

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

DANIEL ELLIOTT,

VCRB 2020-71

**Former Conservation Technician,
Tygarts Valley Conservation District,
Respondent.**

FINAL DECISION AND ORDER

This matter came for consideration before the West Virginia Ethics Commission during its regularly scheduled meeting on December 7, 2023, following a public hearing conducted before the Commission's duly appointed hearing examiner on August 22, 2023.

This proceeding arises under the West Virginia Governmental Ethics Act, W. Va. Code §§ 6B-2-1 through 6B-3-11 ("Ethics Act").

The Ethics Commission's Probable Cause Review Board, following an investigation, entered an Order on November 16, 2022, finding probable cause to believe that Respondent Elliott violated W. Va. Code §§ 6B-2-5(b) and (d)(1) and ordering that a Statement of Charges be prepared and that a public hearing be scheduled.

A Statement of Charges and Notice of Hearing was issued on November 17, 2022. The Statement of Charges contains two counts against Respondent Elliott:

Count One: Through his rental of his equipment to the Conservation District, the Respondent had a prohibited interest in public contracts over which he may have direct authority to enter into, or over which he may have control in violation of W. Va. Code § 6B-2-5(d).

Count Two: The Respondent used his office for the private gain of another person or persons by taking timber from a private property owner; using Tygarts Valley Conservation District ("Conservation District") employees and equipment to remove, transport, and sell the timber, and using the proceeds from the sale to give Conservation District employees a Christmas bonus of around \$100 each. This action of the Respondent violated W. Va. Code § 6B-2-5(b)(1).

The hearing on the Complaint was held in Charleston, West Virginia, on August 22, 2023, with Jeffrey G. Blaydes presiding as the independent Hearing Examiner. At the hearing, the Commission was represented by its Staff Attorney John E. Roush and Staff Attorney Andrew R. Herrick. Respondent appeared at the hearing and was represented by counsel David M. Grunau. The Respondent did not testify. A certified court reporter created a stenographic record of the hearing and a transcript of the proceedings.

The Commission, with six of the Commission members present and voting, considered the hearing record, which includes the Probable Cause Order, Statement of Charges and Notice of Hearing; the Hearing Examiner's Findings of Fact and Conclusions of Law (hereinafter "Hearing Examiner's Recommendation"); the Ethics Commission's Proposed Findings of Fact and Conclusions of Law; the Ethics Commission's Written Arguments; the Respondent's Proposed Findings of Fact and Conclusions of Law; the hearing transcript with exhibits, and the depositions of James Nester and Guy Harris.

The Commission adopts the Hearing Examiner's "Findings of Fact and Conclusions of Law," which is attached hereto and incorporated herein by reference.

ORDER

Based on the foregoing, the West Virginia Ethics Commission finds that there was clear and convincing evidence presented in this matter that Daniel Elliott materially violated W. Va. Code § 6B-2-5(b) and (d)(1) and ORDERS the following sanctions against him:

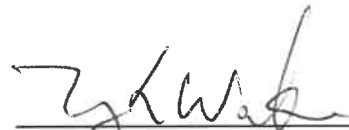
1. A public reprimand shall be issued against Respondent relating to both counts;
2. Respondent shall repay Tygarts Valley Conservation District \$9,202.50, which is the amount he received from the Tygarts Valley Conservation District for the rental of his equipment to the District by June 30, 2024, and shall provide written confirmation to the Ethics Commission that the payment was made within five business days of making the payment;
3. Respondent shall pay Tygarts Valley Conservation District \$819.48 for the value of the trees sold as part of the May 2018 project by June 30, 2024, and shall provide written confirmation to the Ethics Commission that the payment was made within five business days of making the payment;
4. Respondent shall pay a fine in the amount of \$5,000.00 to the West Virginia Ethics Commission for his violation of the Ethics Act in Count One by June 30, 2024;

5. Respondent shall pay a fine in the amount of \$1,000.00 to the West Virginia Ethics Commission for his violation of the Ethics Act in Count Two by June 30, 2024;
6. Respondent shall reimburse the West Virginia Ethics Commission for the total actual costs of investigating and prosecuting the violations, as follows, by June 30, 2024; and

Court reporter (deposition transcript)	\$ 359.75
Travel for Roush (deposition)	52.99
Nester appearance fee (deposition)	27.50
Court reporter (hearing transcript)	1,051.25
Hearing examiner	<u>2,975.00</u>
TOTAL	\$4,466.49

7. Respondent shall undergo training on the West Virginia Governmental Ethics Act by attending either an in-person or virtual training presented by the Ethics Commission staff or by viewing the training provided on the Ethics Commission's website at ethics.wv.gov by June 30, 2024, and shall provide written confirmation of the completion of this training to the Ethics Commission within five business days of completing it.

This Order was entered on the 7th day of December 2023.



