

CONTRACT EXEMPTION NO. 2013-04

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WEST VIRGINIA ETHICS COMMISSION

EXEMPTION SOUGHT

The West Virginia Conservation Agency seeks an exemption to allow Elected Members of Conservation Districts to participate in cost-share programs the Districts offer.

FACTS RELIED UPON BY THE COMMISSION

Conservation Districts were created to conserve land from soil erosion. See W. Va. Code § 19-21A-2. The districts have been in existence in some form since 1939 and were originally called "Soil Conservation Districts" until 2002 when their name was changed to "Conservation Districts."¹ A district may consist of land in one or more counties. Landowners in one or more counties may form a district by petitioning the State Conservation Committee.²

Each county in a district shall elect two non-partisan supervisors.³ A candidate for Conservation Supervisor "must be a landowner and an active farmer with a minimum of five years' experience or a retired farmer who has had a minimum of five years' experience and must have the education, training and experience necessary to carry out the duties required in this article."⁴ Additionally, the Code requires Conservation Supervisors to "be persons who are by training and experience qualified to perform the specialized skill service which are required of them in the performance of their duties under this section and shall be legal residents and landowners in the district."⁵

Conservation Districts participate in the state Agricultural Enhancement Program (AgEP) which offers a cost share program to local landowners who qualify for the program. This program provides cost-share for a variety of best management practices farmers can implement to reduce soil erosion, improve water quality and enhance production on their farms, e.g., one cost-share practice involves the spreading of lime.

The AgEP mission is to assist the agriculture cooperators of West Virginia with the voluntary implementation of best management practices on agricultural lands in order to conserve and improve land and water quality. Practices are determined by each

¹ S.B. 417, 2002 Regular Session.

² W. Va. Code § 19-21A-14 when read in conjunction with 19-21A-5 as amended in 2002.

³ W. Va. Code § 19-21A-6. Counties which meet the population requirements shall elect additional supervisors in accordance with this code section. Id.

⁴ Id.

⁵ W. Va. Code §19-21A-7(a).

Conservation District and applications are presented to each Conservation District Board for review and approval at monthly board meetings.

Districts have the statutory power to conduct surveys relating to the character of soil erosion.⁶ Districts may also expend public funds for demonstration projects on land within a district for the purpose of determining which “means, methods and measures” best prevent soil erosion.⁷ Some of the Districts’ programs involve cost-sharing whereby landowners receive certain benefits but also pay a portion of the cost.

The West Virginia Conservation Agency is the administrative office of the State Conservation Commission. The Conservation Commission is a 10-member board that oversees the implementation of soil conservation and watershed programs in the State. The State Conservation Commission is also charged with working with West Virginia’s 14 Conservation Districts and the 114 elected conservation supervisors to implement conservation programming at the local level.

In support of the request for a contract exemption, the Requester states:

Because of the position and candidacy requirements, conservation district supervisors believe the \$1,000 annual contract limit prevents them from taking full advantage of agricultural cost-share programs they oversee as conservation supervisors.

Farming is often a family affair, and since the exemption extends to spouses and immediate family members, many conservation supervisors feel the restriction unjustly interferes with their ability to run their agricultural businesses.

On behalf of the 14 Conservation Districts, the West Virginia Conservation Agency seeks a blanket exemption to allow Elected Members of Conservation Districts to participate in cost-share programs the Districts offer. Without a blanket exemption, each time an Elected Member of a Conservation District wanted to participate in a cost-share program offered by her/his District, such District would have to seek and obtain a Contract Exemption from the Ethics Commission before public funds could be expended on any such Elected Board Member.

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides that no elected public official or business with which s/he is associated may be a party to or have an interest in the profits or benefits of a contract which such official may have direct authority to enter into, or over which s/he may have control.

⁶ W. Va. Code § 19-21A-8(1)

⁷ W. Va. Code § 19-21A-8(2)

W. Va. Code § 6B-2-5(d)(3) states, in pertinent part, that where the provisions of subdivisions (1) and (2) of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption.

