

Contract Exemption 2017-04

Issued on August 18, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **West Virginia Development Office** requests a contract exemption to attend the annual Business Summit hosted by the West Virginia Chamber of Commerce at The Greenbrier Resort. In addition, the **West Virginia Development Office** and the **West Virginia Tourism Office** request a Contract Exemption for future functions and/or events occurring at The Greenbrier Resort that represent business recruitment opportunities for West Virginia.

Facts Relied Upon by the Commission

The West Virginia Development Office (“WVDO”) is organized under the West Virginia Department of Commerce and is statutorily charged with fostering economic development on behalf of the State of West Virginia. W. Va. Code § 5B-1-2(3); W. Va. Code §§ 5B-2-1 through 5B-2-6. The executive director of the WVDO is mandated to “enhance economic growth and development through the development of a comprehensive economic development strategy for West Virginia.” W. Va. Code § 5B-2-2. “Comprehensive economic development strategy” is defined as:

[A] plan that outlines strategies and activities designed to continue, diversify or expand the economic base of the state as a whole; create jobs; develop a highly skilled workforce; facilitate business access to capital, including venture capital; advertise and market the resources offered by the state with respect to the needs of business and industry; facilitate cooperation among local, regional and private economic development enterprises; improve infrastructure on a state, regional and community level; improve the business climate generally; and leverage funding from sources other than the state, including federal and private sources.

Id.

The West Virginia Tourism Office (“WVTO”) is also organized under the West Virginia Department of Commerce and is statutorily charged with “develop[ing] and implement[ing] a comprehensive tourism advertising, promotion and development strategy for West Virginia.” W. Va. Code § 5B-2I-4(a). A “[c]omprehensive tourism advertising, promotion and development strategy” means:

[A] plan that outlines strategies and activities designed to continue, diversify and expand the tourism base of the state as a whole; create tourism jobs; develop a highly skilled tourism workforce; facilitate business access to capital for tourism; advertise and market the resources offered by the state

with respect to tourism advertising, promotion and development; facilitate cooperation among local, regional and private tourism enterprises; improve infrastructure on a state, regional and community level in order to facilitate tourism development; improve the tourism business climate generally; and leverage funding from sources other than the state, including local, federal and private sources.

Id.

The WVDO states that it has routinely attended functions at The Greenbrier Resort (“Greenbrier”) as part of its normal business operations. In this request, the WVDO seeks to attend the annual Business Summit of the West Virginia Chamber of Commerce (“Summit”) to be held at The Greenbrier later this month. The website of the West Virginia Chamber of Commerce describes the Summit as “the largest gathering of business, industry, financial, and political leaders from around our state.”¹ A registration fee, paid to the West Virginia Chamber of Commerce, is required to attend the Summit. A portion of the registration fee is used to pay expenses associated with the use of The Greenbrier’s facilities. Lodging, however, is not included with the registration fee. The WVDO’s registration fees will be approximately \$5,000.

The WVDO states that it will only be paying for lodging at The Greenbrier for WVDO employees. It will “provide on-site lodging for necessary personnel and host business prospects . . . to support its mission to recruit new and better jobs to West Virginia.” It anticipates total expenses to The Greenbrier to not exceed \$5,000 for meals and lodging. The WVDO states that the final amount owed for these events is typically less than the amount budgeted.

The WVDO states that it has attended the Summit in the past “to interact with business leaders from West Virginia to learn about their operations and identify opportunities to grow those companies.” While it does not have a list of attendees, the WVDO states that it is not uncommon for out-of-state businesses with interests in West Virginia to attend the Summit. The WVDO states that it “can meet and network with companies or professionals attending the event who may have interest in bringing business to the state.”

The larger exemption request on behalf of both the WVDO and the WVTO is to alleviate the need to seek event by event exemptions. For example, the WVDO states that it desires to continue to use The Greenbrier to host site location consultants who “act as intermediary counselors between their corporate clients evaluating significant capital investments and state economic development agencies representing potential locations for those investments.” The WVDO states it has no current plans to host these individuals at The Greenbrier but would like the flexibility to do so. The WVTO is also invited to attend events at The Greenbrier representing business recruitment opportunities and is seeking similar flexibility.

