

BEFORE THE WEST VIRGINIA ETHICS COMMISSION

IN RE:

EMMETT S. PUGH
Mayor of the City of Beckley

Complaint Nos. VCRB 2009-09
VCRB 2011-04

CONCILIATION AGREEMENT

The West Virginia Ethics Commission and Emmett S. Pugh freely and voluntarily enter into the following Conciliation Agreement pursuant to West Virginia Code § 6B-2-4(s) to resolve all potential ethics charges arising from the above referenced Complaints.

FINDINGS OF FACT

After a thorough investigation of all the claims and allegations set forth in the aforementioned Complaints and related Statement of Charges, the following facts are hereby stipulated and agreed upon by the West Virginia Ethics Commission and Emmett S. Pugh, and are taken as true and correct:

1. Respondent Emmett S. Pugh (Respondent) was elected Mayor of the City of Beckley (City) in 1988 and has held this position at all times relevant herein.
2. Respondent will retire as Mayor effective January 1, 2014.
3. As Mayor, Respondent is the "chief executive officer" of the City, and, generally speaking, oversees the several public service departments of the City, including specifically, the City's Public Works Department.
4. Additionally, as the Mayor of the City, Respondent serves as the Chairman of the Beckley Sanitary Board, and presides over the city council, which is formally known as the Beckley Common Council.
5. Complainant filed with the West Virginia Ethics Commission (Commission) ethics complaints against Respondent on or about March 25, 2009 and March 1, 2011. The complaints, subsequently consolidated, alleged numerous violations of the Ethics Act.
6. On or about March 21, 2012, the members of the Probable Cause Review Board voted to enter an Order finding probable cause to believe that the Respondent violated W. Va. Code §§ 6B-2-5(b), (c), & (d).

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7. The Probable Cause Review Board is charged solely with investigating ethics complaints to determine if there is probable cause to proceed, and it is not the final trier of fact.
8. As required by W. Va. Code § 6B-2-4(f), the Ethics Commission issued a Statement of Charges that Respondent violated the Ethics Act as a result of the following:

I.

Woodland Properties, LLC

9. In 2006, local businessman Woody Duba approached Respondent about building a subdivision off the East Beckley Bypass in East Beckley. In particular, they discussed the benefits of having the City annex seventy-two (72) acres of land owned by Beaver Coal Company, Ltd. (hereinafter "Beaver Coal Company").
10. During the course of their conversation about the benefits of annexation, Respondent mentioned the City's longstanding practice of offsetting the additional cost of annexation through the use of certain City services, including free labor to pave roads in the future subdivision, known as Woodlands Village subdivision.
11. The City has historically (since at least the 1970s) offered such services as an enticement to annexation and to ensure the paving is completed in accordance with the City's street regulations, as the streets are deeded back to the City, which then is responsible for maintaining and repairing them.
12. On August 8, 2006, the Common Council approved the annexation of Beaver Coal Company's 72 acres of land.
13. On September 25, 2006, Beaver Coal Company negotiated and executed a written agreement with the general manager of the Beckley Sanitary Board regarding installation of an alternate main line extension to the newly annexed property. The agreement provided that the Sanitary Board would provide its employees and equipment free of cost in the installation of the main line extension. In exchange, Beaver Coal Company agreed to reimburse the Sanitary Board for non-Sanitary Board supplies and equipment. Respondent contends this historically has been the practice of the Sanitary Board, among other reasons, (a) as a way to encourage and bring in additional customers without having to bear the entire burden of the cost of installing new lines, and (b) to ensure the new lines are constructed according to the

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proper specifications, as the Sanitary Board ultimately is responsible for maintenance and repair. Respondent further contends that he neither specifically approved, authorized, nor requested this agreement. (This agreement was negotiated and executed before Woodland Properties, LLC, was formed and, thus, before Respondent had any interest in the properties.)

14. Effective on October 1, 2006, a new company, named Woodland Properties, LLC, was formed by Beckley businessman Roy Shrewsbury.
15. The formation of the new company was a joint decision by Mr. Shrewsbury and Mr. Duba with the intention that Woodland Properties, LLC develop the Woodlands Village subdivision by selling lots and/or houses.
16. At the time of the company formation, Mr. Shrewsbury was the only member of Woodland Properties, LLC.
17. On or about October 18, 2006, Mr. Shrewsbury offered, and Respondent accepted, a 49% interest in Woodland Properties, LLC.
18. Roy Shrewsbury is a long-time personal friend of Respondent, and Respondent maintains that the offer to join Woodland Properties, LLC was a result of his personal relationship with Mr. Shrewsbury and not due to his position as Mayor.
19. Respondent paid no money into the company and provided no collateral in exchange for his 49% interest, but contributed equity in the form of services (which is expressly authorized by statute), to-wit: all bookkeeping, as well as certain marketing, sales, and maintenance of lots.
20. Respondent maintained his ownership interest in Woodland Properties, LLC until December 31, 2007, at which time he voluntarily terminated his ownership interest.
21. During the course of his ownership interest in Woodland Properties, LLC, Respondent received cash distributions in the total amount of \$2,000.00, as well as a single payment of \$10,000.00 (representing redemption by the company of his ownership interest) on December 31, 2007.
22. On October 25, 2006, Beaver Coal Company deeded lots in the subdivision to Woodland Properties, LLC, but retained ownership of the roads.
23. The Beckley Sanitary Board subsequently finished installation of the alternate main line extension pursuant to the agreement that was executed before Woodland

