

## CONTRACT EXEMPTION 2015-03

Issued on May 7, 2015, by

### THE WEST VIRGINIA ETHICS COMMISSION

#### EXEMPTION SOUGHT

The Little Kanawha Conservation District seeks an exemption to allow Calhoun County Conservation Supervisor Roger Collins to provide private lime delivery services to farmers, including those who seek reimbursement through the Conservation District's programs.

#### FACTS RELIED UPON BY THE COMMISSION

Mr. Collins operates a trucking service which hauls lime to farmers whose farms are located more than one mile from the state road.<sup>1</sup> Other trucking companies offer delivery of bulk, unbagged lime by dump truck only to the state road. Farmers then have no mechanism to transport the bulk lime to the location where it will be spread on their farms. Mr. Collins states that farmers pay for the lime hauled to their farms.<sup>2</sup> Mr. Collins further states that he does not advertise or solicit for this lime-hauling work. Mr. Collins states that he provided this lime-hauling service prior to taking office as a Conservation District Supervisor.<sup>3</sup> Mr. Collins further states that providing this lime-hauling service also benefits the Conservation District.

In support of the request for a contract exemption, the Little Kanawha Conservation District states that Mr. Collins is fulfilling his obligations in his position as Conservation District Supervisor. Little Kanawha Conservation District desires that Mr. Collins remain on its Board of Supervisors. If Mr. Collins is forced to choose between his personal business and his position on the Little Kanawha Conservation District Board of Supervisors, this will create an extreme hardship on the District, according to Mike Nichols, Chairman of the Little Kanawha Conservation District Board of Supervisors, as well as Jessica Nichols, District Manager. The District would be required to begin a

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<sup>1</sup> Based on results of soil testing, farmers apply a recommended amount of lime to their soil to produce optimal conditions for their individual farm's needs.

<sup>2</sup> The payment process relied upon by farmers to pay for lime hauling varies depending on the individual case. Some farmers pay directly for lime-hauling services. Other farmers may be program participants who apply to the Conservation District Board of Supervisors to receive reimbursement for lime-hauling services.

<sup>3</sup> Mr. Collins primarily provides this lime-hauling service in Calhoun County, West Virginia, where steep terrain presents delivery challenges.

replacement process for Mr. Collins' position.<sup>4</sup> This replacement process is a lengthy and costly process for the District. The District therefore states that it is in its best interests for Mr. Collins to maintain his current position.

Furthermore, if Mr. Collins is unable to continue offering lime delivery services more than one mile from the main road, farmers who are the recipients of this service will also suffer extreme hardship. This lime delivery service is not otherwise available to them from other vendors.

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

W.Va. Code § 6B-2-5(b) prohibits public officials from knowingly and intentionally using their offices or the prestige thereof for their own private gain or that of another person.

W.Va. Code § 6B-2-5(d)(1) provides that no elected official or business with which he or she is associated 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.

W.Va. Code § 6B-2-5(d) (3) provides that 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 or her 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 § 6B-2-5(4) states, in pertinent part, that where the provisions of subdivisions (1) and (2) of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption.

W.Va. Code § 6B-2-5(j)(1)(A) provides that public officials may not vote on a matter in which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

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<sup>4</sup> One member of the Little Kanawha Conservation District Board of Supervisors recently tendered his/her resignation and must be replaced. Therefore, the membership of the Little Kanawha Conservation District Board of Supervisors currently has one vacancy of 10 total positions. Two members represent each county within the Little Kanawha Conservation District.

W.Va. Code § 6B-2-5(j)(3) provides that 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.

### **ADVISORY OPINION**

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. This prohibition contains an exception for part-time appointed officials, but there is no exception for elected officials. There is also an exception for contracts which do not exceed \$1,000 per calendar year. The Conservation District Supervisor is an elected member of the Little Kanawha Conservation District Board of Supervisors and as such, is subject to the prohibitions of W.Va. Code § 6B-2-5(d). The Ethics Commission must therefore determine whether the reimbursement of a participating landowner by the Conservation District constitutes a contract in which the elected member of the Little Kanawha Conservation District Board of Supervisors has a financial interest.