 Terry L. Walker, Acting Chairperson
 West Virginia Ethics Commission

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

COMPLAINT NO. VCRB 2020-71

**DANIEL ELLIOTT,
CONSERVATION TECHNICIAN,
TYGARTS VALLEY CONSERVATION DISTRICT**

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for hearing on August 25, 2023, at the West Virginia Ethics Commission located at 210 Brooks Street, Charleston, Kanawha County, pursuant to a Notice of Hearing issued by the Commission. The Commission was represented by Staff Attorney John E. Roush and State Attorney Andrew R. Herrick, Esquire. Daniel Elliott appeared in person and was represented by Daniel M. Grunau, Esquire. This matter became ripe for decision following the parties' submissions of Proposed Findings of Fact and Conclusions of Law. Having thoroughly considered the evidence and argument presented at the hearing and the written submissions of the parties, the hearing examiner now issues the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Daniel Elliott ("Respondent" or "Elliott") was employed by the Tygarts Valley Conservation District ("Conservation District") as a Conservation Technician from approximately 2017 through 2020.¹

¹ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, p. 16; August 22, 2023 Transcript of Public Hearing pp. 121

2. The Conservation District is a public body governed by an elected nine-member Board of Supervisors.²

3. The Conservation District provides various services for property owners in its region and in thirteen other Districts throughout the state, including heavy construction projects on farms.³

Equipment Rentals

4. The Conservation District owns a variety of pieces of heavy and medium weight equipment. However, it did not own all of the equipment necessary to complete every project. Therefore, some projects required the rental of such equipment as tractors, brush hogs, trucks, trailers, and man lifts.⁴

5. As a Conservation Technician, Elliott exercised control over projects undertaken by the Conservation District. Elliott's duties included:

- a. Evaluating a potential project;⁵
- b. Determining if the Conservation District would agree to perform a particular project;⁶
- c. Determining when it would occur;⁷

² This Conservation District covers the counties of Barbour, Randolph, Taylor, Tucker and Upsher. Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 7 - 8; August 22, 2023 Transcript of Public Hearing p. 25; See also W. Va. Code § 19-21A-1, *et seq.*

³ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 8 - 10; August 22, 2023 Transcript of Public Hearing p. 23-26

⁴ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 12 - 14, 19

⁵ Transcript of Public Hearing, pp. 29, 33, 107, 120-123

⁶ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, p. 17; August 22, 2023 Transcript of Public Hearing pp. 27 - 29, 33, 107- 108, 121 - 122

⁷ Transcript of Public Hearing, pp. 33, 108, 120-123

- d. Determining what equipment and manpower would be necessary to perform the project;⁸
- e. Supervising the execution of the Conservation District's projects;⁹
- f. Acting as the supervisor or foreman for the Conservation District's employees who executed the Conservation District's projects;¹⁰ and
- g. Determining if the Conservation District needed to rent additional equipment to complete a project.¹¹

6. The final decision on whether to rent equipment was normally made by the Conservation Technician, i.e., Elliott, except, at times, when the equipment was rented from Elliott.¹²

7. When Elliott determined the need to use his own equipment on a project, he would, on certain occasions seek approval¹³ from either the Board of Supervisors ("Board").¹⁴ or a member of the Board of Supervisors, i.e., James Nester, Sheldon Findley, or Donnie Tenney.¹⁵ Conversely, Supervisor Nester testified that when Elliott approached him for approval for the District to rent equipment from Elliott, Supervisor Nester typically relied upon Elliott's judgment.¹⁶

⁸ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 15, 17; August 22, 2023 Transcript of Public Hearing pp. 29 - 30, 33, 108, 123

⁹ August 22, 2023 Transcript of Public Hearing pp. 29 - 30, 33

¹⁰ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 10 - 12

¹¹ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 14, 18; August 22, 2023 Transcript of Public Hearing pp. 29, 33 - 34.

¹² Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, p. 14

¹³ There is also evidence that sometimes he sought this approval after the fact. *See* August 22, 2023 Transcript of Public Hearing p. 38

¹⁴ August 22, 2023 Transcript of Public Hearing pp. 44 - 46

¹⁵ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 19, 37; August 22, 2023 Transcript of Public Hearing p. 37

¹⁶ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, p. 46

8. According to Supervisor Nester, the Conservation Technician decided if equipment was needed and, at times, would determine if equipment would be rented. Nester testified that there were times when Elliott used his equipment “on his own” whether he was providing it for free or renting it to the District. Moreover, he indicated that there were times where Elliott would use his equipment before it was approved. At times – particularly if a lot of equipment was rented – the Board would be involved with the decision. Nester noted that there were times when just he and Elliott would discuss rental of equipment without Board participation. Elliott consulted with Nester because Nester was the Chairman of the Equipment and Safety Committee for the Board of Supervisors.¹⁷

9. Nester further testified that the Conservation Technician normally decided if a project would be undertaken; when the project would occur; and the type of equipment to be used.¹⁸ Nester recalled that if Elliott approached him about renting equipment, Nester did not personally verify if the equipment was needed. Moreover, Elliott always raised the issue of equipment rentals; Nester never did.¹⁹

10. Elliott’s work crew used his equipment on Conservation District projects without charge on some occasions. However, Elliott charged the Conservation District \$9,202.50 in 2018 for renting the equipment that he owned to the District.