Properties, LLC, was formed, and before Respondent had any interest in the properties. This installation was completed without PSC approval, although the failure to obtain PSC approval was neither intentional nor unique to this installation: the Sanitary Board had been remiss in obtaining approval for all of its alternate main line extensions.

24. By providing labor and City-owned equipment at no cost to Beaver Coal Company, Beaver Coal Company saved money and/or the expense of having to pay a private contractor to install the main line extension.
25. In addition, during the period of Respondent's ownership interest, the City's Department of Public Works paved a portion of the roads for the proposed Woodlands Village subdivision. The remaining portions of the roads were paved after Respondent voluntarily terminated his membership interest in Woodland Properties, LLC. There was neither a written agreement nor Common Council approval. As with the sewage system, the City provided its employees and equipment free of cost to Beaver Coal Company. Beaver Coal Company only paid for the asphalt.
26. In his position as Mayor, Respondent is responsible for City departments. The Commission contends Respondent authorized the paving of the roads in the subdivision. Respondent contends, however, that he never authorized or directed the City Public Works Department to install and pave the roads in the annexed land in furtherance of the proposed Woodlands Village subdivision; rather, the practice was for developers to approach directly the Public Works department head, who would make all necessary arrangements.
27. The labor and equipment were provided by the City at no cost to Beaver Coal Company, thereby saving Beaver Coal Company money and/or the expense of having to pay a private contractor to install and pave the roads.
28. At the time of the paving, the roads were the private property of Beaver Coal Company, and Woodland Properties, LLC, had no interest in them. Typically, the roads are deeded back to the City for its maintenance, although Beaver Coal Company suspended its plans to do so pending disposition of this matter.

29. On and off since at least 2006, Roy Shrewsbury has been doing and/or seeking to do business with the City and its various governmental sub-units. Additionally, at the time Respondent accepted the ownership interest in Woodland Properties, LLC, Beaver Coal Company/Woody Duba was doing business with the Beckley Sanitary Board.
30. As businesses operating within or doing business with the City, Beaver Coal Company and one or more businesses of Mr. Shrewsbury were subject to City ordinances, rules, regulations, and/or oversight.
31. The Ethics Commission takes the position that these facts constitute a violation of the Ethics Act in that the ownership interest was a gift, but Respondent contends he provided permissible and substantive consideration for his ownership interest such that the interest was not a gift in violation of the Ethics Act. The Ethics Commission takes the position that the paving and sewer main line extensions were violations of the Ethics Act because Respondent acted improperly to benefit himself and third parties. Respondent contends (a) he did not act at all with respect to paving and sewer, (b) the actions taken with respect to Woodland Properties, LLC, and/or Beaver Coal Company were the same actions the City would take with respect to any other developer, and (c) the City's actions were taken with an eye toward benefitting the City (in that the City would maintain and repair roads and sewer lines that it knew were properly constructed).

II.

ATV at the Rock, Inc.

(d.b.a. Burning Rock)

32. Following his resignation/termination from Woodland Properties, LLC, Respondent accepted a 10% ownership interest in ATV at the Rock, Inc. from Roy Shrewsbury. As with Woodland Properties, LLC, Respondent paid neither monetary consideration into the company nor provided collateral for his ownership interest in ATV at the Rock, Inc., but contributed equity in the form of services (which is expressly authorized by statute), to-wit: working certain weekends operating the general store.
33. ATV at the Rock, Inc. was formed in March 2008 by Roy Shrewsbury, and was officially recognized as a corporation by the Secretary of State on March 19, 2008.

