

## **CONTRACT EXEMPTION NO. 2009-01**

**Issued On March 5, 2009 By The**

### **WEST VIRGINIA ETHICS COMMISSION**

#### **OPINION SOUGHT**

The **Town of Mabscott**, 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, Assistant Fire Chief and Head of the Street Department.

#### **FACTS RELIED UPON BY THE COMMISSION**

The Town of Mabscott has a population of around 1400. Wayne Houck is the Mayor of Mabscott and has been for more than twenty years. His mayoral salary is \$900 per month. The Town of Mabscott has a Strong Mayor form of government. The Mayor supervises all Town employees. The Town Council is responsible for appointing the Town's Police Chief and sets the salary for the Police Chief and all police officers. The Mayor supervises the Police Department and all other Town employees

When the former Police Chief left the position, the Town encountered difficulty in filling his vacancy. In May 2005, the Town Council agreed to hire Mayor Houck as temporary Police Chief at a salary of \$500 per month. In June 2006, not having found a suitable replacement, the Town Council hired Mayor Houck as permanent Police Chief and he continues to serve in that position at a present salary of \$500 per month. The Town only has one other full time police officer. But for the Mayor's service as Police Chief, that officer's safety and the Town's safety would be compromised, according to the Requester.

Mayor Houck also serves as the Head of the Street Department, and has held that position since his election. According to the Town, the Mayor has always been the Head of the Street Department and has received a salary therefor. Presently, his salary is \$900 per month. According to the Requester:

The Town would further be hampered in its provision of services if the Town were unable to appoint the Mayor the head of the street department. The Mayor generally works many hours including evening operating the snow plow which would not be done with the current employees. The Mayor provides skilled mechanical labor and other services that are not currently available based upon the limited financial resources of the Town.

Finally, Mayor Houck has served as a paid Assistant Fire Chief for over fifteen years; his present salary is \$125 per month. He was selected by Town Council which also

sets his salary; and, although he serves the Mabscott Volunteer Fire Department (VFD), he is considered a Town employee.

The Town's budget for FY 2008-09 is \$535,156. Mabscott's total salaries expenditure is \$257,210 (including salaries for Town Attorney and Municipal Judge). In 2008, Wayne Houck received \$29,682 in wages from the Town of Mabscott.

According to the Requester and the Town's leaders, the Town, "based upon its current financial condition, would be unable to hire separate individuals to fill the spots that the mayor is currently serving."

### **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 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 employing 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 qualified 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.<sup>1</sup> 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.

By contrast, the positions Mayor Houck holds require no extensive training or specialized certification. The Town has failed to demonstrate the efforts it has taken to hire someone other than Mayor Houck to fill the additional positions.

In Advisory Opinion 2006-05 the Commission further stated:

Although both positions are part-time and the Mayor would be able to fulfill both job responsibilities during the course of a work week, an inescapable conflict exists as the Mayor must supervise the City’s employees. The conflict could not be avoided by the Mayor recusing himself on relevant votes or even delegating management responsibilities over his other positions. While the Mayor may be able to balance these job responsibilities and perform his positions in an impartial manner, as a matter of public policy and due to the conflicting nature of the duties and responsibilities, the Ethics Commission finds that the Ethics Act prohibits the Mayor from also being regularly employed by the City.

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<sup>1</sup> A Class I water treatment and distribution system must be operated by a person holding a Class I certification, or higher, from the West Virginia Department of Health and Human Resources, Office of Environmental Health. In order to obtain a Class I Certification, a person must have at least 2,000 hours of supervised experience in operating a water system. This certification must be renewed every 2 years and requires 12 hours of continuing education requirements during the 2 year period.

Therefore, it would violate W. Va. Code § 6B-2-5(d)(1) for the Town of Mabscott to continue to employ Mayor Houck as Police Chief and/or Head of the Street Department and/or Assistant Fire Chief during his service as the Town's Mayor. Mayor Houck shall, within thirty (30) days, notify the Ethics Commission and the Town Council how he elects to comply with this opinion. The Town of Mabscott is hereby granted a transition period of ninety (90) days from the date of this opinion to comply with this opinion.

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