

## **Contract Exemption 2024-01**

**Issued on June 6, 2024, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

The **Fayette County Board of Education** requests a contract exemption to continue contracting with Rainelle Medical Center, Inc. and enter into a new contract if James Pat Gray, a BOE member, becomes an uncompensated member of Rainelle Medical Center's board of directors.

### **Facts Relied Upon By the Commission**

James Pat Gray ("Mr. Gray") serves as an elected member of the Fayette County Board of Education ("BOE"). The BOE is currently contracting with Rainelle Medical Center, Inc. ("RMC"), a for-profit medical provider that operates in many locations in southern West Virginia. RMC operates health care facilities on the Requester's school properties that provide medical, mental health, and counseling services to students and physical examinations for bus drivers. The contract provides that the BOE will pay \$75 per physical exam. This provision will expire on June 30, 2024. The contract also states that RMC is to provide social worker services in three schools for \$80,000 per year. This provision will expire on September 30, 2024. The BOE would like to enter into a new contract with RMC under the same terms and conditions.

Mr. Gray has been asked to serve as a member of RMC's board of directors, which is an unpaid position. His only relationship with RMC would be as a member of its board of directors. Mr. Gray does not have a personal financial interest in RMC or in the profits or benefits of the contracts held by RMC. The BOE is requesting the exemption through the remainder of Mr. Gray's current term on the BOE, June 30, 2026.

### **Provisions Relied Upon By the Commission**

[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. 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 . . . .

[W. Va. Code § 61-10-15\(a\)](#) states, in relevant part:

It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control . . . .

[W. Va. Code R. § 158-8-4 \(2009\)](#) 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.

## **Opinion**

The Ethics Act prohibits contracts between the BOE and a business with which a BOE member is associated, unless the BOE seeks and receives an exemption from the Ethics Commission. W. Va. Code §§ 6B-2-5(d)(1)-(4).<sup>1</sup> A BOE member is associated with a business if he or she, or their immediate family member, is a director or officer of the business. W. Va. Code R. § 158-8-4 (2009). As a member of RMC’s board of directors, Mr. Gray would be a director of the business. The Commission acknowledges that Mr. Gray does not have a personal financial interest in RMC. Nonetheless, contracts between the BOE and RMC would become prohibited at the time Mr. Gray began serving on RMC’s board.<sup>2</sup>

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<sup>1</sup> W. Va. Code §§ 6B-2-5(d)(1) and (2) provide exceptions to the prohibition, but none apply here.

<sup>2</sup> In addition to the Ethics Act, county officers, such as BOE members, must abide by the prohibitions in W. Va. Code § 61-10-15(a), a statute that imposes criminal penalties against a county official who has a pecuniary interest, either directly or indirectly, in the proceeds of a contract over which the official exercises voice, influence, or control. This statute is only triggered when a board member has an actual pecuniary interest, unlike the Ethics Act, which applies to members of for-profit boards of directors even if they lack a personal financial interest. As an unpaid member of the board of directors of the medical provider, Mr. Gray would have no personal pecuniary interest in the proceeds of the contracts between the BOE and RMC. Therefore, the contract would not violate W. Va. Code § 61-10-15(a), and an exemption is unnecessary under this provision.

### *Pre-existing contract*

The Ethics Commission, however, has employed an exception to the Ethics Act's prohibited contract provision for pre-existing contracts. See [Advisory Opinion 2001-11](#) (holding a board of education may continue buying dairy services under an existing contract with the superintendent's spouse's employer because it was a pre-existing contract); [Advisory Opinion 2000-16](#) (holding a board of education may continue its existing service contract with a board member to maintain a TV satellite system that he installed before becoming a member, so long as there is no modification of the contract's terms and conditions); and [Advisory Opinion 1996-49](#) (holding a board of education may purchase textbooks from a publisher that employs the superintendent's wife during the balance of the term of the contract due to the pre-existing contract).

**Therefore, the Commission holds that, if James Pat Gray becomes a member of Rainelle Medical Center, Inc.'s board of directors, the Fayette County Board of Education may continue the pre-existing contract with Rainelle Medical Center, Inc. until the contract's terms expire in June and September 2024.**

### *New contract*

If Mr. Gray accepts the position on RMC's board of directors, a contract exemption would be necessary before a new contract or any changes or modifications to the existing contract terms, which are due to expire this year, are taken up by the BOE. The Ethics Commission may only grant a contract exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the BOE's operations. W. Va. Code § 6B-2-5(d)(4).

The BOE has indicated that there are other medical providers in the county. However, the BOE contends that it has taken time to cultivate and develop the relationship with RMC and establish the sites for care in the school system. Starting all over with finding and setting up services with a different provider would be time consuming and logistically cumbersome. Specifically, the BOE asserts that the main clinic where RMC provides services to Fayette County Schools is on one of the BOE's campuses in a building owned by RMC. In the event that RMC ceased to be the provider and an equivalent one had to be found, the BOE may need to spend hundreds of thousands of dollars, possibly even up to \$300,000, building a new facility. Furthermore, it would take at least a year or longer to set up such arrangements, particularly if new construction or expansions to school facilities were required.

The Ethics Commission finds support in its past holding in [Advisory Opinion 1989-129](#), to grant the exemption in this case. In that Opinion, the Commission granted an exemption to a board of education to continue its 15-year contract for legal services with a board employee's spouse.<sup>3</sup> The Commission stated:

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<sup>3</sup> The language in W. Va. Code § 6B-2-5(d)(1) has been amended since 1989 but the amendment is immaterial to this case.

Through his representation of the County Board of Education the attorney has developed an expertise with regard to matters associated with the school system in general and the County Board of Education in particular. If the exemption is not granted the Board would have to go outside the County and obtain legal counsel from another area, which would increase the cost of legal representation to the Board. There are currently an excess of forty separate pending cases concerning the County Board of Education . . . .The Commission finds that excessive cost, undue hardship and substantial interference would result from the enforcement of (d) . . . .

The Commission is also persuaded to grant this exemption because, although Mr. Gray is associated with RMC, he does not have a personal financial interest in RMC or its contracts and will be serving as an unpaid board member. Further, the terms of the new contract will be the same as the contract terms that are currently in place, which were negotiated prior to Mr. Gray taking a seat on the board of directors.

**The Ethics Commission finds that the Fayette County Board of Education will face excessive cost, undue hardship, and substantial interference in its operations if this request is denied. Therefore, the Commission grants the contract exemption with the below limitations.**

First, the contract exemption will expire on June 30, 2026. If Mr. Gray is elected for another term to the BOE and remains on the RMC board, a new contract exemption will be necessary.

Second, Mr. Gray must recuse himself from decisions, discussions, and votes relating to the BOE's contract with RMC or payments for services to RMC. For recusal to be proper, he must first fully disclose on the record his disqualifying interest and leave the room during the discussion, deliberation, and vote on the matter as required by W. Va. Code §§ 6B-2-5(d) and (j)(3). In addition, the minutes or record of the meeting must reflect the basis for the recusal and that Mr. Gray left the room during all consideration, discussion, and vote on the contract and payment for services.

*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