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34. ATV at the Rock, Inc., does business as Burning Rock Outdoor Adventure Park (hereinafter "Burning Rock").
35. Burning Rock consists of nearly 100 miles of off-road trails, situated over 8,000 acres of land near Sophia, WV.
36. Beaver Coal Company owns the 8,000 acres of land, and entered into a lease agreement with ATV at the Rock, Inc. to operate Burning Rock.
37. The other business operations at Burning Rock cater to users of the ATV trails. Specifically, there is an ATV rental shop, a general store, and cabins available for rent. The incomes generated from all of these business operations go to ATV at the Rock, Inc.
38. At the time he accepted an ownership interest in ATV at the Rock, Inc., Respondent was aware that Roy Shrewsbury and Beaver Coal Company were doing business and/or seeking to do business with the City, including, but not limited to the Beckley Intermodal Gateway (B.I.G.) project.
39. Further, during the period of his ownership interest, Respondent permitted City government officials or their agents to negotiate and approve contracts on behalf of the City with Mr. Shrewsbury and Mr. Duba/Beaver Coal Company.
40. The Ethics Commission takes the position that these facts constitute a violation of the Ethics Act in that the ownership interest was a gift to Respondent, but Respondent contends that he provided permissible and substantive consideration for his ownership interest such that the interest was not a gift in violation of the Ethics Act.

III.

Beckley Intermodal Gateway Project

41. The Beckley Intermodal Gateway (B.I.G.) project is a multi-phase transportation center constructed in downtown Beckley that is owned and operated by the City.
42. The bulk of the funding, \$20 million, was secured in 2006 through a grant from the Federal Transit Administration (FTA). The City was responsible for a 20 percent funding match, which, according to the City's website, came from \$2.3 million in land value and \$2.7 million in Department of Transportation revenue credits.

43. As Mayor, Respondent was the designated agent on behalf of the City for the construction of the B.I.G. project. Although the Beckley Common Council had general approval authority, Respondent possessed the signature authority for the City, as well as the authority to direct and/or approve actions on behalf of the City. The City subsequently retained Parsons Brinckerhoff (PB), a firm specializing in these kinds of projects, to manage the B.I.G. project for the City. At that point, PB was the main point of contact for the City regarding contractors and jobs related to the B.I.G. project.
44. As part of the construction of the B.I.G., the site had to be excavated and dirt removed from the site location. This removed dirt is commonly referred to as "spoils."
45. PB authorized and/or approved an agreement with Woody Duba/Beaver Coal Company to place the spoils on a piece of land off Harper Road that was owned by Beaver Coal Company. PB and/or its subcontractors had explored several potential spoils sites, but ultimately there was no site suitable for the spoils besides the Beaver Coal Company property.
46. Because of permitting issues through the Department of Environmental Protection (DEP), the initial spoils site plan (which included, among other things, a road somewhat improved from the road that already existed on the property) was broken into two phases. The contractor responsible for the spoils site submitted costs to PB with respect to the first phase.
47. The spoils were not deposited on the Harper Road site or graded according to plan, and a dispute arose between Beaver Coal and the City/contractor as to the grading and preparation of the spoils at the Harper Road location. In particular, the spoils had simply been dumped in piles, blocking the existing road through the property, and the contractor responsible for the spoils site had not made any effort to begin the somewhat improved road that had been negotiated as part of the initial arrangement and that was part of the initial spoils site plan and subsequently incorporated into the second phase of the spoils site plan. Additionally, Respondent contends that the Sanitary Board strongly voiced concerns that the piled and non-graded spoils were not in compliance with DEP standards.

48. At that point, PB determined the contractual arrangement with the spoils site contractor was vague with respect to the contractor's obligations regarding the site plan and asked the contractor to provide the cost to complete the spoils site as per the site plans.
49. After the spoils site contractor provided the additional cost estimate (to comply with the second phase of the spoils site plan), PB submitted a change order under the FTA grant.
50. Respondent approved the change order and expenditure of additional FTA grant funds on behalf of the City.
51. The placement of spoils and the improvement of a road provided a financial gain to Beaver Coal Company and enhanced the site for future commercial use, although property owners typically exact a per-cubic-yard fee for placing spoils, which Beaver Coal Company waived in lieu of this site improvement.
52. The Ethics Commission takes the position that these facts constitute a violation of the Ethics Act, while Respondent asserts that they do not because he took no action for the purpose of benefiting Beaver Coal Company or any other person or entity besides the City.

IV.

Leased Vehicle

53. At all times relevant herein, Respondent was provided and utilized a vehicle leased by the Beckley Sanitary Board.
54. As Chairman of the Beckley Sanitary Board, Respondent was vested with the authority to negotiate and approve leases of vehicles for business and personal use. Over the past ten years, Respondent has leased a Cadillac SRX, Cadillac Escalade, and currently leases and uses an Acura MDX.
55. Respondent maintains that he needs the leased vehicle in order to perform his duties and responsibilities as Chairman of the Beckley Sanitary Board.
56. Respondent keeps a mileage log of both his private and public use of the leased vehicle, and the City converts the value of his private mileage use into income for tax purposes.