11. The Conservation District did not receive a Contract Exemption from the Ethics Commission authorizing the District to rent equipment from Elliott in excess of \$1,000.00 for 2018 or any other year.²⁰

¹⁷ June 28, 2023 Transcript Evidentiary Depositions, pp. 14, 20-21; Transcript of Public Hearing, pp. 92, 96-97

¹⁸ June 28, 2023 Transcript of Evidentiary Depositions, p. 17

¹⁹ June 28, 2023 Transcript of Evidentiary Depositions, pp. 45-46

²⁰ Exhibit #20, August 22, 2023 Transcript of Public Hearing

12. Elliott had control of the various projects entered into that are at issue in this case. The record establishes by clear and convincing evidence that Elliott (a) evaluated the projects at issue; (b) determined if the Conservation District would agree to perform the project; (c) supervised the execution of the project; (d) determined if the Conservation District needed to rent additional equipment; (e) made the final decision on equipment rentals unless he consulted with Nester, Findley, or Tenney who, particularly in the case of Tenney, relied upon the judgment of Elliott.²¹

13. When Elliott unilaterally evaluated a project - - which would undoubtedly include consideration for the type of equipment needed - - Elliott had control of the type of equipment to be used. Moreover, Elliott would then recommend the need for equipment - - some of which he owned.²²

²¹ Elliott contends that question regarding Elliott's control of various projects were "hypothetical" and, therefore, the Commission failed to present evidence at hearing the extent of Elliott's authority and control. The record demonstrates otherwise. The reliable, probative and substantial record establishes without any contradiction that Elliott exercised a sufficient level of control over the projects at issue as required by W. Va. Code § 6B-2-5(d)(1).

²² Some members of the Conservation District were concerned about the manner in which Elliott controlled projects upon which he worked and for which he paid a rental fee to himself for using his own equipment on the same projects. District Supervisor James Dean testified:

[T]here was concern that equipment was being used by, Mr. Elliott's equipment was being used, and we needed to get a handle on how we were going to handle this.

He continued:

There was a concern that he was using equipment that [the District] was responsible for paying for. There was concern whether the equipment was needed, and there was a concern about the implications of personally renting us equipment when he worked for us.

The ethical concern of an employee using his own equipment and making the decision if he should rent his own equipment or whether it was needed to be rented or not.

(Transcript of Public Hearing, 142-143)

14. Given the evidence, the essential elements of a legal contract are established herein. The Commission has proven by clear and convincing evidence that the parties to the contract were competent; the subject matter of the contract was unlawful; the exchange of valuable consideration occurred; and there was assent.

15. The Conservation District did not consult the Commission regarding rental payment to Elliott until months after they had paid him. The Conservation District did not seek or receive a contract exemption from the Commission in this matter

16. Elliott's financial interest in the rental contracts exceeded \$1,000.00 in a calendar year.

2018 Christmas Bonus

17. Prior to 2018, the Tygarts Valley Conservation District had given its employees a Christmas bonus of \$100.00.00 in December on some occasions if money was available.²³

18. The Conservation District did not have the money to give Christmas bonuses in 2018.²⁴

19. In May 2018, the Conservation District contracted with private property owner, Guy Harris, to repair a pond at his farm in a nearby county, outside the District's area, for \$12,000.00.²⁵ The project required the Conservation District employees to cut and remove trees from the property. The Conservation District employees performed this work while on duty for the Conservation District and with equipment owned or rented by the Conservation District.²⁶

²³ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 21 -22:

²⁴ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 24, 33

²⁵ Exhibits #12 - #13, Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 49 - 51

²⁶ Exhibits #7 - # 11, August 22, 2023 Public Hearing, Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 22 - 23; August 22, 2023 Transcript of Public Hearing p. 100

20. Harris wanted the trees removed and informed Elliott that he had no interest in keeping the trees.²⁷ Harris testified that Elliott stated that there were two other trees that were likely to fall. Harris indicated that he had never noticed the trees and he did not want Elliott to remove the trees because they were right on budget and he did not want to pay for it. He testified, "I told him not to do it." He noted that it was not part of the original estimate. Ultimately, Harris did not pay for the removal of the two extra trees. He observed that his final invoice included a discount of \$806.46.²⁸

21. Elliott used District equipment and resources to remove the trees.²⁹

22. Elliott and another District employee sold the timber from the 2018 project on private property to a local lumber mill. The timber sold for \$819.48 - - Elliott received \$684.86 and the other District employee received the remaining \$134.62.³⁰

23. Elliott did not deposit the proceeds of the sale of the timber with the Conservation District. Instead, Elliott presented the money to Board personnel as Christmas bonuses in 2018 to District work crew employees under his supervision.³¹ No other District employees received a Christmas bonus in 2018.³²

