CONTRACT EXEMPTION 2016-05

Issued on October 6, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Sheriff of Hardy County** requests an exemption to purchase emergency lighting equipment for the office's cruisers from a business owned by one of his deputies. He further requests an exemption to make future purchases at this business and at another business in which the employee has an ownership interest.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected County Sheriff. The Requester wants to purchase emergency lighting equipment for two of the office's cruisers from a business owned by a deputy in his office. He states that the cost of the equipment would be approximately $450 per unit per cruiser.

He states this cost represents a significant savings from the cost of $900 per unit per cruiser previously paid by the Sheriff's Office to another vendor. He states that the Deputy's business will also be able to deliver the items in a timelier manner.

The Deputy is a certified dealer for the equipment. If the equipment requires repairs, the Requester states it will not be repaired by the Deputy's business. Instead, it will either be sent to the manufacturer for repair or to another business.

The Requester has related that there are fewer than 15 deputies in his office. As it is a small office, everyone pitches in to meet the needs of the office.

The Deputy from whom he seeks to purchase the emergency lighting equipment has various skill sets. One of these skills is the ability to install lighting equipment on emergency service vehicles. The Deputy has in the past assisted the office with installing lighting equipment on its vehicles. The Deputy performs the work on the office's vehicles during his work shift. He is not paid additional compensation for this work.

The Deputy also has financial interests in two other businesses. According to the Requester, the Deputy recently "went into partnership with a local established business that the County has used to purchase supplies and/or equipment in the past, prior to the employee being involved in the business." This business sells electronic and computer equipment and related components. It also sells batteries and other similar items. It is an authorized RadioShack™ dealer. The Requester also seeks to continue making purchases from this business.

There is also reference in the Contract Exemption request that the Deputy owns a third business "relating to electronic equipment sales, repairs and installation." The Requester provides no information regarding what equipment or services his office may seek to purchase or use from this business.

Another skill set of the Deputy relates to computers and office technology. He is the Sheriff's Office's forensic examiner. His job duties include investigating cybercrimes and assisting with the forensic examination of computers and other electronic devices for criminal investigations. As it is a small office, the Deputy is also considered the technical specialist in the office. In this role, he assists in troubleshooting computer problems and fixing minor problems when he can.

The Requester states that deputy sheriffs below the rank of sergeant do not have voice, control or influence over purchases made by or on behalf of the Sheriff's Office. He states: "The employee is a full-time Deputy Sheriff who does not have any decision making authority to enter into contracts to purchase equipment."[1] The Requester also states, "There would not be any special treatment or compensation for either party involved in the contract."

The Requester states, "The employee's business would only be utilized in the event that he was the low bid on a contract." The Requester has clarified this representation. He states when the office purchases emergency lighting equipment, it generally obtains quotes but does not advertise for bids from the public. The majority of purchases made by the office from the Deputy's other businesses would not be put out for bid because of the low purchase prices.

PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or public employee may not knowingly and 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) states, in relevant part:

[1] The rank of the Deputy is "Deputy Sheriff 1st Class," a rank below sergeant.

[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)(2) states, in relevant part:

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

...

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 § 6B-2-5(d)(4) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

W.Va. Code § 61-10-15(a) states, in pertinent 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 ... [an] officer ..., he or she may have any voice, influence or control ....

ADVISORY OPINION

Both the Ethics Act, at W.Va. Code §§ 6B-2-5(b) and (d), and W.Va. Code § 61-10-15, a criminal misdemeanor statute that applies to certain county officials and employees, prohibit public servants from being a party to, or having a financial interest in, a public contract over which their public positions give them varying degrees of control. The Ethics Commission must determine whether, based upon the limitations in these Code sections, the Sheriff's Office may purchase emergency lighting equipment from the Deputy or make purchases from the other business in which he has an ownership interest.

W.Va. Code § 61-10-15 is more restrictive than the Ethics Act in that it prohibits certain public officials at the county level from having a pecuniary interest in public contracts if they have "voice, influence or control" over the contracts. The West Virginia Supreme Court has held that this Code section:

> [I]mplements the public policy of this State, and its provisions are clear and unambiguous. Although harsh, its objects and purposes are salutary. The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 132 W. Va. 865, 871, 53 S.E.2d 735, 739 (1949)

The Ethics Commission must consider whether the Deputy exercises voice, influence or control over the purchase of emergency lighting equipment by the Sheriff's Office. If so, the Sheriff may only purchase this equipment from the Deputy if the Ethics Commission grants the Sheriff's Office an exemption authorizing it to make the purchase.[2]

In Advisory Opinion 2013-15, the Commission found that the Sheriff's Chief Law Enforcement Deputy was a public official subject to the limitations of W.Va. Code § 61-10-15. *Id.* at page 5. The Commission further held that based upon the job responsibilities of the chief deputy, he was prohibited from entering into a contract to perform additional services for the County 911. *Id.* The Commission qualified its holding as follows: "This conclusion should not be construed as a finding that a law enforcement deputy or chief law enforcement deputy has voice, influence or control over every contract to which the sheriff is a party. Instead the finding herein as to the MOU (Memorandum of Understanding) and subsequent agreement is fact specific." *Id.*, fn. 2.

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[2] Further, if the Deputy is subject to the restrictions in W.Va. Code § 61-10-15, then it is not necessary for the Commission to analyze the application of the Ethics Act as it would be academic.