57. The Ethics Commission contends that the use of a leased vehicle constitutes an impermissible increase in salary since the provision of a vehicle does not, according to the Commission's interpretation, meet the statutory definition of authorized compensation in W. Va. Code § 16-13-18. Respondent contends, however, that the vehicle is expressly authorized by statute (a) as part of payment for expenses (in lieu of reimbursement for mileage driven in a personally-owned vehicle), and (b) as salary, given that the value of his personal use of the vehicle is converted to income for tax purposes.
58. Respondent is a member of the board of directors of a not-for-profit health system with facilities and employees in, and serving the citizens of, the City. Respondent attends board meetings, which are often held in Kentucky.
59. During the course of the investigation, the Ethics Commission found the mileage logs contained entries for Respondent's attendance at these board meetings in Kentucky that were classified as business use.
60. Additionally, the investigation found instances where Respondent received reimbursement from the health system for expenses (including food, lodging, and mileage reimbursement) associated with attendance at meetings.
61. The Ethics Commission takes the position that these mileage log entries and reimbursements were improper (in that the mileage should have been recorded as personal use and the reimbursements were improper) and resulted in private financial gain to Respondent, while Respondent takes the position that they are entirely appropriate and not inconsistent with the Ethics Act or other laws and regulations.

RELEVANT LEGAL PROVISIONS

West Virginia Code § 6B-2-5(b) provides, in relevant part, that "[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. . . . 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." (Emphasis added). W.Va. C.S.R. § 158-6-6 states:

It is unlawful for a public official or public employee to accept any money or thing of value from any person for providing business or other benefits to that person through the public official's or public employee's governmental agency or as a result of his influence or control.

Further, W.Va. C.S.R. § 158-6-7 states:

It is unlawful for a public official or employee to receive money or any thing of value from any person for the purpose of influencing or persuading the official to perform his duties in a manner to benefit such person.

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

(c) *Gifts.* -- (1). . . No official or employee may knowingly accept any gift, directly or indirectly, . . . from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

W.Va. Code § 6B-2-5(d)(1) states, in relevant 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. C.S.R. § 158-8-2 ("direct authority and control") further states:

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 § 31B-4-402(a) provides that a member of a limited liability company, in exchange for an interest in the company, may contribute, among other things, "services performed or . . . contracts for services to be performed." Similarly, W.Va. Code § 31D-6-621(b) provides that a shareholder of a corporation, in exchange

for an interest in the corporation, may contribute, among other things, "serviced performed [or] contracts for services to be performed"

CONCILIATION OF CHARGES

I, **EMMETT S. PUGH**, Mayor of the City of Beckley, freely and voluntarily enter into this Conciliation Agreement in order to resolve these complaints. By signing this agreement, I also agree to the imposition of sanctions by the West Virginia Ethics Commission.

In consideration for the settlement and resolution of this matter, I agree to the imposition of the following sanctions by the Ethics Commission:

- a. Public Reprimand by the Ethics Commission;
- b. Divestiture of all of my ownership interest in ATV at the Rock, Inc.;
- c. Payment of seven thousand dollars (\$7,000.00) as reimbursement for the actual costs of the investigation, payable to the West Virginia Ethics Commission, in twenty (20) equal monthly payments of Three Hundred Fifty dollars (\$350.00) each, beginning 30 days after the entry of the Order approving this Conciliation Agreement; and
- d. Agreement not to hold public office or employment, including appointment to public boards or commissions that are subject to the oversight and purview of the Ethics Commission, regardless of compensation, for five (5) years, beginning January 1, 2014, and agreement to review and/or propose, if necessary, new City policies, with the approval of the Beckley Common Council and in compliance with the West Virginia Ethics Act, relating to: the use of public resources in private paving projects; private use of public vehicles; acceptance of gifts from individuals or entities that are doing, or seeking to do, business with the City; and prohibition of public employees and officials from having a financial interest in a City-financed and/or -authorized project.

By signing this Agreement, I hereby acknowledge and agree that the Ethics Commission will approve only the sanctions listed above. I understand that in order for this Conciliation Agreement to be finalized, the Commission must approve it and must further make a determination concerning which, if any, sanctions to approve. In the event the Commission enters an Order approving any sanctions other than those specifically set forth above, then both the Order and this Conciliation Agreement are null and void, and the complaints shall be scheduled for a public hearing on the merits before the already appointed hearing examiner.

If the Ethics Commission approves this Agreement, I understand that it will enter an Order in which it approves the Agreement and sets forth the sanctions listed above. I further understand that, pursuant to W. Va. Code § 6B-2-4(s), this Conciliation Agreement and the Ethics Commission's Order must be made available to the public.

Date: 06/06/13



R. Kemp Morton, Chairperson
WV Ethics Commission

Date: 6/6/13



Emmett S. Pugh, Respondent