

CONTRACT EXEMPTION NO. 2010-01

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The Town of Wayne asks for a temporary contract exemption to allow it to continue leasing the Town Hall building from Mayor James Ramey, III until July 1, 2010.

FACTS RELIED UPON BY THE COMMISSION

James Ramey, III, is the elected Mayor of the Town of Wayne. He owns a building which he leases to the Town. Prior to leasing the building, the Town of Wayne obtained an exemption from the Ethics Commission.

The exemption was granted in Advisory Opinion No. 2003-01 which was issued on February 6, 2003. The opinion granted the Town an exemption to lease the building for seven years. (A.O. 2003-01 and lease attached hereto and incorporated by reference).

According to the written lease agreement between James Ramey, III, and the Town of Wayne, the terms of the lease were as follows: **First**, a four month term from **March 1, 2003** and ending on **June 30, 2003**; and, **Second**, a one year term commencing on July 1, 2003 with a clause stating that it is subject to renewal for a seven year period thereafter. Hence, the total term of the lease is seven years and four months. That is 4 months longer than the seven year period authorized by the Ethics Commission.

The Town recognizes that the lease exceeds the original period of time granted by the Commission; hence, it seeks a temporary contract exemption to allow it to fulfill the terms of its lease through June 30, 2010. The Town Council states that it is imperative that it be allowed this additional time based upon the following grounds: **First**, there are no other facilities located in the Town which would be readily available; **Second**, the citizens are familiar with the location of the Town Hall and the citizens would suffer confusion and hardship, such as lack of parking, should the Town be forced to move immediately; **Third**, the costs associated with upgrading any other facilities for such short term use would be prohibitive; and, **Fourth**, to deny the exemption would substantially interfere with the Town's operations. Accordingly, the Town seeks a temporary exemption to allow it to continue to lease the building in question through the end of the lease term on June 30, 2010.

The Town Council voted on the exemption request at a public meeting held on February 23, 2010. According to the exemption request letter, James Ramey, III, was not present during any discussion or vote on this matter.

The Town further seeks the temporary exemption to allow it adequate time to renegotiate the lease and/or to explore its other options. The Town realizes that if it renegotiates a lease with James Ramey, III, then it must submit a new contract exemption request in order that the Commission may consider whether a contract exemption should be granted to allow the Town to renew its lease for the building in question.

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 Ethics Act, W. Va. Code § 6B-2-5(d)(1), prohibits public 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 Mayors, 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 here.

The Ethics Commission finds that the Town of Wayne has entered into a lease with James Ramey, III, albeit the terms of the lease extend past the original contract exemption. Still, the Commission finds that to require the Town to terminate the lease would result in excessive cost, undue hardship, or other substantial interference with the operation of the Town of Wayne.

Specifically, the Commission finds that to require the Town to vacate the building immediately for purposes of complying with the original contract exemption would result in excessive costs to the Town and its citizens due to the expense which would result from, on short notice, finding available space and moving. Further, moving on such short notice would interfere with the efficient and orderly operation of the Town. It would create both an undue burden on the City employees and the public who may have their government services interrupted if, without proper planning, the Town has to relocate.

Accordingly, the Ethics Commission hereby grants a temporary contract exemption until July 1, 2010 to allow the Town to continue to lease the subject building. If the Town seeks to renew its lease with James Ramey, III, then it may only do so by submitting another contract exemption request not later than May 15, 2010.

The Commission will **only** consider granting such a request if the Town submits with it the report of an independent appraiser setting forth the fair market rental value of the building. The appraiser hired should be different from the one initially used when the initial contract exemption request was submitted in 2003. Further, the appraiser should be an individual without any familial or financial connections to Ramey.

This directive should not be construed as an opinion by the Commission that the initial appraiser was not qualified, independent or impartial; however, to ensure the impartiality and independence of proceedings before this Commission, the Commission requires that the appraisal be completed by a new appraiser as a means of obtaining a second opinion as to the present fair market value of the building. The Commission further cautions that James Ramey, III should not have conversations with the appraiser relating to the value of the building unless such conversations are initiated by the appraiser in accordance with standard appraisal procedures for purposes of conducting the appraisal.

Further, the Town must demonstrate that it made a good faith effort to evaluate what other comparable space, if any, is available to rent and the cost thereof. If the Town seeks a contract exemption, it must set forth in its exemption request what efforts were

taken to evaluate all potential options which may be available to the Town for purposes of making a decision in regard to whether continuing to lease the subject space is in the best interest of the Town.

In order to comply with the Ethics Act, James Ramey, III, as the owner of the current Town Hall building and potential beneficiary of any future lease agreement for office space, may not be involved in the Town's efforts to evaluate other property or options. He must recuse himself from all matters relating to the Town's decision to either renew his lease or enter into another lease with another party. For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter.

Further, both during and outside of meetings, he may not attempt to influence Council Members to vote to renew the lease; to do so could violate the Ethics Act. Indeed, he should not communicate with Council Members about this matter – regardless of who initiates the conversation. Moreover, an attempt to reach a consensus outside the course of a publicly noticed meeting would be a violation of the Open Meetings Act. W.Va. Code § 6-9A-1 *et. seq.*

The Executive Director may in her discretion extend the time of this temporary contract exemption to a date not to exceed September 15, 2010 if in her judgment she finds that there are compelling and demonstrable reasons to extend the temporary contract exemption; however, the Town should make every effort to comply with the **May 15, 2010** deadline imposed herein.

The Commission notes that exemptions must be granted on a case-by-case basis. It cautions the Town of Wayne and other agencies to read the exemptions closely and to comply with their terms.

s/s

R. Kemp Morton, Chairperson