24. Had Elliott deposited the \$819.48 in funds with the Conservation District, the funds would not have been used for a Christmas bonus for the crew members. The money would have simply gone into the Conservation District's "coffers."³³

25. Elliott did not testify at the hearing in this case.

²⁷ June 28, 2023 Transcript of Evidentiary Depositions, pp. 52-53

²⁸ June 28, 2023 Transcript of Evidentiary Depositions, pp.55-60

²⁹ June 28, 2023 Transcript of Evidentiary Depositions, pp.99-100

³⁰ Exhibits #4 - #6, August 22, 2023 Transcript of Public Hearing

³¹ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 25 - 26; 48 - 49, 66

³² Transcript of Public Hearing p. 66

³³ August 22, 2023 Transcript Public Hearing, p. 49

26. The Commission has established by clear and convincing evidence that Elliott used his office for the private gain of another person or persons. Elliott utilized public employees or public work time to harvest the trees at issue. He personally received the proceeds from the trees (rather than having payment made directly to the Conservation District). Thereafter, the proceeds from the sale of timber were not placed in a Conservation District account and paid out as a Christmas bonus through payroll. Nor did the Board of Supervisors approve the use of the money.

ANALYSIS

The purpose and intent of the West Virginia Governmental Ethics Act ("Act") is set forth in West Virginia Code § 6B-1-2(a), as follows:

The Legislature hereby finds that the holding of a public office or public employment is a *public trust*. Independence and impartiality of public officials and public employees are essential for the maintenance of the confidence of our citizens in the operation of democratic government. The decisions and actions of public officials and public employees must be made free from undue influence, favoritism or threat, at every level of government. *Public officials and public employees who exercise the powers of their office or employment for personal gain beyond the lawful emoluments of their position or who see to benefit narrow economic or political interests at the expense of the public at large undermine public confidence in the integrity of democratic government.*

(Emphasis added)

A central tenet of the Act is that the public fisc must be protected and used only for the benefit of the public. To this end, the Legislature has prohibited the use of a public office for private gain. West Virginia Code § 6B-2-5(b) states:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

With this backdrop, the undersigned will now address the arguments of the parties and the salient facts of this case. In this case the Commission asserts: (1) that Elliott had control of all or nearly all of the decisions related to various public projects of the conservation District and that

Elliott rented his own equipment to the Conservation District without a contract exemption; and (2) Elliott sold lumber from a Conservation District project obtained with Conservation District equipment by Conservation District employees and did not deposit the proceeds of the lumber sale with the Conservation District. Rather, Elliott unilaterally earmarked and then distributed the proceeds for employee bonuses which constitute the use of public employment for the private gain of others.

Elliott offers a series of defenses. He questions the existence of a valid contract. He contends that evidence adduced regarding control of various projects by Elliott "are without any weight." He also contends that no "isolated use of Mr. Elliott's equipment was ever compensated at a rate greater than \$1,000.00." Elliott further contends that no contract existed because the Conservation District had no contractual right to use Elliott's equipment.

As it relates to the Christmas Bonus issue, Elliott contends, *inter alia*, that it involved an "insignificant use of public resources and an incidental use of equipment or resource."

At the outset, Elliott generally contends that the inquiries of various witnesses amounted only to "hypotheticals" and that those questions should be accorded no weight. This argument is without merit. The individual testimony and the evidentiary record as a whole clearly demonstrate the salient facts of this case with proper and clear and convincing evidence. Witnesses from the Conservation District repeatedly testified to the duties performed by Elliott; the use of his rental equipment; and the payment by the Conservation District of the same. Moreover, the record is replete with evidence that Elliott controlled the various jobs performed.

Moreover, it is beyond cavil that Elliott utilized his own equipment in performing these duties. Unequivocally, he was paid for the same either in whole or part. Indeed, the testimony in this regard is uncontroverted.³⁴

Additionally, Elliott contends that it was difficult to find the proper equipment and that the Conservation District benefitted from the use of the equipment. Further, Elliott asserts that he received little guidance from the Conservation District and that he intended to “do the right thing.” None of these factors allow Elliott to circumvent the Act. Elliott provides no statute or case to support his claims under the Act.³⁵

As it relates to Elliott’s contention regarding the existence of a contract, it is clear one existed. In *Dan Ryan Builders, Inc. v. Nelson*, 230 W. Va. 281, 737 S.E.2d 550 (2012), the West Virginia Supreme Court of Appeals held:

“The fundamentals of a legal contract are competent parties, legal subject matter, valuable consideration and mutual assent. There can be no contract if there is one of these essential elements upon which the minds of the parties are not in agreement.” Syllabus Point 5, *Virginian Export Coal Co. v. Rowland Land Co.*, 100 W.Va. 559, 131 S.E. 253 (1926).

