

## CONTRACT EXEMPTION NO. 2012-01

Issued on April 12, 2012 By the

### WEST VIRGINIA ETHICS COMMISSION

#### OPINION SOUGHT

The **Webster County Commission** seeks to renew its previous exemption (C.E. 2008-10) allowing it to rent office space from the County Prosecutor to house the Office of the Prosecuting Attorney.

#### FACTS RELIED UPON BY THE COMMISSION

This exemption is the latest in a string of contract exemption requests by the Webster County Commission to allow the County to continue renting office space from the County Prosecutor, Dwayne Vandevender.<sup>1</sup> The Ethics Commission denied the most recent request on September 1, 2011, because the County Commission provided insufficient information to grant an exemption. See Contract Exemption 2011-03. In particular, the County Commission failed to demonstrate its attempts to remedy the office space problem during the prior three years.

Since the issuance of C.E. 2011-03, the Webster County Commission has provided further information and taken specific action to remedy the office space shortage precipitating this issue.<sup>2</sup> Specifically, the Webster County Commission provided information reflecting its attempt to purchase additional tracts of land adjacent to the courthouse as well as other existing buildings. Both options failed as a result of unwilling sellers and/or cost-prohibitive reasons.

Ultimately, on February 1, 2012, the Webster County Commission formally approved a plan to purchase land and build a new 911/Emergency Operations Center. Once built, the existing 911 center will vacate the county courthouse and the Prosecuting Attorney's office will move into the space. While this decision now places the County Commission on a formal path to provide office space for the Prosecutor's office, the completion of the new 911 center will take approximately two (2) years.

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<sup>1</sup> A summary of the factual background and historical exemption requests may be found in Contract Exemption 2011-03, and is hereby incorporated by reference. See *a/so* C.E. 2008-09 and C.E. 2008-10.

<sup>2</sup> In accordance with C.E. 2011-03, the County Commission was granted a three-month extension by the Commission's Executive Director to complete necessary actions.

Therefore, the Webster County Commission seeks another contract exemption to allow it to continue renting office space from Prosecuting Attorney Vandevender until the construction of the 911 center is complete.

In support of an exemption, the County Commission has provided a copy of a proposed lease which it negotiated with Mr. Vandevender's company, Vandycorp, Inc.<sup>3</sup> The terms of the proposed lease are similar to the prior agreement approved in C.E. 2008-10, except that the rent has increased from \$475 a month to \$500.00 a month. The proposed agreement is for a term of one year, with the option for two renewals, and a potential increase in the amount of rent with each renewal. A copy of the proposed lease is attached hereto and made part of the opinion.

### **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:

[N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the 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 municipality the affected government body may make written application to the ethics commission for an exemption from subdivision (1) of this subsection.

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<sup>3</sup> Given his legal relationship with the County Commission, Mr. Vandevender did not advise the County Commission with respect to this matter. Instead, the Commission consulted outside counsel and negotiated through counsel with Mr. Vandevender.

W. Va. Code § 61-10-15(a) states, in part:

It is unlawful for any member of a county commission, . . . to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, . . . he or she 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 and W.Va. Code § 61-10-15 prohibit county public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public officials away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

In 2008, the Webster County Commission was faced with a dilemma of where to locate the Office of the Prosecuting Attorney. Its Prosecuting Attorney, Dwayne Vandevender, became the elected full-time Prosecutor and the County did not have office space in the courthouse for the prosecutor's office. Mr. Vandevender offered to allow the County Commission to continue to use his privately owned office space, which he used while he was the part-time prosecutor, until the County Commission could obtain adequate office space.

This contractual relationship between the County Commission and the County Prosecutor created a prohibited interest in a public contract, and necessitated a contract exemption. Accordingly, in July 2008, the County Commission sought a contract exemption from the Ethics Commission. Based upon the circumstances, the Ethics Commission granted a three year exemption to allow the County Commission to acquire new office space for the prosecutor's office and an orderly transition out of Mr. Vandevender's privately-owned office space. C.E. 2008-09 and C.E. 2008-10.

However, the County Commission failed to take adequate steps to remedy the lack of an office space. Instead, when the three year exemption terminated, the County Commission sought another exemption. The Ethics Commission denied the request because the County Commission did not provide information reflecting its attempts to find office space for the Prosecutor's Office. C.E. 2011-03.

Since then, the County Commission has taken demonstrable steps to remedy the lack of office space and has formally implemented a plan to build a new 911 Center. This will free up office space in the courthouse which will be used to house the office of the Prosecuting Attorney. While the formal plan will resolve the office space shortage long-term, the County Commission must still obtain an exemption to continue to contract with the Prosecutor's office in the interim.

As with all contract exemptions, the Requester must demonstrate that the prohibitions of the Ethics Act and W.Va. Code § 61-10-15 would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. Based upon the information provided by the County Commission and the actions taken to resolve the situation, the Ethics Commission hereby finds that an exemption is warranted.

In reaching this conclusion, the Commission notes that, as was the situation in 2008, there is no existing space in the courthouse. Further, based upon the information provided by the County Commission, there is no available, cost-efficient office space near the Courthouse. Therefore, requiring the prosecutor's office to relocate to an office space which is either a good distance away from the Courthouse and/or cost-prohibitive during the construction would result in excessive costs and/or substantial interference with the operations of the Prosecutor's office. Further, the Commission notes that since the issuance of C.E. 2011-03, the County Commission has been actively working with the Ethics Commission staff to timely resolve this situation.

Accordingly, the Ethics Commission hereby grants a contract exemption until **July 1, 2014** to allow the County Commission to continue to lease office space in Mr. Vandevender's building in accordance with the terms of the proposed lease agreement. The Ethics Commission further directs the County Commission that time is of the essence, and due diligence should be taken to complete construction and resolve this situation before the expiration of this exemption.

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\_\_ R. Kemp Morton\_\_\_\_\_  
R. Kemp Morton, Chairperson