

CONTRACT EXEMPTION NO. 2009-04

Issued On July 9, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Monroe Health Center** asks for an exemption to allow it to make purchases from a local grocery store owned by Michael Shane Ashley, an elected County Commissioner.

FACTS RELIED UPON BY THE COMMISSION

The Monroe Health Center is a public agency formed pursuant to W.Va. Code § 7-3-15. It is governed by a Board of Trustees which is appointed by the Monroe County Commission. Commissioner Ashley owns a supermarket, Ashley's IGA. It is the only supermarket in the County.

Prior to his election in 2007, the Health Center purchased distilled water at his store. It also purchased food from the IGA deli for employee appreciation events.

The Center requires distilled water to operate various medical machines in the facility. The Health Center spends approximately \$25.00 per month on distilled water. The Center states that there is no other store in the County which sells distilled water nor does any service deliver distilled water, only natural water. At present, a Health Center employee must drive 50 miles round trip to another County twice a month to purchase the distilled water.

In regard to the lunches, the Center, on occasion, has employee recognition events. A limited amount of funds are expended for this purpose. The Center staff is aware that the Ethics Commission has recently adopted employee recognition guidelines and states that it will continue to comply with the \$25.00 per employee per calendar year limit set forth in the guideline.

The estimated cost of the water per calendar year is \$300.00. The average cost of meals purchased for purposes of recognizing employees is \$1,375.00.

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.

W. Va. Code § 61-10-15(a) states in part that ... It shall be unlawful for ... any elected county official ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such ... member ... he may have any voice, influence, or control.

W. Va. Code § 61-10-15(h) further provides:

Where the provisions of subsection (a) of this section would result in the loss of 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 a written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

Both the Ethics Act, W. Va. Code § 6B-2-5(d)(1), and a separate criminal misdemeanor statute, W. Va. Code § 61-10-15, prohibit County Officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Pursuant to W. Va. Code § 6B-2-5(d)(1) an elected public official may not have 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 from the West Virginia Ethics Commission to contract with the public official. The Ethics Act prohibits public servants, including appointed county board members, 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 official. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in

a calendar year. W.Va. Code § 6B-2-5(d)(2)(A). However, the \$1,000 exception is inapplicable in the present situation due to the harsher restrictions imposed by W.Va. Code § 61-10-15.

The County Commission appoints the Board of Trustees for the Health Center. Normally, for purposes of the Ethics Act, the power to appoint does not necessarily constitute direct authority or control. Hence, the Health Center, pursuant to the Ethics Act, would not be prohibited from transacting business with the Health Center. However, this analysis is academic in light of stricter standards contained elsewhere in the code.

W. Va. Code § 61-10-15, a similar but separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which those officials may exercise "voice, influence or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. As a current County Commissioner, due to the power of the County Commission to appoint members of the Health Center's Board of Trustees, Commissioner Ashley has voice, influence and control over Health Center contracts. See A.O. 2009-01.

Effective June 10, 2007, the Legislature amended WV Code § 61-10-15 to allow the Ethics Commission to grant exemptions from the prohibitions in this code section if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The Ethics Commission decides whether to grant or deny exemptions under the Ethics Act and W. Va. Code § 61-10-15 on a case-by-case basis.

In this case, the IGA owned by an elected County Commissioner is the only store in the County which sells distilled water. The Center states that if it is not allowed to purchase the water at this store, then a 50 mile round trip is required. The current IRS mileage reimbursement rate is 55 cents per mile. Each trip to the other county costs the Health Center twenty-seven dollars and fifty cents (\$27.50) for mileage plus the cost of staff time.

The Ethics Commission finds that to require the Monroe Health Center to purchase water in another county imposes an undue hardship and excessive cost. As such, the Commission grants the Monroe County Health Center an exemption to purchase distilled water from the IGA in an amount not to exceed \$500.00 per year. This amount contemplates the current expenditure level while leaving room for additional purchases of water when required. Still, the Center should continue to evaluate on a periodic basis if there are any businesses which are willing and able to deliver distilled water to the Center.

In regard to purchasing food, the Commission finds that although requiring the Health Center to purchase food for these types of events at a restaurant **may** result in excessive cost and undue hardship, the Health Center has not demonstrated that such is the case. The Commission notes that although small, Monroe County does have other restaurants that may offer competitive pricing. Unless and until the Monroe Health

Center demonstrates **actual** excessive cost and/or undue hardship if it is not allowed to purchase from Ashley's IGA, an exemption has not been justified here.

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

Drema Radford, Vice-Chair