All of the essential elements of a contract exist in the rental of equipment by the Conservation District from Elliott. Elliott is presumed to be a competent adult. The parties were competent to enter into a contract; there was legal subject matter; valuable consideration was exchanged; and there was mutual assent.

The record also establishes that Elliott gathered his hours for use of his personal equipment; rental rates were applied to the equipment; Elliott submitted amount(s) due; and the Conservation

³⁴ As noted, Elliott elected not to testify with regard to these or any issues in this case.

³⁵ It must be noted, as the Commission accurately asserts, Elliott could have been protected by a contract exemption, but none was requested or obtained. This failure to obtain a contract exemption does not permit Elliott to then violate the Act. Rather, he is specifically bound by the terms of the Act unless and until the exemption is obtained. That never occurred here.

District paid it. The Commission has established by clear and convincing evidence that a contract existed.

Moreover, Elliott clearly exercised control over the contract. Elliott's duties included:

- a. Evaluating a potential project;³⁶
- h. Determining if the Conservation District would agree to perform a particular project;³⁷
- i. Determining when it would occur;³⁸
- j. Determining what equipment and manpower would be necessary to perform the project;³⁹
- k. Supervising the execution of the Conservation District's projects;⁴⁰
- l. Acting as the supervisor or foreman for the Conservation District's employees who executed the Conservation District's projects,⁴¹ and
- m. Determining if the Conservation District needed to rent additional equipment to complete a project.⁴²

The Ethics Act prohibits a public employee from having a financial interest in a contract with his or her agency over which he or she has authority to enter into or over which he or she has control. West Virginia Code § 6B-2-5(d) states:

Interests in public contracts. - (1) In addition to the provisions of §61-10-15 of this code, no elected or appointed public official or public employee or member of his

³⁶ Transcript of Public Hearing, pp. 29, 33, 107, 120-123

³⁷ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, p. 17; August 22, 2023 Transcript of Public Hearing pp. 27 - 29, 33, 107- 108, 121 - 122

³⁸ Transcript of Public Hearing, pp. 33, 108, 120-123

³⁹ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 15, 17; August 22, 2023 Transcript of Public Hearing pp. 29 - 30, 33, 108, 123

⁴⁰ August 22, 2023 Transcript of Public Hearing pp. 29 - 30, 33

⁴¹ Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 10 - 12

⁴² Joint Exhibit #1, June 28, 2023 Transcript of Evidentiary Depositions, pp. 14, 18; August 22, 2023 Transcript of Public Hearing pp. 29, 33 - 34.

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. (Emphasis added).

Additionally, W. Va code § 6b-2-5(b)(3) provides:

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.

The Commission has applied these provisions in prior Advisory Opinions. In Advisory Opinion 1992-03, a part-time prosecuting attorney asked if it violated the Ethics Act for the county commission to rent office equipment from the part-time prosecuting attorney for his use as prosecuting attorney at his public office. The Commission held:

The requestor states that any contract or agreement for the rental of computer equipment for use by the prosecuting attorney's office would be awarded and approved by the County Commission. The [W. Va. Ethics] Commission determined that the Requestor has control over the county's decision to enter into a contract with him due to his instigation of this contract, his close involvement with the ultimate decision as the attorney for the County Commission, and his inevitable role as supervisor or overseer of the contract which will be performed in his office. For these reasons it would be a violation of West Virginia Code § 6B-2-5(d)(1) for the requestor to rent his private office equipment to the county for use in his office as prosecuting attorney. (Emphasis added).

The affected parties in Advisory Opinion 1992-03 were advised that the public agency could seek a contract exemption to cover the situation.

In Advisory Opinion 1995-02, a public employee served as a licensed psychologist and full-time unit supervisor for a state correctional institution. The public employee asked if he or she could bid on a contract to act as consulting psychologist for the correctional institution. The Commission held:

In this instance, the requester would like to contract as a consulting psychologist to provide psychological services such as testing and evaluations, to a State Institution. He would provide these services during his off-duty hours or reschedule his regular work hours. However, the requester is also a full-time unit supervisor for this institution and his job responsibilities include overseeing the staff and ensuring that the procedures and instructions of the consulting psychologist are administered properly.

Pursuant to WV Code §6B-2-5(d)(1) a public employee may not have more than a limited interest in the profits or benefits of a public contract over which he may have direct authority or control. Although any contract for psychological services will be awarded and approved by the State Division in conjunction with the Acting Warden and Business Manager of the Institution, the Ethics Commission has previously held that an individual has control over a contract as contemplated by WV Code §6B-2-5(d)(1) if he oversees the administration of the contract or if he monitors or supervises the services provided under the contract.

Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the requester to contract to provide services to the State institution since he is employed by this institution as a supervisor and as such has authority or control over a contract in which he has more than a limited interest.

(Emphasis added).

