

CONTRACT EXEMPTION NO. 2012-02

Issued On September 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Handley** seeks another exemption to allow the Town to continue employing its Mayor as the Town's Police Chief.

FACTS RELIED UPON BY THE COMMISSION

On January 8, 2009 the Ethics Commission granted the Town of Handley a contract exemption to allow it to continue employing its Mayor as the Town's Chief of Police. The exemption was effective until July 1, 2010. See CE 2008-13.

Upon expiration of the original contract exemption, the Town of Handley sought another contract exemption, C.E. 2010-06, to allow it to continue employing its Mayor as Chief of Police. On August 5, 2010 the Ethics Commission granted the Town of Handley another contract exemption. This exemption remained in effect until August 5, 2012.

In C.E. 2010-06, the Ethics Commission directed as follows:

In the ensuing year, the Commission further directs the Town of Handley to pursue any and all sources of outside funding to finance a Police Chief position, e.g. a federal grant or State funding. As the Recorder noted in the request letter, "The Police Chief position is available if funding can be obtained and a satisfactory applicant can be found to accept the position." If the Town is successful in its efforts to secure such funding, it shall advertise for the position of Police Chief for not less than one month in newspapers and other media that reach the entire State of West Virginia. The Mayor shall recuse himself from participation in advertising, interviewing, and selecting candidates for the position. Any request for future contract exemptions shall include copies of all such advertisements, copies of any and all applications for the position, as well as an explanation as to why the Town was unable to fill the position with a qualified applicant. If the Town is unsuccessful in its efforts to secure outside funding, then it shall submit an overview of the steps it took to seek the funding with any future contract exemption request.

In regard to seeking a grant, the Town Recorder states that she contacted the West Virginia Division of Justice and Community Service. This Division sent her a list of places to search for a grant to help fund a police officer position. The Recorder states that her efforts to obtain a grant for this purpose were of no avail as, while the listed places will provide funding for police equipment or dogs, they do not normally provide grants or funding to pay the salary of a law enforcement officer. The Recorder also

states that she sent various inquiries via the internet to potential funding sources, but has not received any responses.

The Town states that they advertised the position in the Charleston Gazette. The advertisement stated that the Town was accepting resumes for a person for the position. Applicants were required to have five years of experience and to have completed police academy training.

The Town states that in response to the advertisement, it received two resumes; however, when they tried to follow-up with the applicants, neither returned their calls. Recently they received another application which they had difficulty reading. A copy of this resume has been provided to the Ethics Commission and it is indeed difficult to read. Nevertheless, it appears undisputed that the recent applicant does not have the minimum qualifications set forth in the advertisement, and the Town has determined that he is not qualified to serve in the position.

The Town of Handley's current budget is \$91,000. The Town states that it cannot afford to pay for an officer to get certified.

The Town seeks an exemption to allow the Mayor to continue serving as Chief of Police at the rate of \$250.00 per month. It states that the Mayor is available 24 hours a day. The Town notes that while the Sheriff's Department has a Quincy detachment, it cannot cover the Town of Handley on a regular basis. Nevertheless, when needed, the Mayor may contact the Sheriff's Department for assistance.

In support of its request for an exemption, the Town has provided a copy of the newspaper advertisement, resumes received and the minutes and agenda where this matter was discussed and voted upon. The minutes state that the Council believes Mayor Ford is doing a good job and that they seek to keep him in this position until they get a qualified applicant who is willing to serve in this position at the rate of \$250.00 per month. The minutes further reflect that the Mayor was recused from the discussion and vote on this matter, i.e. he left the room during the discussion and vote and did not return until Council had voted on this matter.

The Town of Handley is located in Kanawha County, West Virginia. According to the 2010 census, the Town has a population of 312. In its request letter the Town states that it only has one business which conducts most of its business outside Town limits. Hence, the Town has limited tax revenue.

When the Commission granted the initial exemption, as a condition of the exemption, the Commission required Handley's Town Council to adopt, as authorized by Town of Handley Ordinance Article III, Division I, Sec. 2.34 a., a resolution giving it, rather than the Mayor, direct oversight and supervision of the Town Police Chief, and allowing citizens direct access to Town Council regarding police matters that may arise. The Town of Handley has adopted such an ordinance.

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 West Virginia Ethics Act prohibits public servants from having an interest in a public contract over which they exercise control. Standing alone, this provision does not prohibit a municipality from hiring its Mayor. This provision must be read in conjunction with other restrictions in the Ethics Act, including the prohibition against use of office for private gain. W. Va. Code § 6B-2-5(b).

The Ethics Commission previously ruled in A.O. 2006-05 that a Mayor in a strong Mayor form of government could not also be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees.

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 municipality. Under the unique facts presented, the Commission finds that the Town has demonstrated that it will result in excessive cost, undue hardship, or other substantial interference with the operation of a municipality if the Town is prohibited from continuing its current arrangement with Mayor Ford wherein he will, for the sum of \$250.00 per month, serve as Chief of Police and be on-call 24 hours a day.

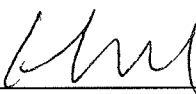
The Commission is cognizant that the advertisement requires the candidate to have formal training as a law enforcement officer from the West Virginia Police Academy or other accredited training program. Yet, based upon information and belief, Mayor Ford does not have this training. This discrepancy raises the question of whether the Mayor is being unlawfully favored as he is not being held to the same standard as others who may be willing to serve in this position.

The Commission takes administrative notice that historically some elected Mayors have served as Chief of Police, and that the West Virginia Code sets forth that some of their powers relate to exercising the police powers of the municipality where they serve as Mayor. For example, the code states that it “[s]hall be his duty especially to see that the peace and good order of the municipality are preserved, and that persons and property therein are protected....” W.Va. Code § 8-10-1. The code also states “It shall be the duty of the mayor and police officers of every municipality and any municipal sergeant to aid in the enforcement of the criminal laws of the state within the municipality, independently of any charter provision or any ordinance or lack of an ordinance with respect thereto, and to cause the arrest of or arrest any offender and take him before a magistrate to be dealt with according to the law.” W. Va. Code § 8-14-3. As such, under the unique situation presented, and based upon the cited code provisions, it is reasonable for the Town to impose a higher standard for applicants as they are not statutorily charged with the duties conferred upon a Mayor.

This exemption is effective until **August 5, 2014** at which time the Town must submit a new request for an exemption in order for Mayor Ford to continue to be employed as the Town of Handley’s Police Chief. All limitations set forth in the previous contract exemptions, C.E.s. 2008-13 and 2010-06 are incorporated herein by reference. Further, Mayor Ford may **not** serve as municipal judge while serving as Police Chief.

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.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, et seq. and does not purport to interpret other laws or rules. In particular, in the present case, the Commission is without authority to opine whether the Mayor’s service as Chief of Police runs afoul of the common law rule against self-appointment, or the incompatibility of office doctrine or other provisions in the West Virginia Code which may govern the question presented.



Jonathan E. Turak, Acting Chairperson