

## CONTRACT EXEMPTION NO. 2011-02

Issued On October 6, 2011 By The

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

The **Guyan Conservation District** requests a contract exemption to allow its continued use of the Putnam County Bank as the depository for some of the District's funds.

#### FACTS RELIED UPON BY THE COMMISSION

When the Guyan Conservation District receives funds for a project it is required to deposit the funds in an interest bearing account. For example, the District may receive funds for a cooperative flood control project with the United States Corp of Engineers. The funds are deposited in an interest bearing account and withdrawn as needed.

The District has two interest bearing certificate of deposit accounts at the Putnam County Bank. The interest rate for each account is 2%. One account holds approximately \$10,952.99, the other \$712,649.97. The District's general operating funds are not deposited at this bank nor does the District intend to move its other accounts to this bank.

An elected District Board Member, Boyd Meadows, serves on the Putnam County Bank's Board of Directors. He owns 25,257 shares of the Bank's stocks and receives annual dividends. The Requester states that, per the Bank's last financial statement, the total number of outstanding shares is 600,000. Hence, he owns approximately 4% of the outstanding shares.

The Federal Deposit Insurance Corporation (FDIC) annually issues a Deposit Market Share Report. The most recent report, which reflects market share as of June 30, 2010, states that the Putnam County Bank has \$466,451,000.00 in deposits. Hence, the District's certificate of deposit accounts at the Putnam County bank represent approximately .156% of the total deposits of the bank ( $\$723,602.96/\$466,451,000.00$ ).

The Requester states that the funds were originally moved to Putnam County Bank as the previous financial institution which held the accounts charged a penalty for withdrawal. At this bank, there is no penalty for withdrawal. Additionally, the Requester states that no other area banks offer a comparable interest rate. The quotes obtained by the Requester are as follows: First Sentry - .55%; Chase Bank - .50%; First State Bank - .35%; City National Bank - .50%; and, Suntrust Bank - .20%.

The Requester seeks this exemption solely for the purposes of maintaining the two existing certificate of deposit accounts at Putnam County Bank; **not** for purposes of

depositing additional funds in the existing accounts, or opening new accounts, at this bank.

### **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 ... governmental agency... 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.

The District is seeking this contract exemption to comply with the Ethics Act. Specifically, the Ethics Act prohibits public servants, including elected members of conservation districts, from having a financial interest in a contract over which they exercise control. W.Va. Code § 6B-2-5(d).<sup>1</sup> For purposes of this code provision,

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<sup>1</sup> There is an exception for part-time appointed officials; provided, they remove themselves from the decision-making process in regard to contracts in which they may have a financial interest. County Officials must be cognizant of the stricter limitations in W.Va. Code 61-10-15 which does not contain a part-time appointed exception; however, conservation districts do not fall within the ambit of § 61-10-15. See A.O. 2010-20.

financial interests include those interests arising from a public official's association with a business. Public officials or members of their immediate family are considered to be "associated" with a business if they are a "director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class. W.Va. C.S.R. § 158-8-4. Since District Member Meadows serves on the board of directors of the bank, he is considered to have a financial interest in the subject contract/agreement with the bank.

The Commission may grant an exemption if it finds that denying the exemption will result in excessive cost, undue hardship, or other substantial interference with the operation of a public agency. The Commission finds that requiring the District to place its money in certificate of deposit account which yields at least 1.45% less in interest would result in excessive cost and undue hardship to the Conservation District. Hence, the District may leave the funds at the Putnam County Bank with the following limitations:

**First**, the affected District Member/Bank Director must recuse himself from participating in or voting on matters relating to the Putnam County Bank. 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. See W.Va. Code § 6B-2-5(j). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the affected District Member left the room during all consideration, discussion and vote on the item under consideration.

**Second**, this exemption is limited to the two existing certificate of deposit accounts. It does not authorize the deposit of additional funds into these accounts nor authorize the opening of additional accounts at this bank.

**Third**, this contract exemption is effective until **October 6, 2013** at which time the District must submit a new request for an exemption if it seeks to continue to keep the accounts at the Putnam County Bank. Of course if the affected Board Member does not seek re-election, resigns or is not re-elected, then this step is not necessary.

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

S/S 10/6/2011  
R. Kemp Morton, Chairperson