

## CONTRACT EXEMPTION NO. 2014-01

Issued on May 1, 2014 by

### THE WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

The **Webster County Commission** seeks another Contract Exemption to allow it to continue to rent office space from the County Prosecutor to house the Office of the Prosecuting Attorney.

#### FACTS RELIED UPON BY THE COMMISSION

This is the latest in a series of Contract Exemption requests, submitted by the Webster County Commission to allow the County, to continue renting office space from the County Prosecutor, Dwayne Vandevender.<sup>1</sup> On April 12, 2012, the Ethics Commission granted the most recent exemption request effective until July 1, 2014. Contract Exemption 2012-01. The Webster County Commission again seeks permission for the County Prosecutor “to remain in his own building, while the county builds a new 911 Center”. The request letter further states, “A time period for this exemption is not being requested although a year would suffice to then reevaluate the situation.” The County Commission included a timeline with its request showing action taken on the new facility from August 2010 through November 2013.

The County Commission also provided a copy of the existing lease with Mr. Vandevender’s company, Vandycorp, Inc. The lease is for a term of one year, with the option for two renewals, and a potential increase in the amount of rent with each renewal. From 2008 to 2012, the rent increased from \$475/month to \$500/month.

According to the Requester, since the issuance of Contract Exemption 2012-01, the Webster County Commission has been notified that there is other available office space to house the Office of the Prosecuting Attorney. The exemption request states that this alternative would result in moving the office twice—once the current exemption expires and again after the new 911 Center is complete. Otherwise, the County Commission did not provide any other details to demonstrate that a move to another location would result in excessive cost, undue hardship, or other substantial interference with government operations.

According to the Ethics Commission’s independent investigation, there is at least one other available property that would cost the same to rent, although the County

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<sup>1</sup> A summary of the factual background and historical exemption requests may be found in Contract Exemption 2011-03, and is hereby incorporated by reference. See also Contract Exemptions 2008-09, 2008-10 and 2012-01.

Commission would have to pay utilities. Owned by the Town of Webster Springs, the alternative office space consists of a newly renovated building within a few hundred yards of the courthouse, and is closer to the courthouse than the office space currently rented. There is street parking available with no meters. There are three offices, a room which could be used as a file room, a large kitchen area and a large bathroom, but not much of a lobby area. The property is approximately 1,000 square feet.

According to the County's representative, the Office of the Prosecuting Attorney employs an assistant prosecutor, two secretaries, and one part-time transcriptionist.

The Webster County Commission voted 2-1 to seek this exemption.

### **CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-2-5(b)(1) reads:

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:

[N]o 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....

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 government operations, the affected government body may make written application to the Ethics Commission for an exemption from the prohibition.

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

It is unlawful for 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) 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**

Both the Ethics Act and W.Va. Code § 61-10-15 prohibit county public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public officials away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

In 2001, Dwayne Vandevender was elected part-time prosecutor for Webster County. During this time, Vandevender ran the Office of the Prosecuting Attorney and his own private office out of a building controlled and owned by a corporation, in which he was principal shareholder. Following the practice of his two predecessors, Vandevender used his own office, at no charge to the County, because the space available through the County Commission was small and insufficient for the needs of the Office of the Prosecuting Attorney.

In 2008, Mr. Vandevender became the elected full-time Prosecuting Attorney and the County did not have office space in the courthouse to house the Office of the Prosecuting Attorney. Mr. Vandevender offered to allow the County Commission to continue to use his privately owned office space that he had used while he was the part-time prosecutor until the County Commission could obtain adequate office space.

This contractual relationship between the County Commission and the County Prosecutor created a prohibited interest in a public contract, and necessitated a Contract Exemption. Specifically, County Prosecuting Attorneys have the requisite control over County contracts under both the Ethics Act and W. Va. Code § 61-10-15. Advisory Opinions 2010-24 and 2013-08. Accordingly, the County Commission sought a Contract Exemption from the Ethics Commission. Based upon the circumstances, the Ethics Commission generously granted a three-year exemption to allow the County Commission sufficient time to acquire new office space for the Office of the Prosecuting Attorney and an orderly transition from Mr. Vandevender's privately-owned office space. Contract Exemptions 2008-09 and 2008-10.

For three years thereafter, however, the County Commission failed to take adequate steps to remedy the lack of an office space. Instead, when the three-year exemption expired, the County Commission sought another exemption. The Ethics Commission denied the request because the County Commission did not provide information reflecting its attempts to find office space to house the Office of the Prosecuting Attorney, but granted a four-month temporary exemption to gather the necessary information. Contract Exemption 2011-03.

Thereafter, the County Commission embarked on a plan to build a new 911 Center. Upon completion, office space in the courthouse will be free to house the Office of the Prosecuting Attorney. As a result, the Ethics Commission granted another exemption, and stated, "The Ethics Commission further directs the County Commission that time is of the essence, and due diligence should be taken to complete construction and resolve this situation before the expiration of this exemption." Contract Exemption 2012-01.

Notwithstanding the passage of six years, little progress has been made on the completion of the 911 Center. Further, there is no indication that the County Commission has engaged in any effort to identify another suitable location.

As with all Contract Exemptions, the Requester must demonstrate that the prohibitions of the Ethics Act and W.Va. Code § 61-10-15 would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. Based upon the limited information provided by the County Commission and the Ethics Commission's own investigation, the Ethics Commission hereby finds that an exemption is **not** warranted since there is no of evidence that moving the Office of the County Prosecutor to another location would result in excessive cost, undue hardship, or other substantial interference with government operations.

Accordingly, the Ethics Commission hereby **denies** the County Commission's request for another Contract Exemption to allow it to continue to rent office space from the County Prosecutor to house the Office of the Prosecuting Attorney. Since Contract Exemption 2012-01 expires on **July 1, 2014**, the County Commission must proceed with due speed to ensure that the Office of the Prosecuting Attorney is relocated by that date to avoid violating the Ethics Act's prohibition against personal interests in public contracts.



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Father Douglas Sutton  
Acting Chairperson