¹ 2017 Annual Meeting and Business Summit, West Virginia Chamber, <http://www.wvchamber.com/wcevents/eventdetail.aspx?eventid=311> (last visited August 11, 2017).

Provisions Relied Upon by the Commission

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

(B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

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 R. § 158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be “associated” with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

Advisory Opinion

The Ethics Act (“Act”) prohibits a public official or member of the official’s immediate family or business with which the official is associated from having more than a limited interest in the profits or benefits of a public contract over which the official has direct authority or control unless the governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d). The Ethics Commission will first analyze whether to grant a Contract Exemption to the WVDO to attend the Business Summit.

The Business Summit

The public contracts at issue here are the WVDO’s registration fee to attend the Summit, a portion of which will be used by the West Virginia Chamber of Commerce to pay for its use of The Greenbrier’s facilities, as well as the WVDO’s anticipated lodging and other expenses paid directly to The Greenbrier. The Greenbrier constitutes a business with which the Governor of West Virginia is associated for purposes of W. Va. Code § 6B-2-5(d) due to the Governor owning more than five percent of The Greenbrier’s total outstanding stock. W. Va. Code R. § 158-8-4. The WVDO anticipates the total expenses payable to The Greenbrier to not exceed \$5,000.

The Greenbrier has a direct financial interest in the WVDO’s lodging and other expenses paid to The Greenbrier. Additionally, The Greenbrier has an indirect financial interest in the WVDO’s registration fee. The Greenbrier’s financial interest in the registration fee is not precluded by the fact that the WVDO first pays the fee to the West Virginia Chamber of Commerce. Indeed, “[t]he Commission has consistently applied the Ethics Act’s prohibitions to relationships with subcontractors as well as contractors.” Advisory Opinion 2013-27; *see also* Advisory Opinion 94-22 (“Therefore, it would be a violation of WV Code §6B-2-5(d)(1) for the requester’s private company to enter into a public contract directly . . . or indirectly as a subcontractor to perform private work for that [public agency].”). Accordingly, the Commission finds that a business with which the Governor is associated, The Greenbrier, has more than a “limited interest”² in the WVDO’s public contracts.

A financial interest in a public contract alone is not enough to trigger the prohibition in W. Va. Code § 6B-2-5(d)(1). A public official must also have either direct authority or control

² The Ethics Act contains a “limited interest” exception to the public contract prohibition. W. Va. Code § 6B-2-5(d)(2); *see also* W. Va. Code R. § 158-8-3 (“A limited interest is an amount not to exceed \$1,000.00 in the gross revenues in a public contract or contracts per calendar year. The \$1,000.00 limit is applicable to gross revenues received through a public contract by a public official . . . or business with which the public official . . . is associated.”).

over the public contract in which the official has a financial interest. In this case, the Governor is the chief executive officer of the State of West Virginia and directly appoints the executive director of the WVDO who serves at the will and pleasure of the Governor. W. Va. Const. Art. 7 § 5; W. Va. Code § 5B-2-2(a). Furthermore, the Cabinet Secretary of the Department of Commerce, the Department under which the WVDO is organized, is appointed by and serves at the will and pleasure of the Governor. W. Va. Code § 5B-1-1. The Commission finds that the Governor has sufficient control over the public contracts of the WVDO with The Greenbrier for purposes of W. Va. Code § 6B-2-5(d)(1).

Therefore, unless it receives a Contract Exemption, W. Va. Code § 6B-2-5(d)(1) prohibits the WVDO from either directly contracting with The Greenbrier or indirectly through paying registration fees.

Excessive Cost, Undue Hardship or Other Substantial Interference

The Commission may grant an affected governmental body an exemption from the prohibition in W. Va. Code § 6B-2-5(d)(1) when it would result in excessive cost, undue hardship or other substantial interference with the operation of the governmental body. W. Va. Code § 6B-2-5(d)(4).

