

Contract Exemption 2018-03

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The West Virginia Ethics Commission

Opinion Sought

The **Kanawha County Commission** requests a Contract Exemption to allow it to continue purchasing publication services and daily newspaper subscriptions from Charleston Newspapers in which Commissioner Ben Salango has an ownership interest.

Facts Relied Upon by the Commission

The County Commission has a long-standing practice of contracting with Charleston Newspapers for publication services in the Charleston Gazette-Mail, the largest newspaper in West Virginia and the only daily newspaper in Kanawha County. Such publications include the County's required legal publications, publications for bids for goods and services, and other publications and notices of public interest and concern. The Kanawha County Commission also maintains several daily newspaper subscriptions with the Gazette-Mail which cost less than \$1,000 per year.

The County Commission states that during fiscal year 2016-2017, the County paid \$180,146.25 to Charleston Newspapers for publications for all county offices. Most of these expenses were for legal advertisements required by law to be published. As discussed below, the County Commission does not need a Contract Exemption to purchase legal advertisements that are required by law.

The County Commission estimates the actual amount spent in recent years for advertisements *not* required by law to be between \$6,500 to \$10,000 each year.¹ The advertisements were primarily for the Kanawha County Clean-ups, to announce public meetings and to purchase larger block-type ads rather than classified-type legal ads. The budgeted amount for publications for fiscal year 2018-2019 is \$274,571.00, which includes expenses of \$15,500 for advertisements *not* required by law.

The County Commission states that Commissioner Salango's ownership interest will not be more than five percent of Charleston Newspapers' total outstanding stock.

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

¹ Some of these legal advertisements are required to be made by existing county purchasing policy or by ordinance.

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)(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.

W. Va. Code § 6B-2-5(j)(3) states:

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 be reflected in the meeting minutes.

W. Va. Code § 61-10-15(a) states, in pertinent part:

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

W. Va. Code § 61-10-15(i)

The provisions of this section [a] do not apply to publications in newspapers required by law to be made.

Opinion

Prohibited Contract

The Ethics Act, at W. Va. Code § 6B-2-5(d)(1), prohibits a public official or employee or business with which he or she is associated from being a party to public contracts which the official or employee may have direct authority to enter into or over which he or she may have control. Commissioner Salango is not “associated” with Charleston Newspapers for purposes of the Act because his ownership is not more than five percent of Charleston Newspapers’ total outstanding stock. W. Va. Code R. § 158-8-4. The Act, therefore, does not prohibit the Kanawha County Commission from contracting with Charleston Newspapers. **Commissioner Salango must, however, recuse himself from decisions and votes relating to the County’s contracts with Charleston Newspapers. W. Va. Code § 6B-2-5(j) and § 6B-2-5(d)(3).**

In addition to the Ethics Act, County Commissioners must abide by the prohibitions contained in W. Va. Code § 61-10-15, which prohibits county entities from contracting with some county officials, including county commissioners, who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they exercise voice, influence or control. While this statute does not contain the same exception applicable to the Ethics Act discussed above, W. Va. Code § 61-10-15(i) provides an exception to its prohibition for “publications in newspapers required by law to be made.” Most of the County Commission’s publications purchased from Charleston Newspapers are “required by law to be made.”²

Therefore, W. Va. Code § 61-10-15 prohibits the County Commission from purchasing publication services that are not required by law unless it receives a Contract Exemption.

Excessive Cost, Undue Hardship or Other Substantial Interference

The Ethics Commission may grant an affected governmental body an exemption from the contract prohibition in W. Va. Code § 6B-2-5(d)(1) when application of the prohibition 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).

² The law requires the Sheriff’s Tax Office or the Fiduciary Supervisor’s Office to provide publication of the following: notices of filing of estate accounts - W. Va. Code § 44-3A-4; notices of administration of estates - W. Va. Code § 44-1-14a; delinquent tax lists - W. Va. Code § 11A-2-13; delinquent real estate taxes - W. Va. Code § 11A-3-2; notices of the Sheriff’s tax lien sales - W. Va. Code § 11A-3-13; notices of applications for the administration of estates - W. Va. Code § 44-9-3, and notices of claims periods - W. Va. Code § 44-4-9.

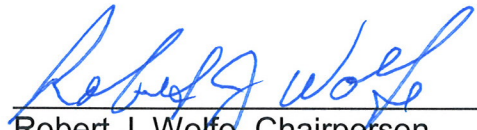
There are also legal requirements for publication of tax appeal notices, at W. Va. Code §11-3-24, and election notices, at W. Va. Code § 3-3-2A, § 3-1-7, § 3-3A-26 and §3-4A-13.

The County Commission states that:

[A]n exemption for publication services should be granted because (1) nearly all of Kanawha County's newspaper publications are required by law, ordinance, or existing county policy and (2) the Charleston Gazette-Mail is the only daily newspaper of general circulation in Kanawha County through which the Kanawha County Commission can provide effective notice to the public on matters of public interest and concern. As such, the inability to publish in the Charleston Gazette-Mail would cause undue hardship and substantial interference with the operation of the Kanawha County government and services.³

The Ethics Commission finds that denial of the Contract Exemption would result in substantial interference and undue hardship to the Kanawha County Commission. It hereby grants the County Commission a Contract Exemption to allow it to continue purchasing publication services, including those publications that are not required by law, in the Charleston Gazette-Mail. The County Commission may also continue its daily newspaper subscriptions.

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
West Virginia Ethics Commission

³ The costs of classified legal ads are not set by the individual newspapers. The rates that newspapers may charge for publishing legal advertisements are set by the West Virginia Legislature. W. Va. Code § 59-3-3.