

## **Contract Exemption 2017-06**

**Issued on October 5, 2017, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Town of Fairview** requests an exemption to continue contracting with its Mayor and a Council Member to serve as temporary water utility employees while the Town's Chief Water Plant Operator recovers from a severe injury.

### **Facts Relied Upon By the Commission**

The Requester, the Town of Fairview, owns and operates a water plant. On August 1, 2017, the Town's Chief Water Plant Operator was critically injured. Immediately following his injury, he was unable to work. Since that time, he has worked approximately five hours for purposes of signing-off on monthly operational reports required by law to be filed by the water plant with the State of West Virginia. It is necessary for him to file the reports as he is the only Town employee certified to file them, *i.e.*, he holds a Class II water plant operator certification.

At present, due to a recent follow-up medical procedure for his injury, the Water Plant Operator is unable to work, even on a limited basis. The employee's doctor states that the employee will be unable to return to work on a full-time basis for at least two years. The Town anticipates that during his recovery period, he may be able to work on a limited intermittent basis to perform general tasks such as reviewing and filing required reports.

The Town has five employees. In addition to the Chief Water Plant Operator, one other full-time employee, who has Class I water operator certification, also performs work at the water plant. Since the Town does not have a maintenance department, the water plant employees' job duties include performing general maintenance work for the Town.

To keep the water plant operational while the Water Plant Operator is on medical leave, the Town has retained Mayor Stacy Riggs and Council Member Eric Savors as part-time contract workers. Their duties include performing water plant checks, reading meters, fixing water leaks, mowing and removing garbage. They also perform general maintenance on the Town's streets and sidewalks.

The Requester states the Mayor and Council Member are qualified for the positions. Mr. Savors is a former employee of the water plant and is currently training to be a water operator. The Requester states that Mayor Riggs has "experience in plumbing and water operations" and "is also experienced with electrical which is very useful in running the plant."

In support of its exemption request, the Town represents as follows:

Our plant is over 50 yrs. old and we believe that our town and one other town has this operating system in WV. And do [sic] to our plant working on a manual system and not by computer we thought it would be best to have Councilman Eric Savors who was training under Our [sic] Chief Plant Operator before the accident as an OIT (operator in training) to work alongside with our Class I operator and to have Mayor Stacy Riggs help with plant watches and sit at the plant so our class I operator could mix chemicals and other tasks that he must perform daily.

Council Member Savors and Mayor Riggs each receive nine dollars per hour for their work. They do not receive benefits. When the Town voted to retain them as contract workers, Mayor Riggs and Council Member Savors recused themselves, including leaving the meeting room during the discussion and vote.

The Requester states: "All work is to be reported at the Town Council meetings under reports to be approved at the meetings." From July 29, 2017, until September 10, 2017, Mayor Riggs worked 88.66 hours and the Town paid him \$797.94. During this same period, Council Member Savors worked 32.12 hours and the Town paid him \$289.08.

Based upon advice from the Town's auditor and certified public accountant, the Town states it anticipates placing these employees on the payroll at some point in the future in lieu of paying them as contract employees. At that time, both the Mayor and Council Member will be part-time employees who will work no more than 20 hours per week at the rate of nine dollars per hour and will not receive benefits. The Requester represents they will only be paid for actual hours worked. As Council Member Savors only works on an as-needed basis, the Town anticipates that he will work fewer than 20 hours per week.

### **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;

....

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(j) reads, in relevant part:

(3) 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. The recusal shall also be reflected in the meeting minutes.

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. § 158-8-5 (2009) reads, in relevant part:

5.1. For the purposes of W. Va. Code § 6B-2-5(d), the Ethics Commission will consider a person "recused" if he or she (1) has made a full disclosure of his or her interest in the public contract, (2) has refrained from discussing, voting on or otherwise influencing or deciding the matter, and (3) is absent from the room during the discussion and voting process.

5.2. Making a full disclosure of one's interest means making a prior public disclosure including the amount of interest held directly or indirectly by a

public employee or public official or immediate family thereof in a public contract.

### **Advisory Opinion**

The Ethics Act prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d). For purposes of this provision, a “limited interest” is defined as an interest which does not exceed \$1,000 in the profits or benefits of the contract in a calendar year. W. Va. Code § 6B-2-5(d)(2)(A).

The Town requests a Contract Exemption as it anticipates paying Mayor Riggs and Council Member Savors more than \$1,000 each during this calendar year for contractual services rendered. The Town has not requested a specific dollar amount in its exemption request.

The Ethics Commission may grant an exemption from the prohibitions in W. Va. Code § 6B-2-5(d) if the prohibition results in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency. Based upon the information provided, the Commission finds that the Town will suffer undue hardship and substantial interference with its operations if prohibited from continuing to contract with Mayor Riggs and Council Member Savors. In making this finding, the Commission has considered all facts including the unforeseen circumstances arising from the Chief Water Plant Operator’s critical injury, the age of the water plant, the small size of the Town and its workforce, and the uncertainty regarding the number of hours the injured employee will be able to work during his recovery period.

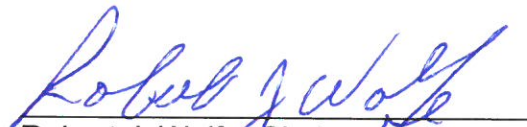
**Accordingly, subject to the restrictions outlined below, the Ethics Commission hereby grants the Town of Fairview an exemption to continue contracting with Mayor Riggs to perform the services described in an amount not to exceed \$3,500 during the calendar year ending December 31, 2017. Further, the Commission hereby grants the Town of Fairview an exemption to continue contracting with Council Member Savors to perform the services described in an amount not to exceed \$3,000 during the calendar year ending December 31, 2017.**

Neither Mayor Riggs nor Council Member Savors may be involved in any decisions affecting the contracts, and both must be recused, in conformity with W. Va. Code § 6B-2-5(j) and W. Va. Code R. § 158-8-5, from deliberations and voting on matters relating to the contractual services that either is providing.

This Contract Exemption authorizes the Town to contract with Mayor Riggs and Council Member Savors during this calendar year in amounts not to exceed the monetary limits specified herein. The Town must seek, and receive, another Contract Exemption prior to exceeding the authorized contractual amount/s.

Prior to submitting an additional Contract Exemption request, the Town must take reasonable steps, including advertising the positions, to give other qualified job candidates the opportunity to apply for the temporary contract work. If Mayor Riggs and Council Member Savors will be submitting applications, then they may not be involved in the selection process. For example, Town Council, and not Mayor Riggs or Council Member Savors, must establish the qualifications for the positions and determine how they will be advertised. All applications received by the Town must be evaluated and considered in a fair and impartial manner. The Town must comply with these steps regardless of whether the person hired for each position is classified by the Town as an independent contractor or temporary employee.<sup>1</sup>

*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

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<sup>1</sup> Nothing in the Ethics Act prohibits a municipality from employing one of its council members or its mayor. See Advisory Opinions 2012-01 and 2016-04. Similarly, nothing in the Ethics Act requires a municipality to obtain a Contract Exemption prior to hiring a council member or mayor as an employee. *Id.* As required by Advisory Opinion 2016-04, “[t]he hiring decision must be based upon merit, not favoritism.”

If the Town classifies Mayor Riggs or Council Member Savors as employees, it does not have to obtain a Contract Exemption prior to taking that action. Nevertheless, the Town must, however, comply with the restrictions set forth in this Exemption prior to hiring them on a long-term temporary basis, *i.e.*, past December 31, 2017.