The WVDO states that “it would place a hardship on the agency and substantially interfere with its purpose if it is unable to attend the Business Summit because it is the only function of its kind during the year that convenes these businesses and their representatives in a single location.” The WVDO articulates that the benefits to the WVDO through attending the Summit are generally intangible and difficult to quantify because the WVDO “builds good will and fosters or nurtures relationships that lead to positive impacts to the West Virginia economy over time.” The WVDO desires to be at the Business Summit so that its representatives would be available to meet with interested parties if such a business was inclined to interact and learn more about business opportunities in the state.

The WVDO states that “[w]hile not necessarily associated with the Business Summit, . . . many of the major investments that have been announced over the past years . . . have involved meetings at The Greenbrier Resort.” It states that The Greenbrier is a unique venue in West Virginia because “it has a national reputation and is very effective in demonstrating West Virginia’s greatest assets: its people, natural beauty, and recreational opportunities.” The WVDO states when it uses The Greenbrier, its clients and prospects “leave with a positive opinion of the state which is critical when selling the state as a location to invest substantial sums of money and resources.” If it loses The Greenbrier as a venue to host prospects and clients, the WVDO states it would sacrifice one of its most effective tools to showcase the state.

The Ethics Commission’s Analysis

The Commission does not doubt the WVDO’s judgment that the Summit is effective as a business recruitment tool. See Advisory Opinion 95-28 (“The determination of whether [an] activity will actually benefit the state by promoting tourism and economic development is an issue for the [agency] to resolve.”). The Commission nonetheless expresses difficulty in granting an exemption in this case. As the WVDO states, the

benefits of attending the Summit are intangible and difficult to quantify. If the WVDO is prohibited from participating in this year's Summit, it is not a certainty that the state will lose out on significant investment opportunities.

If the WVDO is prohibited from attending the Summit, however, the Commission finds that the WVDO will lose a significant opportunity to carry out its statutory mandate, which includes advertising and marketing the resources offered by the state with respect to the needs of business and industry. W. Va. Code § 5B-2-2. The Commission finds persuasive that the Summit offers a benefit that few other functions can match as the WVDO can advertise and market the state's resources to businesses and representatives statewide in a single location. It is also significant that the decision regarding where the Summit is to be held is not within the WVDO's control. The WVDO cannot simply select another venue to hold the Summit so that it may participate.

The Commission hereby grants the WVDO a Contract Exemption, in an amount not to exceed \$5,000, for the cost of registration for WVDO staff to attend the 2017 Business Summit of the West Virginia Chamber of Commerce. No public funds may be expended for lodging or meals at The Greenbrier. In granting this exemption, the Commission cautions the West Virginia Development Office that public funds may only be expended for an authorized purpose, may not be spent for private gain, and must be spent using fiscal responsibility. Advisory Opinion 2014-01. Public funds must not be used for personal gain or to otherwise "benefit narrow economic or political interests at the expense of the public at large." W. Va. Code § 6B-1-2(a).

All Future Functions and/or Events

To obviate the need to seek a Contract Exemption from one event to the next, the WVDO and the WVTO request a blanket Contract Exemption for future functions and/or events occurring at The Greenbrier that represent business recruitment opportunities for West Virginia.

The Commission must consider Contract Exemption requests on a case-by-case basis. See, e.g., C.E. 2013-04 ("[D]espite the unique situation presented, the Commission cannot grant a blanket exemption."). While the Commission has granted a Contract Exemption for the WVDO to attend the Summit at The Greenbrier, it does not necessarily follow that the WVDO or WVTO will suffer excessive cost, undue hardship or other substantial interference if it cannot attend all events at The Greenbrier that may represent business recruitment opportunities.³ **The Ethics Commission declines to grant Contract Exemptions for all such functions and/or events held at The Greenbrier in the future.**

³ The WVTO is currently planning to attend the West Virginia Hospitality and Travel Association's annual conference to be held at The Greenbrier in January 2018. The WVTO has provided no information, however, to support a finding of excessive cost, undue hardship or other substantial interference with the operation of the WVTO if it is prohibited from attending the conference.

The Ethics 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 or entities.



Robert J. Wolfe, Chairperson
WV Ethics Commission