

CONTRACT EXEMPTION NO. 2008-10

Issued on September 4, 2008 By the

WEST VIRGINIA ETHICS COMMISSION

CONTRACT EXEMPTION SOUGHT

The **Webster County Commission** seeks an exemption to allow it to rent office space from the County Prosecutor, Dwayne C. Vandevender, to house the Office of the Prosecuting Attorney for a temporary period of time.

FACTS RELIED UPON BY THE COMMISSION

In 2001, Dwayne Vandevender was elected part-time prosecutor for Webster County. While serving as the part-time prosecutor, he also had a private law practice. Vandevender operated the Prosecutor's Office out of a building controlled and owned by a corporation, in which he was principal shareholder. Consistent with the practice of his two predecessors, Vandevender allowed the County to use his office space at no charge to the County because the space available through the County Commission was too small and insufficient for the needs of the Prosecutor's Office.

On July 1, 2008, Vandevender became the full-time Prosecuting Attorney for Webster County. He has discontinued his private law practice.

Initially, he was going to allow the County Commission to continue to use his privately owned office space rent-free until the County Commission renovated the third floor of the County Courthouse. It was anticipated that these renovations would be completed by the spring of 2009 and that the new space would house the office of the Prosecutor and Family Court Judges. Until the renovations were complete, Prosecutor Vandevender planned on allowing the County Commission to continue to utilize, at no charge, his private office space; provided that, the County paid for the utilities for the portion of the building used by the Prosecutor. The County requested and received a contract exemption from the Ethics Commission to allow it to pay for the utilities. See C.E. 2008-09.

Now, the County has discovered there is insufficient space to house both the Prosecutor's Office and Family Court on the third floor of the Courthouse. The third floor of the Courthouse will be used for the Family Court system. The County must now consider other locations for the Prosecutor's Office. This process will take some time. The County intends to seek funding, possibly through grant monies, to purchase and renovate a building near the Courthouse for this purpose. In the interim, the County Commission wants to rent Prosecutor's Vandevender's space for a period of approximately 3 years.

Prosecutor Vandevender has agreed to rent the space to the County Commission at a rate of \$475.00 per month which includes utilities. It is estimated that the utilities cost approximately \$400.00 to \$450.00 per month. Hence, once the utilities are paid, Prosecutor Vandevender, in his private capacity, will receive approximately \$25.00 to \$50.00 per month in gross rent. The rent price would also include some office furnishings such as computer desks, executive desks, a conference table, book shelves, chairs and basement storage files.

The Requester states that there are only a couple of other buildings with office space for rent in Webster Springs, the county seat. However, due to insufficient space, deterioration or distance from the Courthouse, none of these buildings are suitable to house the Prosecutor's Office. The space owned by Prosecutor Vandevender is within easy walking distance of the Courthouse, contains sufficient space and has already been renovated to house a law office. A building located near the Courthouse is for sale. Some day the County may purchase this building or another building which suits its needs. However, at present the County wants to consider various funding options before it commits to purchasing a new building.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or 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.

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be party to or have an interest in ... a contract which such official or employee may have direct authority to enter into, or over which he or she may have control

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality ... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part that ... It shall be unlawful for ... any elected county official ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member ... he may have any voice, influence, or control.

W. Va. Code § 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section would result in the loss of 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 a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

The Ethics Act

Pursuant to W. Va. Code § 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official.

The Ethics Commission may grant exemptions from the prohibitions in this code section if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. In the present case, the County Commission has the opportunity to lease space in a building owned by the Prosecutor at a rate of \$475.00 per month, which includes utilities and some office furnishings. The County has a duty to provide County Officials suitable office space where the business of the County may be conducted in an efficient manner. Traditionally, the Office of the Prosecuting Attorney is located in or near the Courthouse to allow the Prosecutor easy access to the Court and other County officials. At present, it does not appear that there is any other suitable space within walking distance of the Courthouse, particularly at the rental rate being offered by Duane Vandevender in his private capacity. In the opinion of the Commission, it would impose an undue hardship on the County to require it to expend additional County funds to lease space when the office space currently being used is available for rent at the rate of \$475.00 per month, including utilities and some office furnishings.

West Virginia Code § 61-10-15

W. Va. Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds from a

public contract over which those officials may exercise “voice, influence, or control.” Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

Once again, the Legislature amended W. Va. Code § 61-10-15 to allow the Ethics Commission to grant exemptions for the prohibitions in this code section if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. For the reasons set forth in the preceding section, the Ethics Commission grants an exemption to this prohibition.

The exemptions to these code provisions are limited as follows: First, the exemption is effective until September 5, 2011, a three year period. If at that time the County Commission seeks to continue this arrangement, and if Duane Vandevender is still the Prosecutor, it shall seek another contract exemption from the Ethics Commission. Second, County funds may not be used to make repairs or capital improvements to the office space until and unless it first seeks advice from the Ethics Commission. Third, the Prosecutor may not use his public position to receive any special treatment for his building, for as long as he remains County Prosecuting Attorney.

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

s/s
R. Kemp Morton, II