

CONTRACT EXEMPTION NO. 2008-13

Issued On January 8, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Handley**, by unanimous vote of Town Council, asks for an exemption to allow the Town to continue employing its Mayor as the Town's Police Chief.

FACTS RELIED UPON BY THE COMMISSION

The Town of Handley is located in Kanawha County, West Virginia. According to the 2000 census, the Town has a population of 336; according to the requester, the Town has lost population since then. Essie Ford is the Mayor of Handley. His mayoral salary is \$100 per month. The Town of Handley has a Strong Mayor form of government; the Mayor is responsible for appointing the Town's Police Chief. The Town Council, however, establishes the Police Department's budget and sets the salary for the Police Chief and all police officers.

The Town's annual budget is just over \$60,000. When the former Police Chief left the position, the Town encountered difficulty in filling his vacancy. As a result, the Town Council agreed to pay Mayor Ford an additional \$250 per month to serve as Police Chief, effective July 1, 2006. According to the requesters, Police Chief Ford is always on call. The Town only has one other police officer who only works part time. Given its financial situation, the Town states that it cannot afford a full time or another part time police officer. Further, although the County Sheriff's Department helps out as needed, it cannot cover the Town of Handley on a regular basis.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. -- (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body....

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) 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 subdivision (1) ... of this subsection.

ADVISORY OPINION

The West Virginia Ethics Act prohibits public servants from having an interest in a public contract over which they exercise control. Standing alone, this provision does not prohibit a municipality from hiring its Mayor. This provision must be read in conjunction with other restrictions in the Ethics Act, including the prohibition against use of office for private gain. W.Va. Code § 6B-2-5(b).

The Ethics Commission previously ruled in A.O. 2006-05 that a Mayor in a strong Mayor form of government could not also be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees. The Commission also recognized, however, that “[T]here may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities.”

Indeed, in Contract Exemption 2008-08, the Commission granted an exemption to the Town of Rhodell to continue to employ its Mayor as its Water Plant Operator. Due to its location and the shortage of water plant operators in that part of the State, the Commission found that it was not practical to require the Town to hire someone else to operate the water system. The Commission specifically found that to require the Town to terminate the Mayor’s employment and hire someone else to operate the Water Plant would result in excessive cost and undue hardship.

Here, the Town of Handley has demonstrated that but for Mayor Ford’s willingness to serve as the Town’s Police Chief, it would only have the services of a part time police officer who works full time in a community in the Upper Kanawha Valley.

In light of the circumstances presented, the Ethics Commission finds that it is within its powers to grant an exemption to the limitations imposed by W.Va. Code § 6B-2-5(d) and § 6B-2-5(b). As such, the Ethics Commission hereby grants the Town of Handley an exemption in order that it may continue to employ its Mayor as the Police Chief, at a rate not to exceed \$250.00 per month. As a condition of this exemption, however, the Commission requires Handley's Town Council to adopt, as authorized by Town of Handley Ordinance Article III, Division I, Sec. 2.34 a., a resolution giving it, rather than the Mayor, direct oversight and supervision of the Town Police Chief, and allowing citizens direct access to Town Council regarding police matters that may arise.

The exemption is effective until July 1, 2010 at which time the Town must submit a new request for an exemption in order for Mayor Ford to continue to be employed as the Town of Handley's Police Chief.

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