

CONTRACT EXEMPTION NO. 2014-02

Issued On September 4, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Wyoming County Health Department** seeks a contract exemption to allow its governing board to enter into a contract with a local physicians group where the governing board's chairperson resides with the senior physician in the group, and the senior physician's son is the Health Officer for the Wyoming County Health Department.

FACTS RELIED UPON BY THE COMMISSION

County boards of health, which govern county health departments, are required to provide community health promotion, environmental health protection and communicable or reportable disease prevention and control pursuant to W. Va. Code § 16-2-11(a)(1)(i)-(iii). Further, boards of health may "provide primary health care services, clinical and categorical programs, and enhanced public health services" pursuant to W. Va. Code § 16-2-11(b)(1). "Local health departments" are defined by W. Va. Code § 16-2-2(n) as "the staff of the local board of health." Local health departments are charged with carrying out these requirements for their respective boards.

Accordingly, the Wyoming County Health Department (WCHD), as the staff of the Wyoming County Board of Health (BOH), provides family planning, breast and cervical cancer screenings and other medical services. The WCHD's current medical provider has given it two options to continue receiving these services. The first is to become a satellite organization of the health provider. This option has been determined by the Wyoming County Prosecutor¹ to be impermissible on legal grounds. The second option is to contract with the current provider and assume responsibility for malpractice coverage. This option was rejected as being purportedly outside the financial capabilities of the WCHD. The Requester explains that the administrators searched for alternate providers from areas as far away as Charleston, but that due to economic considerations no agreements could be reached.

The only feasible option available to the WCHD is to contract with a local physicians group for it to provide a nurse practitioner at an affordable rate which includes malpractice coverage.

The BOH, as the governing board of the WCHD, would vote on this contract. The BOH Chairperson, who is part-time, lives with the senior physician in the physicians group. The Chairperson's position is appointed by the County Commission. Further, the senior

¹ The County Prosecutor acts as statutory counsel for the Wyoming County Health Department.

physician's son is the health officer for the health department. The position of Health Officer is appointed by the BOH.

CODE SECTIONS RELIED UPON BY THE COMMISSION

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

[N]o elected official may be a party to or have an interest in a contract which such official may have direct authority to enter into, or over which he or she may have control: *Provided*, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body . . . *Provided, however*, That nothing herein shall be construed to 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)(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 § 61-10-15(a) states, in relevant part:

It is unlawful for any member of a county commission . . . 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, [or] supervisor . . . he or she may have any voice, influence or control[.]

Finally, 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 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.

ANALYSIS

Both W. Va. Code § 6B-2-5(d) and W. Va. Code § 61-10-15 prohibit public officials from having an interest in public contracts over which those officials have influence or control. W. Va. Code § 6B-2-5(d)(1), however, makes an exception for part-time appointed public officials as long as they recuse themselves from voting and from the deliberative process. W. Va. Code § 61-10-15 does not contain such an exception. The BOH Chairperson, based on the information provided, is a part-time official appointed by the County Commission.² Therefore, she can comply with the Ethics Act by recusing herself from voting and from the deliberative process.

With regard to the senior physician's son, he has no voice, influence or control over this contract in his position as Health Officer. Therefore, neither W.Va. Code § 6B-2-5(d)(1) or § 61-10-15(a) would prohibit the contract at issue.

However, the analysis is not concluded with these determinations. It also must be determined whether the BOH, as a county board, is subject to the strictures of W. Va. Code § 61-10-15. The Commission considered a similar situation in Advisory Opinion 2012-12. There the Commission found that "County Board of Health members and their Health Officers are subject to the stricter limitations in W. Va. Code § 61-10-15," including the prohibition against direct and indirect pecuniary interest in contracts.

The next issue, then, is whether the BOH Chairperson's relationship with the senior physician constitutes "pecuniary interest" for purposes of W. Va. Code § 61-10-15. The Ethics Commission addressed this interest in Advisory Opinion 2012-11, where it explained that "there is a rebuttable presumption that where two adults share a home or otherwise live together, regardless of whether it is a romantic or platonic relationship, they have at least an indirect financial interest in the employment contract of the other." Accordingly, W. Va. Code § 61-10-15 prohibits the contract because the BOH Chairperson lives with the head of the physicians group in question.

W. Va. Code § 61-10-15(h), however, permits the Ethics Commission to exempt agencies from this prohibition in part for "excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency." The WCHD has been presented with two legally or financially untenable options from its current medical service provider. It also has not been able to come to an agreement with providers in other counties because of financial restraints.


Based on the information provided, there are no other viable options available to the WCHD other than the local physician group. The Requester states that it will not be able to offer these medical services without the contract exemption. Further, without the

² See, e.g., School Board Advisory Opinion 2010-01, where the Commission ruled that Board of Health members are public officials under W.Va. Code § 18-5-1a(a).

exemption being granted herein, the WCHD is in danger of not being able to carry out the BOH's statutory duties. The Ethics Commission agrees with the Requester that these services are essential for the welfare of the citizens of Wyoming County. Therefore, the Ethics Commission finds that the WCHD will suffer undue hardship and substantial interference with its operations if it is not allowed to contract with the local physicians group.

Accordingly, the Ethics Commission hereby grants the WCHD an exemption to enter into a contract with the physicians group described herein for one contract period not to exceed two years. However, the BOH Chairperson must recuse herself from deliberation and voting on matters related to that physicians group. For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue. W. Va. Code § 6B-2-5(j)(3).

This decision is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as new or omitted facts may alter the analysis and render this decision invalid.


Robert J. Wolfe, Chairman
West Virginia Ethics Commission