Since the Conservation District Board of Supervisors approves the reimbursement applications of some landowners who procure lime via truck delivery to their farms, each Conservation District Board member has direct authority or control over these applications.<sup>5</sup> If a Conservation District Board member provides the goods or service to the landowner, then the Conservation District Board member has a direct financial interest in the benefits of the contract. Although farmers pay for the service out of pocket prior to reimbursement by the District (where applicable), this fact does not solve the problem given that the transaction is between the landowner and an elected member of the Little Kanawha Conservation District Board of Supervisors.<sup>6</sup> (See Advisory Opinion 2013-25.)

An exception to the public contract restrictions in the Ethics Act exists if it is a continuing contract which the governing body entered into prior to the election or appointment of the affected member to the governing body. Mr. Collins apparently provided lime-hauling services prior to his service as a member of the Conservation District Board of Supervisors. However, this exception is inapplicable, as the governing body itself, the Conservation District, is not a party to the contract. Further, the contracts at issue are not continuing in nature, but rather a series of separate individual contracts. None of these contracts were agreed upon or entered into prior to Mr. Collins' service. Therefore no exception exists based on these contracts predating Mr. Collins' service as a Conservation District Supervisor.

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<sup>5</sup> After initial request and approval of a reimbursement for lime purchase and delivery, a farmer does not appear again for further action by the Conservation District Board of Supervisors. After lime is spread, federal entities verify completion with the recipient farmers.

<sup>6</sup> For purposes of the prohibitions in W.Va. Code § 6B-2-5(d), it is not sufficient for public officials to recuse themselves from voting.

The Little Kanawha Conservation District states that absent Mr. Collins' delivery services, lime delivery would no longer be available to farmers past one mile from the state road. As a result, those farmers would experience undue hardship without access to sufficient lime for their farms. In Contract Exemption 2007-01 and Advisory Opinion 2013-25, the Ethics Commission previously noted that in most cases hardship falls on the governing body, but in certain circumstances, it may be extended to the citizens or Conservation District participants.

Here, the District would suffer undue hardship and substantial interference with governmental operations because removing one of the two elected supervisors would leave the county inadequately represented before the District. The legal requirements to become a supervisor will likely make replacing a supervisor difficult. Each county in a District elects two non-partisan supervisors.<sup>7</sup> A candidate for Conservation District Supervisor "must be a landowner and an active farmer with a minimum of five years' experience or a retired farmer who has had a minimum of five years' experience and must have the education, training, and experience necessary to carry out the duties required in this article."<sup>8</sup> Additionally, the governing statute requires Conservation Supervisors to "be persons who are by training and experience qualified to perform the specialized skill services which are required of them in the performance of their duties under this section and shall be legal residents and landowners in the District."<sup>9</sup>

**Based upon the information provided by the Little Kanawha Conservation District, the Ethics Commission finds that it has demonstrated that prohibiting Mr. Collins from continuing to operate his trucking service while serving as a county Conservation Supervisor will result in undue hardship to the District and its program participants as well as substantial interference with governmental operations. A contract exemption is hereby granted.**

**Mr. Collins must recuse himself from all votes related to any and all lime funds. For recusal to be proper, he must first fully disclose on the record his disqualifying interest in any matter before the governing body, then leave the room during the discussion, deliberation and vote on the matter. In addition, the minutes/record of the meeting must reflect the basis for the recusal and that the affected member left the room during all consideration, discussion and vote on the item under consideration.**

**This contract exemption is effective until May 7, 2016, at which time the District must submit a new request for an exemption if it seeks to continue to allow Mr. Collins to serve as a county Conservation District Supervisor while also operating his private trucking business.<sup>10</sup>**

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<sup>7</sup> W.Va. Code § 19-21A-6. Counties which meet the population requirements shall elect additional supervisors in accordance with this code section. *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> W.Va. Code § 19-21A-(7)(a).

<sup>10</sup> If Collins does not seek re-election, resigns, or is not re-elected, then this step is no longer necessary.

**If the Little Kanawha Conservation District applies for any other contract exemptions in the future which are based on the same facts presented here, the Ethics Commission will require information establishing the District's efforts to obtain the necessary lime delivery services from other vendors, and the results of these efforts.**

*The Commission notes that exemptions must be granted on a case-by-case basis.<sup>11</sup> 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.*

  
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Robert J. Wolfe, Chairperson  
WV Ethics Commission

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<sup>11</sup> In Contract Exemption 2013-06, the Little Kanawha Conservation District sought a similar exemption to allow Calhoun County Conservation District Supervisor Roger Collins to offer private lime delivery services for a cost-share program that the District offers. This prior contract exemption request was granted for one year based on the same facts.