

Contract Exemption 2018-07

Issued on November 1, 2018, by

The West Virginia Ethics Commission

Opinion Sought

The **Town of Danville** seeks an exemption to allow it to purchase materials and supplies from Byrnside Hardware and Barker Hardware, which are owned by Town Council Member Fred Byrnside and Town Recorder Tony Hensley, respectively.

Facts Relied Upon By the Commission

The Town of Danville ("Town") is a Class IV municipality located in Boone County, West Virginia, with a population of fewer than 600 residents. It is governed by a Mayor, Recorder/Treasurer and five Town Council Members. The Town has a Town Manager and 12 other employees.

The Town historically bought materials and supplies for the Town's maintenance work from Danville Lumber Company. The Town states that it bought only small items valued at less than \$300 each, including nails, paint, plumbing supplies, screw drivers, tape, hammers, sidewalk salt and small power tools. In April 2018, Danville Lumber Company closed after 75 years in business. The Town states that in recent years, it had made around \$4,000 in purchases each fiscal year (July 1-June 30) from Danville Lumber Company.

There are now only two hardware stores in Danville: Byrnside Hardware and Barker Hardware. Town Council Member Fred Byrnside owns Byrnside Hardware. Town Recorder Tony Hensley is one of several owners of Barker Hardware and is an officer of the business.

The Town began purchasing materials and supplies from Byrnside Hardware and Barker Hardware after Danville Lumber Company closed in April 2018. The total value of these purchases has exceeded \$1,000 at each store.¹

The Town has requested that it be allowed to purchase materials and supplies from the two stores. The Town states that it will not pay more than \$300 per item from either Byrnside Hardware or Barker Hardware.

The Town states that the next closest hardware stores are Lowe's and Home Depot in South Charleston. It takes approximately 30 minutes to drive from Danville to South Charleston. According to the Town, travelling to these stores would cause a loss in

¹ The Town Clerk keeps a monthly total of items purchased from each store to ensure that neither store is favored over the other.

employee productivity, increased liability exposure caused by employees driving farther, and increased gasoline expenses.

Provisions Relied Upon By the Commission

W. Va. Code § 6B-2-5(d)(1) states, in relevant part:

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

...

W. Va. Code § 6B-2-5(d)(2) states, in relevant part:

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;

...

W. Va. Code R. § 158-8-2 states, in relevant part:

Examples of individuals with direct authority and control over the awarding of public contracts include all elected or appointed public officials in the executive branch of City, County and State government, superintendents, assistant superintendents, purchasing directors, County Commissioners, County Board members and City managers.

W. Va. Code R. § 158-8-4 states, in relevant part:

Public officials or public employees or members of their immediate family are considered to be “associated” with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

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) states, in relevant part:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

Opinion

Pursuant to W. Va. Code § 6B-2-5(d)(1), a public employee or official may not have more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. There is an exception for contracts which do not exceed \$1,000 per calendar year.² This exception is not applicable here as the Town wishes to make purchases exceeding \$1,000 per year.

Council Member Byrnside and Recorder Hensley have financial interests in their hardware stores. Council Member Byrnside owns Byrnside Hardware and Recorder Hensley is one of several owners and an officer of Barker Hardware. See W. Va. Code R. § 158-8-4. Further, as a Council Member and Recorder, each has direct authority or control over the Town's contracts. See W. Va. Code R. § 158-8-2. Therefore, the Town was required to receive a Contract Exemption prior to purchasing more than \$1,000 of items per calendar year from Byrnside Hardware or Barker Hardware.

The Ethics Commission must determine whether prohibiting the Town from making purchases from Council Member Byrnside and Recorder Hensley's businesses would result in "excessive cost, undue hardship or other substantial interference" with the operation of the Town. The Town stated that the 30-minute trip to South Charleston would create excessive cost, undue hardship and substantial interference with the operation of the Town by causing a loss of employee productivity, increased liability for traveling employees and increased gasoline expenses.

² While it is permissible to have a limited interest, the affected public official "may not make, participate in making, or in any way attempt to use his office ... to influence a government decision affecting his or her financial or limited financial interest." W. Va. Code § 6B-2-5(d)(3).

The Ethics Commission previously has found that requiring city employees to travel long distances to make purchases created an undue hardship which warranted a Contract Exemption. In Contract Exemption 2016-01, the Commission permitted the City of Cameron to make incidental purchases from a hardware store owned by the Mayor. In granting the exemption, the Commission found that making the City's workers travel 30 minutes one way to the closest hardware or lumber store would result in undue hardship and substantial interference with governmental operations. In Contract Exemption 2008-06, the Commission permitted the City of Belington to make purchases from a hardware store owned by a City Council member because a one-hour round trip to the next closest hardware store constituted undue hardship, excessive cost and substantial interference with the City's operation. Finally, in Contract Exemption 2007-04, the Commission permitted the City of Ripley to make purchases from a hardware store owned by a City Council member because a one-hour round trip to the next closest hardware store constituted undue hardship, excessive cost and substantial interference with the City's operation.

Based on the foregoing, the Ethics Commission finds that undue hardship and substantial interference with governmental operations would result if the Town of Danville is prohibited from making purchases from Byrnside Hardware and Barker Hardware.

The Ethics Commission holds that the Town of Danville may contract with Byrnside Hardware and Barker Hardware for purchases with the following limitations:

First, the total combined purchases from both Byrnside Hardware and Barker Hardware may not exceed \$4,000 for a period of one year beginning on November 1, 2018, and ending on November 1, 2019.


Second, the value of any one item purchased may not exceed \$300.00.

Third, an item may only be purchased from Byrnside Hardware or Barker Hardware when no other business located in Danville has the item. Council Member Byrnside and Recorder Hensley may not attempt to influence Town employees or officials to make purchases from their respective businesses.

Fourth, Council Member Byrnside and Recorder Hensley may not be involved in any of the Town's decisions relating to their respective hardware stores. They must recuse themselves from all matters relating to the Town's decisions to make purchases from, or payments to, their respective hardware stores. For recusal to be proper, Council Member Byrnside and Recorder Hensley must first fully disclose on the record their disqualifying interest, then they must leave the room during the discussion, deliberation and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that they left the room during all consideration, discussion and vote on the item under consideration. W. Va. Code § 6B-2-5(j)(3).

This Contract Exemption is effective until November 1, 2019. After November 1, 2019, if the Town continues to purchase materials or supplies from either Byrnside Hardware or Barker Hardware and the purchases to either exceed the \$1,000 limited financial interest, the Town must receive a new Contract Exemption in order to continue purchasing materials or supplies from either Byrnside Hardware or Barker Hardware.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or entities.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission