hardship and substantial interference in its operations if this request is denied.

**The Ethics Commission grants a Contract Exemption to the Marion County Board of Health to contract with Lloyd R. White at the rate of \$49.19 per hour, not to exceed \$25,000 per calendar year, for performing the work described herein, with the following limitations:**

First, Mr. White must recuse himself from decisions, discussions, and votes relating to his contract and payment for services. He must follow the restrictions in W. Va. Code § 6B-2-5(d). For recusal to be proper, he must first fully disclose on the record his disqualifying interest and leave the room during the discussion, deliberation, and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that Mr. White left the room during all consideration, discussion, and vote on the contract and payment for his services. W. Va. Code § 6B-2-5(j)(3).

Second, the Board may compensate Mr. White for work he may have already performed since he recused himself from decisions, discussions, and votes relating to his contractual services and he followed the restrictions in W. Va. Code § 6B-2-5(d) and (j). In the event he has not complied with the above limitations, he may not be compensated for his past services.

Third, this Contract Exemption is effective until the earlier of April 1, 2024, or when Mr. White has completed his services to the satisfaction of the Board of Health.

*The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or entities.*

  
Terry L. Walker, Acting Chairperson  
West Virginia Ethics Commission