

Contract Exemption 2023-03

Issued on June 1, 2023, by

The West Virginia Ethics Commission

Opinion Sought

The **Mercer County Community Corrections Day Report Center** seeks a Contract Exemption to contract with David Wayne Bailey and James “Jim” Arnold Baker, two Board members to serve as co-interim Executive Directors.

Facts Relied Upon By the Commission

The Mercer County Community Corrections Day Report Center (hereinafter, “Day Report Center”), which was created pursuant to W. Va. Code § 62-11C-5, provides alternative sentencing options for non-violent state criminal offenders. The Day Report Center serves individuals and eligible Adult Drug Court program participants. The services include individual and group therapy counseling; risk/need and clinical assessment services; transportation services; electronic monitoring services, and drug screening observation. The Day Report Center’s laboratory also tests drug screenings for other public entities, such as the West Virginia Department of Health and Human Resources, and private businesses.

The Mercer County Commission appoints the Board members of the Day Report Center. The Board hires an Executive Director who directs the Day Report Center’s day-to-day and long-term operations. For example, the Executive Director manages the Day Report Center’s budgets, interviews program participants, supervises professional case managers and the operation of specialized court-order programs for ADC participants, and serves as the liaison between the Day Report Center and other governmental entities involved in the alternative sentencing process.

On April 11, 2023, the Day Report Center Board terminated its Executive Director. At the time of the termination, the Board determined that no other individual within the organization was qualified for the interim Executive Director position. The Board has posted advertisements for the Executive Director position on various media outlets, and it is currently seeking applicants for the position.¹ However, the Board has been unable to fill the position of Executive Director on an interim or permanent basis since the termination of the former Executive Director.

¹ The Requester has advertised the position in the Princeton Times newspaper, [Monster.com](https://www.monster.com), and on Facebook.

David Wayne Bailey and James “Jim” Arnold Baker are two long-serving members of the Board. Due to the inability to hire either an interim or permanent Executive Director, Mr. Bailey and Mr. Baker have been serving as co-interim Directors without compensation since the termination of the former Executive Director. The Board is, therefore, requesting a Contract Exemption to compensate Mr. Bailey and Mr. Baker at the rate of \$19.00 per hour each until a full-time Executive Director can be hired on a permanent basis. The Requester asserts that Mr. Bailey and Mr. Baker did not participate in the Board’s decision to hire them on an interim basis or pay them \$19 per hour.

Provisions Relied Upon By the Commission

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

In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no 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 Provided, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

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 relevant part:

It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or 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 a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control. . . .

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

Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

Opinion

Ethics Act

The Ethics Act prohibits public employees and officials 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 employee or official. W. Va. Code § 6B-2-5(d)(1). The County Day Report Center Board member has direct authority or control over the Day Report Center's contracts. This provision of the Ethics Act, however, also contains an exception for part-time appointed officials to contract with his or her agency as long as he or she has "not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract." W. Va. Code § 6B-2-5(d)(1). The Board members of the Mercer County Community Corrections Day Report Center are part-time appointed officials, and therefore, they may contract with the Day Report Center under the Ethics Act, without the need of a contract exemption, as long as they recuse themselves and do not participate in the matter pursuant to W. Va. Code § 6B-2-5(d). The Requester asserts that Mr. Bailey and Mr. Baker did not participate in the Board's decision to hire them on an interim basis or pay them \$19 per hour.

W. Va. Code § 61-10-15(a)

But members of county boards must also abide by the stricter prohibitions in W. Va. Code § 61-10-15(a), a statute that imposes criminal penalties against a county official who has a pecuniary interest, either directly or indirectly, in the proceeds of a contract over which the official exercises voice, influence, or control. W. Va. Code § 61-10-15, unlike the Ethics Act, does not contain an exception for part-time appointed officials.

Here, the Board members, David Bailey and Jim Baker, have pecuniary interests in being contract employees of the Day Report Center for purposes of both W. Va. Code § 6B-2-5(d) and W. Va. Code § 61-10-15. Further, as Board members, they exercise direct authority or voice, influence, or control over the employment contracts of the Day Report Center. Hence, to comply with § 61-10-15, it is necessary for the Requester to obtain a Contract Exemption in order to contract with two Board members to serve as co-interim Executive Directors of the Day Report Center. [Advisory Opinion 2012-12](#) and [Advisory Opinion 2017-02](#).

Contract Exemption

The Ethics Commission may only grant a contract exemption from the prohibitions in W. Va. Code § 61-10-15(a) if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency.

Many of the Executive Director position's job duties are integral to the Day Report Center's day-to-day and long-term operations, including overseeing case managers, managing the Day Report Center's budgets, interviewing program participants, and fulfilling the Day Report Center's programs' needs. At this time, there are no known, qualified individuals within the Day Report Center who can serve as the Executive Director. Without an interim Executive Director, the Day Report Center's ability to provide core services to individuals and adult drug court participants will be greatly diminished.

The Board asserts that it is in the best interest of the Day Report Center to enter into a contractual agreement with Mr. Bailey and Mr. Baker to serve as co-interim Executive Directors until a permanent Executive Director can be hired. The proposed rate of pay to each, pursuant to the contractual agreement, will be \$19 per hour, approximately half of what a full-time Executive Director would make on an annual basis. This contract would cease upon the start of a permanent Executive Director's employment. Here, the Day Report Center will face undue hardship and substantial interference in its operations if Mr. Bailey and Mr. Baker cannot serve, temporarily, as its co-interim Executive Directors.

The Ethics Commission grants a Contract Exemption to the Mercer County Day Community Corrections Report Center to contract with David Bailey and Jim Baker at the rate of \$19 per hour each for performing the functions of co-interim Executive Directors, with the following limitations:

First, the Day Report Center Board must continue to advertise the Executive Director position and exercise due diligence in filling the Executive Director position.


Second, Board members David Bailey and Jim Baker must recuse themselves from decisions, discussions, and votes relating to the Day Report Center's decision to hire and pay them for serving as interim Executive Directors and follow the restrictions in W. Va. Code § 6B-2-5(d). For recusal to be proper, the Board members must first fully disclose on the record their disqualifying interest, and must leave the room during the discussion, deliberation, and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that the members left the room during all consideration, discussion, and vote on the item under consideration. W. Va. Code § 6B-2-5(j)(3).

Third, the Board may compensate David Bailey and Jim Baker for work they have already performed as Interim Executive Directors, since the former Executive Director's termination on April 11, 2023, at the rate of \$19 per hour each, but only if they recused themselves from decisions, discussions, and votes relating to the Day Report Center's decision to hire and pay them as interim Executive Directors and followed the restrictions in W. Va. Code § 6B-2-5(d). If they have not complied with the above limitations, they may not be compensated for their past work.

Fourth, in the event that Mr. Bailey and/or Mr. Baker did not properly recuse themselves, the Board would need to take up the issues of the hiring and compensation of Mr. Bailey and/or Mr. Baker anew. Once the Board has properly taken up these issues under the recusal requirements, it may compensate Mr. Bailey and Mr. Baker for their work performed after the date of the Board's action.

Fifth, this Contract Exemption is effective until the earlier of December 31, 2023, or until such time as another interim or permanent Executive Director fills the position.

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 or entities.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission