

CONTRACT EXEMPTION NO. 2010-05

Issued On August 5, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Randolph County Board of Education** seeks an exemption to permit it to continue making purchases from a store where newly elected member David Kesling is employed as the store manager and owns shares of stock.

FACTS RELIED UPON BY THE COMMISSION

For the past twenty years, the staff and personnel of the central office and each of the sixteen schools overseen by the Randolph County Board of Education have purchased supplies and equipment from a Walmart Superstore located in Elkins, West Virginia. The total purchases by the Board of Education and its member schools (collectively "BOE") have ranged from \$9,500 to \$42,000 annually over the last ten years.

On July 1, 2010, David Kesling took office as a new member of the Randolph County Board of Education. His term of office will end on June 30, 2014. Mr. Kesling is also the store manager of the Elkins Walmart.

In addition to his salary, he receives bonuses based upon the sales at the Elkins Walmart store. Additionally, unrelated to his position, Mr. Kesling owns shares of stock in the parent company of his store, Wal-Mart Stores, Inc. However, his percentage of shares are insignificant to the overall total shares of Wal-Mart Stores, Inc.

According to the Requester, the BOE uses the Elkins Walmart due to its location, the economical prices, and the ability to use a Walmart credit card. The Requester states that Walmart is the only local shopping vendor that offers a complete line of supplies, materials, and food items. The Elkins Walmart is the only Walmart in Randolph County.

The BOE also maintains that the Elkins Walmart is the only local shopping vendor that does not require a purchase order. The Requester states that since it is a rural county, travel to the central office to obtain purchase orders can take as long as three hours round trip. Hence, the Requester maintains the availability of a Walmart credit card, and the absence of a requirement to obtain a purchase order, create a "substantial" savings in time and expense to it's central office and member schools.

Accordingly, the Requester maintains it will be an undue hardship for the BOE to require the excessive travel and cost to purchase necessary supplies and equipment at other locations, and/or to have it shipped. Therefore, the Randolph County BOE seeks an

exemption to allow its member schools, and central office, to continue making purchases at the Elkins Walmart.

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 or appointed public 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 state, county, ... or other governmental agency, 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: “It shall be unlawful for any member of a county board of education, . . . 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.”

However, W.Va. Code § 61-10-15(e) states “the provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and

(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.”

Finally, W. Va. Code § 61-10-15(h) 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 and West Virginia Code § 61-10-15

The Ethics Act prohibits public servants, including elected members of a County Board of Education, from having 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. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

In addition to the Ethics Act, elected members of the County Board of Education must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise “voice, influence, or control.” Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition under W.Va. Code § 61-10-15 does not have a \$1,000.00 threshold.

BOE Member has a Pecuniary Interest

The Commission’s initial inquiry is whether Mr. Kesling has a prohibited pecuniary interest. He is the full-time store manager of the Elkins Walmart, and, as such, is the chief administrative officer of the store. He is a salaried employee, and receives bonuses based upon his store’s sales volume. Further, Mr. Kesling owns shares of Walmart.

W.Va. Code § 61-10-15(e) states that the prohibitions from contracting do not apply to any person who is **a salaried employee** of a vendor or supplier under a contract subject to the statute if the employee of the vendor “. . . (2) Is not an owner, **a shareholder**, a director or an officer of a private entity under the contract; (3) Receives no commission, **bonus** or other direct remuneration or thing of value by virtue of the contract; . . .[.] (emphasis added).

Accordingly, since he is both a shareholder and recipient of bonuses based upon the sales of his store, Mr. Kesling has a prohibited pecuniary interest in the purchase of goods by the BOE from the Elkins Walmart. See W.Va. Code § 61-10-15.¹ Additionally, since he is a shareholder of Walmart, Inc., the BOE is precluded from making any purchases from any other Walmart store, including on-line purchases. Finally, although moot given the absolute prohibition under § 61-10-15, those purchases in excess of \$1,000.00, violate W.Va. Code §6B-2-5(d) of the Ethics Act because of the BOE member's interest in the profits.

Therefore, in order to make any further purchases from any Walmart store, the BOE must obtain an exemption under both the Ethics Act and W.Va. Code § 61-10-15.

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. Similarly, under W.Va. Code § 6B-2-5(d) of the Ethics Act, the Commission may grant an exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of the affected government body. Since the factors to be considered under both provisions are similar, the analysis will be combined and shall be deemed applicable to both statutory prohibitions.

In this matter, the BOE maintains that Walmart is the only vendor which does not require a purchase order prior to making a purchase. If prohibited from shopping at the Elkins Walmart, the Requester maintains that school employees and staff will need to first travel to the central office to obtain a purchase order, and then travel to another location to purchase the supplies. The BOE asserts that this creates a hardship, causes excessive cost, and substantially interferes with its operations. In particular, the Requester notes that travel from a rural county school could require as much as a three-hour round-trip to secure a purchase order.

