

CONTRACT EXEMPTION NO. 2008-06

Issued On June 5, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Belington City Council** asks for an exemption to permit it to purchase merchandise and services from Steve's Home and Farm Supply, a hardware store. Belington City Council Member Stephen Cross owns the store.

FACTS RELIED UPON BY THE COMMISSION

Stephen Cross was elected to serve on Belington's City Council on April 1, 2005. The election for the seat he holds occurs on March 10, 2009.

For over fifty years, the City of Belington has transacted business with Steve's Home and Farm Supply. Since Mr. Cross was elected to Council, the amount of business between the City and Steve's Home and Farm Supply has been consistent with transactions over the past twenty years or more. The City's purchases are frequent but generally small; it is not unusual for the City to make several trips to the store in one day based on the needs of various departments. In Fiscal Year 2007, the City purchased \$1,681.69 of goods and services from Steve's Home and Farm Supply. Belington's annual budget was \$395,686.

The Mayor and the Street Commissioner generally approve purchase orders without Council's knowledge or input. Only purchases in excess of \$500 require Council's approval. Mr. Cross has never ordered or voted to order any product or service from Steve's Home and Farm Supply for the City of Belington.

According to the Requester, Steve's Home and Farm Supply is the nearest supplier of plumbing and hardware supplies. Although the City may be eligible for company credit cards at 84 Lumber and Lowes, Steve's Home and Farm Supply is the only local establishment of its kind that will allow the City to purchase on credit. The next closest hardware store is 11 miles away. The approximate round trip travel time is one hour. The closest 84 Lumber is 12 miles and the nearest Lowes is over 30 miles away. If the City were unable to transact business with Steve's Home and Farm Supply, it would incur costs such as travel time, wear and tear on City vehicles, and increasingly expensive gasoline.

Due in part to rising fuel costs, the IRS has increased the allowable mileage expense reimbursement rate to 50.5 cents . Applying this rate, the expense of making each round trip to the next closest hardware store is \$11.10.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such 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)(A) provides in part that ... an elected ... official ... or business with which he or she is associated shall not be considered as having a financial interest in a public contract when [that] interest does not exceed one thousand dollars ... in a calendar year.

W. Va. Code § 6B-2-5(d)(3) provides that 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 [or her] 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) provides that where the provisions of subdivisions (1) and (2) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivisions (1) and (2) of this subsection.

W. Va. Code § 6B-2-5(j)(1)(A) reads: Public officials... may not vote on a matter...in which they... have a financial interest.

W. Va. Code § 6B-2-5(j)(3) reads: 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.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. This prohibition prevents a City from doing business with a business in which one of its Council members has an ownership interest, as here. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant an agency an exemption from this prohibition if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation. If the City is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm. It must show that real and significant

hardship will result, hardship which outweighs the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.¹

The Commission recognized in Advisory Opinion 2005-05 that small towns have a limited number of employees and financial resources; there the Commission found that requiring the Town to make purchases from a hardware store located 13 miles away would result in excessive costs and would create an undue hardship. Recognizing that small towns have a limited number of employees and financial resources, the Commission also observed that not only would such trips be burdensome, there were also associated vehicle and labor costs.

Here, the City of Belington has demonstrated the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption. Specifically, the Commission finds that the increased cost of traveling to 84 Lumber or Lowes for plumbing or hardware supplies constitutes undue hardship, excessive cost and/or substantial interference with the City's operation.

Based upon the foregoing, the Ethics Commission grants the City of Belington an exemption from the prohibition of W.Va. Code § 6B-2-5(d), with limitation, to allow it to purchase hardware from Steve's Home and Farm Supply. The exemption is granted with the limitation that any one item or set of items costing in excess of \$100.00, except in emergency situations, should not be purchased from Steve's Home and Farm Supply. This exemption is effective until March 10, 2009. As of March 10, 2009, if the City wants to continue to contract with Steve's Home and Farm Supply, and if Stephen Cross is still an elected official in the City, then the City should seek another contract exemption.

Further, it would not violate W. Va. Code § 6B-2-5(d) for Council Member Cross to sell goods and services to the City, with the limitation set forth above, provided he fully discloses his involvement in any such sale or service, and excuses himself from any evaluation, discussion or vote to approve the sale, pursuant to W. Va. Code § 6B-2-5(j)(3).

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

s/s
R. Kemp Morton, Chair

¹ During the 2008 regular legislative session, the Ethics Act was amended to establish an exemption from the prohibition on having an interest in a public contract where the interest in a contract or series of contracts does not exceed \$1,000 in a calendar year. Since the City of Belington ordinarily purchases more than \$1,000 each year from Steve's Home and Farm Supply, it is still necessary to determine whether the Commission should grant an exemption.