In Advisory Opinion 1999-02, a Multicounty Vocational School Instructor asked whether it would be a violation of the Ethics Act for him to bid on the School's sale of a modular home constructed by its students as an instructional project. The Commission held:

The Ethics Act prohibits public servants from being a party to or having a personal financial interest in a public contract, purchase or sale that their public position gives them the authority to (1) award or (2) control. The sale of the modular home is a public transaction in which the School's instructors may not have a personal financial interest, if they have the authority to award or control the transaction.

It is clear that the instructors do not have the authority to award a contract of sale for the home. However, they do exercise considerable control over the construction of the home. They select the type of home to be built and decide the type and quality of materials to be used in its construction. Although there is no suggestion they have done so, their positions do give them the ability to fashion a home to satisfy their own personal needs and tastes.

The Commission finds that the instructors' control over the construction process gives them the type of control over the sale of the home which subjects them to the

prohibition against being a party to the sale of the home. It would be a violation of the Ethics Act for either of the instructors to buy the home.

The issue of control is significant in the case. Indeed, the situation in the present case is very similar to the situation described in Advisory Opinion 1992-03 because Elliott exercised the same level of control over the renting of his equipment as the prosecutor had over the renting of the prosecutor's equipment.

Elliott also relies on W. Va. Code § 46-2A-201, the Statute of Frauds, to assert that the statute at issue is not "enforceable" because there was no "writing or signed agreement." Here, Elliott's argument misses the mark. West Virginia Code § 46-2A-201 *et seq* clearly addresses whether a lease contract may be enforced. In other words, this section addresses an instance where a party seeks to enforce a contract or disputes whether a contract exists for enforcement. In this instance, the parties have already performed. That is, rental equipment was provided and payment was made. The Conservation District is not claiming breach or that it did not get the use of the leased equipment. Likewise, Elliott is not contending that he was not paid. Rather, the facts here are not in dispute: both parties performed consistent with an agreement to utilize Elliott's equipment.

Indeed, West Virginia Code § 46-2A-201(4)(c) specifically indicates that where a lease does not meet the statute of frauds, it will still be enforceable with "respect to goods that have been received and accepted by the lessee." Elliott is hard-pressed to argue that he has performed consistent with the contract for rental of his equipment *and accepted payment for the same* and to also claim that no contract actually existed. Stated plainly: Elliott could have performed the work at issue and rejected payment. He did not. This argument is without merit.

Elliott also asserts that West Virginia Code § 6B-2-5(d) of the Ethics Act does not apply in this case. Elliott's contentions are inapplicable herein. Relying on cases that do not apply the

Act, Elliott asserts that the intent behind West Virginia Code § 6B-2-5(d) is to “prevent state officials from exercising undue influence” in order to confer a benefit to “some entity outside of the agency.” He then asserts that this case does not align with what he contends is the purpose of the Act.

In this instance, the specific language of West Virginia Code § 6B-2-5(d) clearly applies to the facts herein. Not only do the facts in this case represent a public contract as envisioned by the Act, but Elliott exercised the requisite control to violate the Act.

Alternatively, Elliott relies upon West Virginia Code § 6B-2-5(d) (2)(A) to assert that he only had a limited interest, or in this case, an interest that did not exceed “\$1,000 in the profits or benefits of the public contract or contracts in a calendar year.” Elliott then posits that the payments in this case were for “one-time uses” of his equipment totaling “less than \$1,000 in every given instance.” This argument simply ignores the clear and unequivocal evidence of record: in a single payment, Elliott was paid over \$9,000 for the use of his equipment. This is undisputed and the record offers no evidence to the contrary.

As it relates to a contract exemption, Elliott correctly points out that the possibility of the same existed. West Virginia Code § 6B-2-5(d) (4) states as follows:

Where the provisions of subdivision (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.

Elliott also accurately states that only the governmental body or agency may apply for the exemption and, here, the Conservation District failed to do so. However, Elliott cannot now assert that he is *exempt from the contract requirements because he did not receive a formal contract exemption from the Commission*. While the slippery slope that might emerge from such a holding

is significant, it is enough to conclude that a public employee may not violate the Act and then be absolved of the same by claiming the absence of the very mechanism that might have allowed him to be paid lawfully.

With regard to West Virginia Code § 6B-2-5(d)(3), Elliott asserts that this provision includes an “intent” and “control element” that Elliott lacked in this case. As discussed herein, the record is replete with uncontroverted evidence that Elliott exercised “control” over the very projects at issue and that he benefitted financially from the exercise of that control.

Elliott also asserts that he did not have guidance in his work and that it was the Conservation District’s “idea” to pay him, not his.” Whether Elliott’s actions were altruistic, a result of his work ethic, or a lack of understanding of the Act, it remains that he violated the statute. The undersigned once again notes that the record is devoid of any testimony from Elliott to actually shed light on this issue.

The Respondent’s control over whether the Conservation District undertook a project and what equipment was necessary to complete the project is the same or similar to the teachers’ control over what type of home to build and what materials to utilize in Advisory Opinion 1992-02. In both cases, critical decisions affecting the cost and awarding of the contract are made by public employees prior to the decision being placed in the hands of those with authority to actually enter into the contract.

The procedure followed by Elliott and the Conservation District for rental of equipment from Respondent may not have always involved “direct authority to enter into” the rental contract with Elliott, but it did at times and certainly did not remove control of the process from him. As indicated above, at the very least, he had control of the process right up until the final nod of approval by Mr. Nester.

As it relates to the Christmas bonus issue, Elliott asserts that he lacked the requisite intent to derive private gain for others while utilizing his office to provide the same. Based upon the record presented, the undersigned cannot reach this conclusion. Indeed, the record clearly demonstrates that Elliott intended to harvest certain trees using public employees and equipment on public work time; that he used the same equipment and employees to sell the timber at issue; and that he then earmarked the proceeds of the sale for those on the work crew (but not other personnel such as the office assistant). The net proceeds from the sale of the timber were not paid by check to the Conservation District. Nor was there evidence that the funds were ever placed in an account of the Conservation District. Elliott intended to create a fund for the bonus and used his authority or office to direct public workers to use public resources to achieve his goal. Elliott clearly intended to use his public office for private gain for others.

Elliott relies upon West Virginia Code § 6B-2-5(b) to assert that the use of time and equipment was “incidental” and that the gain was “de minimis.” Here, Elliott and his crew took on additional work by removing trees that were not a part of the original project. In fact, the owner, Harris, directed Elliott not to remove two trees that were not a part of the project. The money recovered was nearly \$700.00. The work performed was not incidental and the recovery was not de minimis. Stated differently, the work performed (removal of numerous trees) and the money recovered were not a mere “trifling” or insignificant as Elliott asserts.

Elliott also argues that the bonuses were given within the scope of employment, constituted employee pay, and were not private gain. The record establishes otherwise. The Conservation Board was not going to give the bonuses that year and the bonuses were not “employee pay.” The funds for the bonuses never entered the Conservation Board’s accounts.

In light of the foregoing, the undersigned now issues the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The paragraphs set forth in paragraphs 1 through 15 are restated and incorporated herein by reference.

2. Elliott, during his tenure as Conservation Technician with the Conservation District, was a “public employee” as defined in the Ethics Act, at W. Va. Code § 6B-1-3(j).⁴³

3. The Ethics Commission has jurisdiction over alleged violations of the West Virginia Ethics Act committed by public employees or officials, such as Elliott.⁴⁴

4. West Virginia Code § 6B-2-4(k) provides in pertinent part:

With respect to allegations of a violation under this chapter, the complainant has the burden of proof.

5. West Virginia Code § 6B-2-4(s)(1) provides in pertinent part:

If the commission finds by clear and convincing evidence that the facts alleged in the complaint are true and constitute a material violation of this chapter

6. Clear and convincing evidence means that more than a mere scintilla of evidence has been presented to establish the veracity of the allegations of abuse and/or neglect, but it does not impose as exacting an evidentiary burden as criminal proceedings which generally require proof beyond a reasonable doubt. *See Cramer v. W. Va. Dep't of Highways*, 180 W. Va. 97, 99 n.1, 375 S.E.2d 568, 570 n.1 (1988) (construing clear and convincing evidentiary standard of proof as “intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt in criminal cases”). *See also In re F.S.*, 233 W. Va. 538, 546, 759 S.E.2d 769, 777 (2014) (per curium) (“It is imperative to note that the evidence in an abuse and neglect case does not have to satisfy the stringent standard of beyond a reasonable doubt; the

⁴³ August 22, 2023 Transcript of Public Hearing p. 25

⁴⁴ W. Va. Code §§ 6B-1-1 through 6B-3-11.

evidence must establish abuse by clear and convincing evidence."); *In re A.M.*, 849 S.E.2d 371 (W. Va. 2020).

7. West Virginia Code § 6B-2-5(d) states:

Interests in public contracts.

(1) In addition to the provisions of §61-10-15 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.

(2) 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 \$1,000 in the profits or benefits of the public contract or contracts in a calendar year;
(Emphasis added).

8. West Virginia Code § 6B-2-5(d)(3) provides:

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.
(Emphasis added).

9. In Advisory Opinion 1992-03, a part-time prosecuting attorney asked if it was a violation of the West Virginia Ethics Act for the county commission to rent office equipment from the part-time prosecuting attorney for his use as prosecuting attorney at his public office. The Commission held:

The requestor states that any contract or agreement for the rental of computer equipment for use by the prosecuting attorney's office would be awarded and approved by the County Commission. The [W. Va. Ethics] Commission determined that the Requestor has control over the county's decision to enter into a contract with him due to his instigation of this contract, his close involvement with the ultimate decision as the attorney for the County Commission, and his inevitable role as supervisor or overseer of the contract which will be performed in his office. For these reasons it would be a violation of West Virginia Code § 6B-2-5(d)(1) for the requestor to rent his private office equipment to the county for use in his office as prosecuting attorney. (Emphasis added).

