

## Contract Exemption 2024-05

Issued on August 1, 2024, by

The West Virginia Ethics Commission

### Opinion Sought

**Mary Hendrix, President of Shepherd University**, is requesting a contract exemption allowing the University to sell property it owns on 120 North Princess Street in Shepherdstown, West Virginia, to Eric J. Lewis, a member of the University's Board of Governors.

### Facts Relied Upon by the Commission

The Governor appoints persons to serve on a university's board of governors. W. Va. Code [§18B-2A-1](#). Eric J. Lewis serves on the Board of Governors of Shepherd University ("BOG").<sup>1</sup> In summer 2023, the President of Shepherd University ("President") first presented her idea to the BOG members to sell 120 North Princess Street, a property that Shepherd University owns. The property is around .4 acres and contains a brick house that Shepherd University used for office space until May 2024. The President told the BOG that the property was not essential and the cash from the sale would enhance the University's cash reserves. The BOG members, including Mr. Lewis, agreed with the President and encouraged her to explore selling the property by listing it for sale.

The President secured two property appraisals and adhered to the other requirements in W. Va. Code [§18B-19-10\(a\)](#) for selling a university's real property, including public advertisements and a public hearing. The Code requires a higher education institution to set the sales price of its real property at a minimum of the average of two independent appraisals.<sup>2</sup> The average of the two appraisals was \$512,500. The President hired a real estate agent to list the property for sale. The listing agent advertised the property from September 2023 to June 2024. The initial asking price was just over \$1 million. The Requester asserts that during the winter the realtor and the University President recognized that the listed price was excessive and significantly

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<sup>1</sup> BOG positions are not full-time employment positions.

<sup>2</sup> W. Va. Code [§18B-19-10\(a\)](#) states: "The commission, council and governing boards may not sell, convey or otherwise dispose of any real property without first performing the following steps:(1) Providing for property appraisal by two independent licensed appraisers. The property may not be sold for less than the average of the two appraisals; (2) Providing notice to the public in the county in which the real property is located by a Class II legal advertisement pursuant to section two, article three, chapter fifty-nine of this code; (3) Holding a public hearing on the issue in the county in which the real property is located; (4) For real property with a proposed sale price of \$50,000 or greater, ten days prior to the placement of the Class II legal advertisement, providing written notice to the county commission and municipalities in the county in which the real estate property is located and all members of the Legislature . . . ."

reduced the asking price to \$700,000, and ultimately reduced the asking price to \$599,999 in early spring 2024. Board members were not engaged in those discussions.

No offers were made until May 2024. On May 22, 2024, the President presented the offeror's offer to the BOG for approval. The offered purchase price was \$525,000. The BOG discussed the offer in executive session and approved the sale in public by a resolution. Mr. Lewis voted in favor of the sale. The resolution and minutes do not reflect the specific terms of the sale. In June, the offeror withdrew its offer, and Shepherd's listing agent contract expired. The sales price and terms have since been made public. The President asserts that Mr. Lewis does not have any material advantage over the general public in purchasing the property and that Mr. Lewis was not involved in her decisions made during the winter and spring to reduce the sales price.

Mr. Lewis asserts that he had no desire to buy the property until after the proposed purchaser withdrew its offer. In June 2024, Mr. Lewis immediately notified the BOG and the President, in writing, that he was interested in purchasing the property and would recuse himself from any further matters concerning the property. The President asserts that Mr. Lewis negotiated an arm's length proposal with University staff for terms substantially equivalent to the previous offer that was recanted with a sales price of \$525,000.

The University asserts the following undue hardship on its operations if this sale to Mr. Lewis is not authorized: 1) The property has been on the market for eight months, and the University has no other prospective buyers of the property at the statutorily required sales price. 2) The University's effort to improve its fiscal reserves through the sale will be at a dead end without this transaction. 3) Retaining this building would also create multiple hardships for the University, including the expenses of maintenance, repairs, and liability insurance. 4) The empty building would create a nuisance.

### **Code Provisions Relied Upon by the Commission**

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

(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) states, in relevant part:

(1) In addition to the provisions of § 61-10-15 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 or 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 or her interest in the contract.

...

(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) 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.

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

(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. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which

constitutes five percent or more of the total outstanding stocks of any class . . . .

## **Opinion**

### *Prohibited Contract*

The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). A board of governors member has direct authority or control over the contracts of a university. See [Advisory Opinion 1990-50](#) and [Advisory Opinion 1990-138](#). The Ethics Act, however, also includes this exception:

[N]othing herein shall be construed to 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 or 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 or her interest in the contract.

W. Va. Code § 6B-2-5(d)(1). This exception expressly authorizes a part-time appointed board member, such as a member of a board of governors, to contract with the governmental board on which he or she serves, but only when he or she “has not participated in the review or 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 or her interest in the contract.”

In [Advisory Opinion 2010-10](#), a county solid waste authority asked whether its part-time appointed board members may bid on a building the authority was selling at auction. The Commission stated that the “part-time appointed” exception was only available “provided they [SWA members] properly recuse themselves from any and all consideration of any matter concerning the sale of the property, including the method of selling it.”

The Commission recognizes that Mr. Lewis immediately recused himself from all BOG matters concerning the sale of the property once he decided he was interested in making an offer. The Commission must determine, however, when the exception’s conditions, *e.g.*, recusal from deciding and evaluating the contract, were triggered - either at the beginning of the BOG’s first involvement with the process in deciding whether and how to sell the property or when Mr. Lewis decided he was interested in bidding on the property. The Commission finds that the conditions were triggered when the BOG first became involved with the decision-making process concerning the sale of the property. He, as a BOG member, was involved in the decisions to put the property on the market and to accept the initial purchase offer that later fell through. The

Commission finds that Mr. Lewis's prior involvement in the sale of the property cannot be undone.

**The Commission finds that the part-time appointed public official exception to the prohibited contract provision at W. Va. Code § 6B-2-5(d)(1) is not applicable due to Mr. Lewis's prior involvement with the evaluation, decisions, and votes regarding the sale of the property at 120 North Princess Street, in Shepherdstown, West Virginia.**

### *Contract Exemption*

The Ethics Commission will now decide whether to grant a contract exemption to allow Shepherd University to sell the property to Mr. Lewis.

The University asserts the following undue hardship on its operations if this sale to Mr. Lewis is not authorized: 1) The property has been on the market for eight months, and the University has no other prospective buyers of the property at the statutorily required sales price. 2) The University's effort to improve its fiscal reserves by the sale will be at a dead end without this transaction. 3) Retaining this building would also create multiple hardships for the University, including the expenses of maintenance, repairs, and liability insurance. 4) The empty building would create a nuisance.

**The Commission grants a contract exemption, pursuant to W. Va. Code § 6B-2-5(d)(3), to Shepherd University to sell the property at 120 North Princess Street, in Shepherdstown, West Virginia, to Eric J. Lewis, for \$525,000 with terms substantially equivalent to the previous sales contract offer that was withdrawn. Mr. Lewis must continue to recuse himself from all matters concerning the sale of the property.**

*The Ethics 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.*



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Suzan Singleton, Acting Chairperson  
West Virginia Ethics Commission