

CONTRACT EXEMPTION NO. 2008-12

Issued On October 2, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

EXEMPTION SOUGHT

The **Wellsburg City Council** seeks an exemption to purchase a used work/utility trailer from one of its Council members, Paul Billiard.

FACTS RELIED UPON BY THE COMMISSION

The City of Wellsburg needs to purchase a work/utility trailer large enough to haul its tractor around, as well as collateral equipment. When the City Manager mentioned at a Council Meeting the need to purchase a trailer, Councilperson Paul Billiard announced that he had a trailer that he would sell the City for \$2,000. According to the City Manager, although it is used, the trailer is in very good condition and well maintained.

The City Manager subsequently sought bids from local establishments for a suitable trailer; the lowest price for a new trailer satisfying the City's needs is \$3,299.

According to the City Manager, Councilperson Billiard purchased the trailer for \$2,000 to help someone out; now he is offering to sell it to the City. Under this arrangement, Councilperson Billiard would make no profit from the sale of the trailer to the City.

In view of the fact that the City of Wellsburg has experienced a steady decrease in revenues and an increase in expenses over the past several years, the Manager sees this transaction as an opportunity to save money.

Since the original quotes were for new trailers, the Ethics Commission asked the City Manager for quotes for a comparable used utility trailer. The City Manager acceded, and provided a quote of \$2,150 from a supplier for a trailer very similar to Council Member Billiard's trailer.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides that...no elected...public official...or business with which she...is associated may be a party to or have an interest in the profits or benefits of a contract which such official...may have direct authority to enter into, or over which she...may have control...

W. Va. Code § 6B-2-5(d)(3) states, in pertinent part, 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...or

other governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption....

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 one of its Council members. 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.

The Commission finds that the City has failed to demonstrate the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption. Specifically, the Commission finds that the loss of a potential savings of \$150 does not constitute undue hardship, excessive cost or substantial interference with the City's operation. The Commission would rather err on the side of caution and avoid any appearance of impropriety in the proposed contract between the City and Councilperson Billiard. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5 (d).

Therefore, it would violate W. Va. Code § 6B-2-5(d)(1) for Councilperson Billiard to sell his trailer to the City.

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