10. In Advisory Opinion 1995-02, a public employee served as a licensed psychologist and full-time unit supervisor for a state correctional institution. The public employee asked if he or she could bid on a contract to act as a consulting psychologist for the correctional institution.

The Commission held:

In this instance, the requester would like to contract as a consulting psychologist to provide psychological services such as testing and evaluations, to a State Institution. He would provide these services during his off-duty hours or reschedule his regular work hours. However, the requester is also a full-time unit supervisor for this institution and his job responsibilities include overseeing the staff and ensuring that the procedures and instructions of the consulting psychologist are administered properly.

Pursuant to WV Code §6B-2-5(d)(1) a public employee may not have more than a limited interest in the profits or benefits of a public contract over which he may have direct authority or control. Although any contract for psychological services will be awarded and approved by the State Division in conjunction with the Acting Warden and Business Manager of the Institution, the Ethics Commission has previously held that an individual has control over a contract as contemplated by WV Code §6B-2-5(d)(1) if he oversees the administration of the contract or if he monitors or supervises the services provided under the contract. Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the requester to contract to provide services to the State institution since he is employed by this institution as a supervisor and as such has authority or control over a contract in which he has more than a limited interest. (Emphasis added).

11. In Advisory Opinion 1999-02, a Multicounty Vocational School Instructor asked whether it would be a violation of the Ethics Act for him to bid on the School's sale of a modular home constructed by its students as an instructional project. The Commission held:

The Ethics Act prohibits public servants from being a party to or having a personal financial interest in a public contract, purchase or sale that their public position gives them the authority to (1) award or (2) control. The sale of the modular home is a public transaction in which the School's instructors may not have a personal financial interest, if they have the authority to award or control the transaction.

It is clear that the instructors do not have the authority to award a contract of sale for the home. However, they do exercise considerable control over the construction of the home. They select the type of home to be built and decide the type and quality of materials to be used in its construction. Although there is no suggestion they have done so, their positions do give them the ability to fashion a home to satisfy their own personal needs and tastes.

The Commission finds that the instructors' control over the construction process gives them the type of control over the sale of the home which subjects them to the prohibition against being a party to the sale of the home. It would be a violation of the Ethics Act for either of the instructors to buy the home.

12. West Virginia Code § 6B-2-5(b) states:

Use of public office for private gain. - (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain. (Emphasis added).

Count One

13. It has been proven by clear and convincing evidence that Elliott had a financial interest in the rental contracts which exceeded \$1,000.00 in a calendar year 2018 in violation of

West Virginia Code § 6B-2-5(d). Elliott had control of selecting the projects to be undertaken; the contracts for rental of his equipment by virtue of the facts that he chose the equipment needed for a project, suggested the rental of his equipment, and oversaw the use of the equipment rented from himself.

Count Two

14. It has been established by clear and convincing evidence that Elliott used the proceeds of the lumber sale, to which the Conservation District was entitled, for the private gain of his work crew in violation of West Virginia Code § 6B-2-5(b) by giving the work crew members a bonus and allowing one employee to keep \$134.62 from the lumber sale. The total financial gain to others was \$819.48.

PROPOSED SANCTIONS

The Commission proposes that the following sanctions be imposed upon Elliott:

1. A Public Reprimand relating to both counts;
2. The Respondent shall repay Tygarts Valley Conservation District \$9,202.50, which is the amount he received from the Tygarts Valley Conservation District for the rental of his equipment to the District, and
3. The Respondent shall pay Tygarts Valley Conservation district \$819.48 for the value of the trees sold as part of the May 2018 project.
4. The Respondent shall pay a fine in the amount of \$5,000.00 to be paid to the West Virginia Ethics Commission for his violation of the Ethics Act in Count One;
5. The Respondent shall pay a fine in the amount of \$1,000.00 to be paid to the West Virginia Ethics Commission for his violation of the Ethics Act in Count Two;

6. The Respondent shall reimburse the West Virginia Ethics Commission for the actual costs of investigating and prosecuting the violations;

7. The Respondent shall undergo training on the West Virginia Governmental Ethics Act, either in person or by viewing the training provided on the Ethics Commission's website, at ethics.wv.gov;

Entered this 26th day of October, 2023.



JEFFREY G. BLAYDES
HEARING EXAMINER

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

In Re:

DANIEL ELLIOTT,

VCRB 2020-71

**Former Conservation Technician,
Tygarts Valley Conservation District,
Respondent.**

CERTIFICATE OF SERVICE


I, Kimberly B. Weber, Executive Director of the West Virginia Ethics Commission, do hereby certify that I mailed a true and complete copy of the foregoing **FINAL DECISION AND ORDER** on December 7, 2023, to:

Via U.S. Mail and Certified Mail, Return Receipt Requested:

Daniel Elliott
1715 Glen Falls Road
Clarksburg, WV 26301-9007
Respondent

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