

SUPPLEMENTAL CONTRACT EXEMPTION NO. 2010-05

Issued On November 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Randolph County Board of Education** seeks an exemption to permit it to continue making purchases from a store where newly elected member David Kesling is employed as the store manager and owns shares of stock.

PROCEDURAL BACKGROUND AND SPECIFIC QUESTION PRESENTED

A newly elected Randolph County BOE Member is employed as a manager by Wal-Mart Stores, Inc. (hereinafter referred to as "Walmart"). He is based in the company's Elkins store.

Historically, the Randolph BOE has made purchases from this store. Due to the BOE Member's employment with Walmart, his stock ownership in the company, and the terms of his compensation, which include a bonus based upon sales at the Elkins store, the BOE sought an exemption to continue to make purchases from Walmart.

On August 5, 2010 the Ethics Commission granted the Randolph County Board of Education a limited exemption to make purchases at Walmart stores. See C.E. 2010-05 incorporated herein by reference. In its opinion, the Commission held that, due to his stock ownership and sales based bonus, after October 8, 2010 the Randolph County BOE could not continue to make purchases at the Elkins Walmart.¹ The exemption allowed for purchases at other Walmart stores.

In footnote one of its opinion, the Commission stated:

However, if Mr. Kesling is not a shareholder and does not receive a bonus based upon purchases by the BOE, then he would no longer have a prohibited pecuniary interest. W.Va. Code § 61-10-15(e). Rather, he would only be a salaried employee and the BOE could continue making purchases from the Elkins Walmart.

Based upon this language, Board Member Kesling asks whether the BOE may continue to make purchases at the Elkins Walmart under the following circumstances: (1) He sells his shares of Walmart stock and, for so long as he is a BOE Member, does not acquire anymore Walmart stock; and, (2) The BOE provides Walmart a calculation of the total BOE purchases made at the Elkins Walmart store. Walmart will then provide Board Member Kesling a calculation of the percentage of his bonus attributable to these purchases. Then Board Member Kesling will donate this money to the BOE or a non-profit organization.

¹ By letter dated October 13, 2010 the Commission's Executive Director extended the deadline until November 8, 2010 in order to allow the Ethics Commission to formally consider the question presented.

FACTS RELIED UPON BY THE COMMISSION

The facts in C.E. 2010-05 and those set forth in the preceding section are incorporated herein by reference.

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 or 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 or appointed public official ... or business with which he or she is associated may be 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.

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 state, county, ...or other governmental agency, 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: “It shall be unlawful for any member of a county board of education, . . . 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.”

However, W.Va. Code § 61-10-15(e) states “the provisions of subsection (a) of this section do not apply to any person who is a salaried employee of a vendor or supplier under a contract subject to the provisions of said subsection if the employee, his or her spouse or child:

- (1) Is not a party to the contract;
- (2) Is not an owner, a shareholder, a director or an officer of a private entity under the contract;
- (3) Receives no commission, bonus or other direct remuneration or thing of value by virtue of the contract;
- (4) Does not participate in the deliberations or awarding of the contract; and

(5) Does not approve or otherwise authorize the payment for any services performed or supplies furnished under the contract.”

Finally, W. Va. Code § 61-10-15(h) 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

In C.E. 2010-05 the Commission found that the newly elected BOE Member had a prohibited pecuniary interest in the BOE’s purchases from Walmart due to his stock ownership and the fact that his bonuses are based upon the sales at the Elkins Walmart store. See W.Va. Code § 61-10-15 and W.Va. Code § 6B-2-5(d). The Commission finds that the BOE Member’s proposed course of action removes this prohibited financial relationship for purposes of the Ethics Act and W.Va. Code § 61-10-15. However, limitations apply.

First, when the BOE Member donates the percentage of his bonus attributable to sales at the Elkins Walmart, he may not take a tax deduction for this donation. The Commission finds that taking such a tax deduction would result in a prohibited financial interest.

The recommended course of action is that Walmart reduce his bonus based upon the percentage of sales attributable to the Randolph County BOE at the Elkins store. However, if this course of action is not possible, then the BOE member’s proposed course of action is acceptable.

Second, once the BOE Member donates the subject money to the BOE or a charity, he shall submit a memorandum to the BOE on an annual basis which includes the following: (i) that in accordance with this opinion he has donated the amount of his bonus attributable to BOE purchases at the Elkins Walmart to the BOE or a charity; (ii) the amount of money donated; and, (iii) that he has not taken a tax deduction for the donation amount. Further, he shall attach a receipt or other documentation reflecting that the donation was made. The memorandum and attached documentation shall be kept in the BOE office and shall be subject to public disclosure.

Third, he may not vote on matters relating to purchases at Walmart. 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. W.Va. Code § 6B-2-5(j).

In conclusion, 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 precedent by other persons.

 S/S
Kemp R. Morton, Chairperson