ADVISORY OPINION

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. This prohibition prevents a public entity from doing business with one of its own Board Members. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant a public entity an exemption from this prohibition if the public entity demonstrates that compliance with the prohibition will cause the public entity excessive cost, undue hardship or substantial interference with its operation.

W. Va. Code § 6B-2-5(d)(1) prohibits a public official from having more than a limited interest in the profits or benefits of a public contract over which s/he has direct authority or control. This prohibition contains an exception for part-time appointed officials, but there is no exception for elected officials such as Conservation Supervisors.⁸

This is not the first time that the Ethics Commission has applied W. Va. Code § 6B-2-5(d)(1) to Conservation District Members. In Advisory Opinion 2010-20, the Commission first concluded that a Conservation District Member is an elected member and subject to the prohibitions in West Virginia Code § 6B-2-5(d). As a result, if the Conservation District were to expend public funds to improve a District Member's property, then it would constitute a public contract between the property owner/District Member and the District. The Elected Board Member would have a financial interest in this project.⁹ Thus, in Advisory Opinion 2010-20, the Commission concluded that a Conservation District may **not** expend public funds to construct a demonstration project on the property owned by one of its Members unless the District seeks and receives a contract exemption to construct the project. In order to obtain a contract exemption, the District must demonstrate that imposing this restriction in the Ethics Act will result in excessive cost, undue hardship, or other substantial interference with the operation of

⁸ There is also an exception for contracts which do not exceed \$1,000 per calendar year. Based upon information provided by the Requester, however, this exception is inapplicable since most projects exceed \$1,000.

⁹ For purposes of this prohibition, it is not sufficient for public officials to recuse themselves from voting.

the District. W. Va. Code § 6B-2-5(d)(3).

Additionally, in Advisory Opinion 2010-20, the Commission noted that Conservation Districts may construct projects on property owned by its members if the Ethics Act or the Districts' enabling statute is amended to allow their Members to participate in projects wherein public funds are expended.

In Advisory Opinion 2012-42, the Commission ruled that—assuming that the District has the statutory authority to expend public funds for scholarships—a Conservation District may award a \$500 annual scholarship to a District supervisor's child.¹⁰ The Commission noted that this award was permissible so long as the District supervisor recuses him/herself from all participation in selection of scholarship participants, leaves the room during discussion and decision-making period, and fully discloses his or her interests. The Commission noted that W. Va. Code § 6B-2-5(d) prohibits public servants from having a financial interest in a public contract. The Ethics Act defines a prohibited financial interest as one greater than \$1,000 per calendar year. W. Va. Code § 6B-2-5(d)(2)(A). Thus, the Commission found that the scholarship was not a prohibited public contract because the scholarship amount is only \$500, less than the \$1,000 per calendar year threshold.

More recently, in Advisory Opinion 2013-25, the Commission was asked whether it was a conflict of interest for a Conservation District to reimburse landowners for goods and services purchased from an Elected Board Member and, if so, whether it may be cured by his recusal from voting thereon. The Commission wrote:

Since the Conservation District Board approves the application of each landowner prior to the procurement of the lime and/or spreading, each Board Member has direct authority or control over each such application. Similarly, after a landowner incurs the expense, the Board votes to approve the landowner's request for reimbursement of her/his payment to a provider for goods or services; thus, each Board Member has direct authority or control over each such reimbursement request. If a Board Member provides the goods or service to a landowner, then that Board Member has a financial interest in the benefits of a public contract. The fact that the landowner pays for the service out of pocket prior to being compensated by the Conservation District does not solve the problem given that the transaction is between the landowner and an Elected Board Member.

Advisory Opinion 2013-25.

¹⁰ The Commission found no explicit statutory authorization for a District to expend its public money on scholarships and therefore recommended that the District seek an opinion from the W. Va. Attorney General's Office as to whether Conservation Districts are authorized to grant scholarships.

According to the Requester, the Ethics Act provides implicit authority for the award of a blanket exemption, due to the unique characteristics of Conservation Supervisors.