In Advisory Opinion 1999-02, the Ethics Commission ruled a multicounty vocational school instructor may not bid on the school's sale of a modular home constructed by its students. The Commission held: "It is clear that the instructors do not have the authority to award a contract of sale for the home. However, they do exercise considerable control over the construction of the home." *Id.* at page 2. In that Opinion, the Commission was examining what constitutes "control" for purposes of analyzing the public contract limitations in the Ethics Act. This same analysis is relevant to interpreting the limitations in W.Va. Code § 61-10-15, which extend to public servants in county government who exercise voice, influence or control.

Similarly, in Advisory Opinion 1995-02, the Commission held a public employee could not have an interest in a public contract being awarded by his agency. The Requester was a licensed psychologist at a state correctional institution and served as a supervisor. He wanted to hold a contract with the Institution to moonlight as a consulting psychologist to perform services such as testing and evaluating inmates. The Requester had no influence over the awarding of the contract; however, the Commission held that he could not hold this contract because his full-time job responsibilities included overseeing the consulting psychologist. The Commission reasoned that as a supervisor of the consulting psychologist, the Requester had the requisite authority or control over the contract.

The determination of whether the Deputy exercises voice, influence or control is a fact-specific determination made by examining his job duties and the structure of the office. In the present case, the Requester has made it clear that this Deputy, who holds a rank below sergeant, has no authority to enter into contracts on behalf of the office, *e.g.*, he has no signatory authority or authority to direct that certain purchases be made. Nevertheless, as demonstrated by the Advisory Opinions cited above, the exercise of "voice, influence or control" over a public agency's contracts, including purchases, extends beyond authority to financially commit the agency to a particular purchase.

In the present case, the Deputy is knowledgeable about the lighting equipment and he currently installs the equipment on the cruisers. He has acquired a general expertise in this area. Indeed, he has started a private business selling this equipment.

Due to his expertise relating to the installation of lighting equipment on emergency services vehicles, and due to the fact that his work duties include the use of this expertise to install lighting equipment on the Sheriff's Office's cruisers, the Ethics Commission finds he exercises influence and control over the purchase of emergency lighting equipment. Further, he may exercise influence over decisions by the office in regard to what constitutes a "fair price" for emergency lighting equipment. Therefore, the Commission finds for purposes of the application of W.Va. Code § 61-10-15 and related prohibitions that the Deputy exercises

"influence" and "control" over the public contract in question, *i.e.*, the purchase of emergency lighting equipment. [3]

EXEMPTIONS

Next, the Commission must determine whether to grant an exemption to the Sheriff's Office to purchase the two emergency lighting units from the Deputy. The Ethics Commission is authorized to exempt agencies from the prohibitions in W.Va. Code § 61-10-15 if the restrictions in this Code section "would result in ... excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency ..." W.Va. Code § 61-10-15(e).

Based upon the information provided, if the Sheriff's Office purchases two emergency lighting equipment units from the Deputy, the total cost will be $900 ($450 per unit). In contrast, if it purchases the units from its previous vendor, the cost will be $1,800 ($900 per unit). Based upon the foregoing, the Ethics Commission finds it would result in excessive cost and undue hardship to prohibit the Sheriff's Department from purchasing these two units from the Deputy.

Therefore, the Sheriff is granted an exemption to purchase two emergency lighting equipment units from the Deputy.[4] The Deputy's business may not be paid additional money to service the units.

If the Requester seeks future Contract Exemptions for the purchase of additional emergency lighting equipment from the Deputy, he must submit written evidence that an attempt was made to obtain quotes or bids from other vendors to ensure no other vendors are willing and able to sell the office comparable units at a comparable price.

Next, the Commission must determine whether to grant an exemption to the Sheriff's Office to purchase equipment from the Deputy's business which sells electronic and computer equipment and related components. This business also sells batteries and other similar items.

The Deputy has expertise in computer technology based upon his law enforcement training and duties. Additionally, due to this skill set, he serves as a technical advisor to the office for technological matters.

The Requester provides limited information about this other business or about the nature of the purchases his office anticipates making from it. The Requester and his office have been very cooperative in providing the Commission information. Nevertheless, the Commission is unable to determine whether an exemption is needed or warranted without

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[3] A deputy sheriff takes an oath of office. W.Va. Code § 6-3-1(a)(4). For this reason, and in accordance with Advisory Opinion 2013-15, the Commission finds that deputy sheriffs are subject to W.Va. Code § 61-10-15, which applies to certain county officials and employees.

[4] This exemption is also granted pursuant to W.Va. Code § 6B-2-5(d).

additional written information which sets forth: what items the office purchases from this business, the nature of the purchases, the costs of the purchases from this business by the Sheriff's Office for the last several fiscal years, whether the same items are available at other stores in the area at a comparable price, and whether the anticipated purchases relate to computer or technology equipment.

In conclusion, based upon the facts presented, applicable law and relevant Advisory Opinions, the Sheriff's Office may purchase the two emergency lighting units subject to the limitations outlined herein.

The Deputy must perform work relating to the sale of the emergency lighting equipment on his own time. He may not use public resources for his private business.

If the Requester wants the Ethics Commission to further consider his request for an exemption to purchase items from the Deputy's business which sells computers, related components and other items, he must submit another Contract Exemption request which includes the information outlined above. This same information would be required for the Commission to consider a Contract Exemption request for purchases from the third business which sells, repairs and installs electronic equipment.

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

Robert J. Wolfe, Chairperson
WV Ethics Commission