

CONTRACT EXEMPTION NO. 2012-05

Issued On December 6, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Fairview** seeks an exemption to allow a Council Member to be compensated for performing services for the Town in addition to his compensation for serving on Town Council.

FACTS RELIED UPON BY THE COMMISSION

The Town asks whether a Town Council Member, could continue to perform maintenance work on the town's streets and other services for the Town at an hourly rate of \$7.25. The Requester is not a town employee. Rather, he is a contract worker and receives an IRS Form 1009-Misc. Shortly after he began serving on Council, on July 1, 2011, he began to perform odd jobs for the Town, such as patching streets, painting curbs, correcting and fixing street signs, pressure washing and any other service that was needed. The Requester receives more than \$1,000.00 per calendar year for these services. He is also paid \$125.00 every six months for serving on Town Council. The Requester states that the arrangement provides the town with great savings. The Requester states that the town cannot afford to advertise for this work, due to its small budget, i.e. \$105,000.

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) provides:

Interests in public contracts.-(1) In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no 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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body: Provided, however, That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review of evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his interest in the contract. (2) In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

- (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
- (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.
- (3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-2-5(d)(4) 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 § 6B-2-5 provides:

(j) Limitations on Voting.

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. . . .

ADVISORY OPINION

The Town desires a contract exemption , pursuant to W. Va. Code § 6B-2-5(d)(4), to continue to compensate a Council Member, Johnny Knotts, for performing street maintenance and other services for the Town. Although there is no formal employment contract to perform these duties, each job and payment from the Town's general fund constitutes a public contract. There is no evidence that Council Member Knotts has not satisfactorily performed the work for which he has been compensated.

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. W.Va. Code § 6B-2-5(d). 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. There are exceptions to the prohibition, provided in W.Va. Code § 6B-2-5(d)(1) and (2) of the Act. The prohibitions do not apply to part-time appointed officials. Nor do they apply where the interest in the public contract is not more than \$1,000.00 per calendar year. However, these exceptions are not available to the Requester because Council Member Knotts earns more than \$1,000.00 per calendar year from the Town – thus outside the allowable threshold – and he is an elected, not appointed, public official.¹

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 6B-2-5(d) if the prohibition results in excessive cost, undue hardship, or other substantial

¹Another exception in W.Va. Code § 6B-2-5(d) reads: “. . . [N]othing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body. . . .”. Therefore, if the Requester chooses to create a position and employ the Council Member, W.Va. Code § 6B-2-5(d) would not be violated. Of course, the Council Member must not use his office for private gain to get the position. He would need to recuse himself from the voting and decision-making process, including determining whether to create such a position. The Requester would need to advertise the position and follow the other guidelines regarding nepotism in hiring. Further, W. Va. Code § 6B-2-5 prohibits a public official from voting on matters in which they have a financial interest. The Council Member would need to recuse himself from voting on whether to create this position and his employment with the Town, pursuant to W.Va. Code § 6B-2-5(j).

interference with the operation of a governmental body or agency. The governmental body must demonstrate that compliance with the prohibition is certain to produce substantial harm. The burden is upon the Requester to demonstrate sufficient evidence and facts in support of an exemption. C.E. 2008-12.

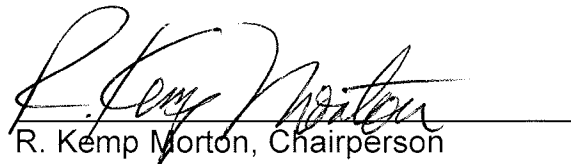
The Town asserts that the contract with the Council Member offers substantial savings to the Town. It further states that there is not enough work to justify adding an employee to the payroll. The Town's population is less than 500, making it difficult to find reliable workers willing to perform the necessary work at that rate of pay.

The Commission has previously recognized that "[t]here may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities." A.O. 2006-05. The Commission has also recognized that municipalities, as with many public and private sector entities, are facing difficult financial times. C.E. 2012-03.

The Commission hereby finds that the Town would experience undue hardship if it were not permitted to continue to use the services of Council Member Knotts. The Commission takes administrative notice of the low hourly rate, and that Council Member Knotts has not received a windfall by virtue of his work for the Town.

Thus, the Commission hereby grants a **one year** exemption from the provisions of W. Va. Code § 6B-2-5(d) for the Town to continue to compensate Council Member Knotts for performing services for the Town (other than his services as a Council Member). Prior to the expiration of this exemption, the Town shall report back to the Ethics Commission the amount of compensation it paid to Council Member Knotts.

The Commission notes that exemptions may only 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. This exemption is effective from the date of issuance.


R. Kemp Morton, Chairperson