W. Va. Code § 6B-2-5(b)(3) provides:

The Legislature, in enacting this subsection, recognizes that there may be certain public officials or public employees who bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. Those persons may, in fact, be sought by the state to serve in their office or employment because, through their unusual gifts or traits, they bring stature and recognition to their office or employment and to the state itself. While the office or employment held or to be held by those persons may have its own inherent prestige, it would be unfair to those individuals and against the best interests of the citizens of this state to deny those persons the right to hold public office or to be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them. Accordingly, the commission is directed, by legislative rule, to establish categories of public officials and public employees, identifying them generally by the office or employment held, and offering persons who fit within those categories the opportunity to apply for an exemption from the application of the provisions of this subsection. Exemptions may be granted by the commission, on a case-by-case basis, when it is shown that: (A) The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

The Requester states that "Conservation supervisors, by law, are required to be active or retired farmers and have the necessary skills successfully execute their oaths of office"; and that as a result, "it would be unfair to individuals who bring a unique set of skills or experience to the positions they occupy to be denied to benefit 'from the personal prestige which otherwise inheres to them'."

Unfortunately, the exemption cited above is to the Ethics Act's prohibition against public officials using their positions for private gain, W. Va. Code § 6B-2-5(b)(1); not the prohibition against having an interest in a public contract, W. Va. Code § 6B-2-5(d)(1).

While the Commission is sympathetic to the plight of the Conservation Supervisors, a careful evaluation of all relevant legislation requires the Commission to deny the Requester's Contract Exemption request for two reasons. First, Contract Exemptions are to be granted on a case-by-case basis. See e.g. Contract Exemption 2007-01.

Second, during the 2013 Regular Session, the West Virginia Legislature passed Senate Bill 412 amending W. Va. Code §§ 19-21A-6 and 19-21A-7. Those amendments did not, however, address the impact of the Ethics Act's prohibition against having an interest in a public contract.¹¹

It does not appear from the recent amendment to the statute that the Legislature intended to exempt Conservation Supervisors from the prohibition against having an interest in a public contract. Thus, the Commission finds that despite the authority to grant Contract Exemptions, the Commission lacks the authority to grant the requested blanket exemption to Conservation Supervisors.

A rule of statutory interpretation is:

A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it was intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Kessel v. Monongalia County General Hospital Company, 648 S.E.2d 366 (W. Va. 2007).

While the Ethics Act allows the Commission to grant Contract Exemptions based on a demonstration of undue hardship, excessive cost or the substantial interference with operation of government, the Commission declines to approve such a broad exception for Conservation Supervisors absent clear legislative authority. See Cabot Oil & Gas v. Huffman, Nos. 35508, 35509, 35510, 35511, ___ W. Va. ___, ___ S.E.2d ___, (Slip Op. at 16, filed Nov. 3, 2010) (per curiam). "Absent a direct expression of such intent by the Legislature, we are constrained to apply the law in effect at the time...." *citing* Syl. pt. 1, Loveless v. State Workmen's Comp. Comm'r, 155 W. Va. 264, 184 S.E.2d 127 (1971). Since the Legislature had the opportunity to effect such change, but did not do so, the Commission is powerless to legislate any statutory change. Ultimately the

¹¹ Senate Bill 412 made changes to the election process and the process for removal from office of Conservation Supervisors.

determination of whether Conservation Supervisors may be exempted from the provisions of W. Va. Code § 6B-2-5(d)(1) will need to be resolved by the Legislature.

As a result, despite the unique situation presented, the Commission cannot grant a blanket exemption. Instead, each time a Conservation Supervisor desires to participate in a cost-share program, the Conservation District is required to seek and obtain an exemption. In order to obtain an exemption, the Conservation District must prove that the prohibition would constitute undue hardship, excessive cost or substantial interference with the operation of the Conservation District. It must demonstrate that compliance with the prohibition is certain to produce substantial harm, and that real and significant hardship will result, hardship which outweighs the important role the prohibition plays in preserving propriety and the appearance thereof in public contracts.

Thus, the Commission hereby denies Conservation Supervisors a blanket exemption from the provisions of W. Va. Code § 6B-2-5(d).



Jonathan E. Turak, Vice-Chairperson