¹ However, if Mr. Kesling is not a shareholder and does not receive a bonus based upon purchases by the BOE, then he would no longer have a prohibited pecuniary interest. W.Va. Code § 61-10-15(e). Rather, he would only be a salaried employee and the BOE could continue making purchases from the Elkins Walmart.

The Requester further states that due to the small size of its schools and a reduced school budgetary allotment, the savings provided by shopping at the Elkins Walmart are substantial in time and expense.

While the Commission is cognizant of the economic savings that may be obtained by shopping at a Walmart, the BOE has not made sufficient showing to justify the granting of an exemption. In particular, the Commission notes that there are multiple equivalent stores (e.g. K-Mart, and Big Lots) within a close vicinity to the Elkins Walmart. The BOE has failed to make a showing that the purchases at a competitor store would be excessively higher and/or that the supplies and items purchased at the Elkins Walmart are unavailable at another location.

Further, the Commission is confused by the hardship argument of the BOE with respect to purchase orders. On the one hand, the BOE states that it would be a hardship for a rural school in the lower part of the county to travel to the central office in Elkins to obtain a purchase order prior to purchasing supplies. Yet, on the other hand, the BOE desires an exemption to allow the same rural school to travel to the Elkins to purchase supplies from the Elkins Walmart.

Finally, the Requester has not demonstrated that the prohibition against making further purchases at the Elkins Walmart will substantially interfere with the operations of the BOE. Given the total amount of purchases by the BOE annually and the availability of other vendors in close proximity, the Commission finds that upholding the prohibition against purchases at the Elkins Walmart will not have a substantial and significant impact upon the operations of the BOE.

Accordingly, the Commission hereby denies the Requester's request for an exemption. While the Commission is acutely aware of the economic constraints placed upon the BOE, it is mandated to uphold the spirit and intent of the Ethics Act, and its companion statute W.Va. Code § 61-10-15. Allowing the BOE to continue to make purchases from a store in which one of its members receives a bonus based upon the store sales creates an appearance of impropriety, and is expressly prohibited by the criminal statute.

However, the Commission does not believe an absolute prohibition should apply to purchases from **all** Walmart stores. Mr. Kesling's bonuses are based upon sales at the Elkins store. He receives no remuneration for purchases from other Walmart stores. However, as a shareholder, albeit an extremely minor shareholder, Mr. Kesling continues to have a prohibited pecuniary interest from all other Walmart stores and online purchases. The Commission finds that prohibiting the BOE central office, and its member schools, from making purchases at other Walmart stores, or online, would be an undue hardship and substantially interfere with school operations. This would especially be true for those schools located in the southern part of the county where there may be a closer Walmart than the Elkins Walmart store.

Therefore, the Commission hereby grants a **limited exemption** to the BOE, and its member schools, to purchase supplies and items from any Walmart store, including on-line purchases, except the Elkins Walmart. Those schools which were previously making purchases from the Elkins Walmart, including the BOE central office, may no longer make purchases from, nor utilize the services of, the Elkins Walmart while Mr. Kesling is a member of the Board of Education.

BOE Member Recusal

Since the Commission has granted a limited exemption for the purchase of items at other Walmarts, Mr. Kesling must recuse himself from any and all discussions and voting relating to purchases at any Walmart store. This includes approval of itemized expenses, payment of Walmart credit cards and/or authorizing purchases at other Walmart stores.

Pursuant to W.Va. Code § 6B-2-5(j), for his recusal to be effective, Mr. Kesling must excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his interests, and recusing himself from voting on the issue.

Temporary Exemption

Additionally, the Commission would note that the BOE was proactive in seeking the contract exemption shortly after Mr. Kesling took office on July 1, 2010. Unfortunately, the timing of this matter creates a potential for confusion and uncertainty as to when and where purchases may be made. In that regard, the Commission is mindful that schools in Randolph County are in the process of finalizing preparations for the start of the school year. Some schools may be in need of immediate purchases and/or may have unknowingly already made purchases. The Commission does not desire to impede the pre-planned operations and expenses of a school, nor unnecessarily create confusion during the early part of the school year.

Therefore, based upon the circumstances presented, the Ethics Commission hereby grants a limited, temporary exemption until **October 8, 2010**, to allow the BOE central office and member schools to continue making purchases from the Elkins Walmart. This will allow for an orderly transition to the school year, and allow the BOE an opportunity to make appropriate arrangements for other vendors or expenses.

Finally, while the Commission has not been presented with sufficient evidence to warrant issuance of an exemption, there may be specific items which the BOE has not fully contemplated or presented for consideration. If the BOE is able to demonstrate with specificity a hardship as to a particular item which is only available for purchase at the Elkins Walmart, the Commission would reconsider an exemption.

In conclusion, 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.



Jonathan E. Turak, Acting Chairperson