

## Property Exemption No. 2017-01

Issued on April 6, 2017, by

The West Virginia Ethics Commission

### Opinion Sought

Jeff S. Sandy, Cabinet Secretary, West Virginia Department of Military Affairs and Public Safety, requests an exemption to continue leasing a vehicle to Perry & Associates Certified Public Accountants, A.C., in accordance with the terms of the April 6, 2016, lease agreement.

### Facts Relied Upon by the Commission

The Requester is the Cabinet Secretary for the West Virginia Department of Military Affairs and Public Safety ("DMAPS"). The Requester assumed the duties of the office of Cabinet Secretary on or around January 15, 2017, when Governor Jim Justice was sworn into office.

Prior to his appointment, Requester Sandy was employed as the Chief Financial Officer for Perry & Associates Certified Public Accountants, A.C. ("Perry & Associates") from May 2015 to June 2016. In April 2016, he leased a 2015 White Chrysler Town & Country van to Perry & Associates.<sup>1</sup> Mr. Sandy is no longer employed by Perry & Associates and, other than the lease, has no current business relationship with them.

The Requester states that Perry & Associates has made lease payments on a regular and timely basis since the execution of the lease agreement. A signed copy of the lease agreement is attached to this Exemption and incorporated herein by reference.

The term of the lease is 60 months. The lease states that the full retail value of the vehicle, a 2015 White Chrysler Town & Country van, is \$32,086.22. The Requester states the full

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<sup>1</sup> Jodey Altier is the owner of Perry & Associates. At the time the Requester leased the vehicle to Perry & Associates, he had another business relationship with Ms. Altier. Specifically, the Requester operated Forensic Financial Investigative Services LLC DBA Perry Forensic Investigations ("Forensic Financial Services"). The Requester states: "The profit from the sales of this business was split 66.34% to Jeff Sandy and 33.33% to Jodey Altier personally, not in her position as owner and CEO of Perry & Associates Certified Public Accountants A.C." Since the Requester has assumed his public position, he and Ms. Altier have not jointly taken on any other clients through the Requester's business, Forensic Financial Services. The Requester is awaiting payment on an invoice for work performed for a client through Forensic Financial Services. The work was performed prior to January 15, 2017. Once that invoice is paid, Ms. Altier will be paid her share; however, after that, neither Jeff Sandy nor Forensic Financial will owe her any other money for her past work with Forensic Financial. Further, Mr. Sandy and Ms. Altier will not be undertaking any more joint projects while he serves as Cabinet Secretary.

retail price is based upon the price he paid to a dealer in 2016 to purchase the vehicle for purposes of leasing it to Perry & Associates.

On October 11, 2016, Perry & Associates submitted a bid for audit and review services to the State of West Virginia Homeland Security and Emergency Management ("Homeland Security"). Homeland Security is a division of DMAPS; hence, it is under the supervision of Secretary Sandy. Prior to December 23, 2016, the Division of Homeland Security awarded the bid for the contract to Perry & Associates. The Requester states he "had no involvement or knowledge of this bid." The Requester further states: "In December 2016, I was selected to be the Cabinet Secretary and at that time had no knowledge of this bid and contract."

The Requester represents: "On March 14th, 2017 at 10:33 AM, I was made aware that Perry & Associates Certified Public Accountants A.C. had won a bid to perform a technical review of the federal funds received by Homeland Security and Emergency Management during an email conversation with Jodey Altier." The Requester also asserts:

I advise the Ethics Commission that I will not be involved with the audit/review, and all matters relating to it. Any contact with the audit team, reviews of their work product, or payment authorizations will be assigned to Deputy Secretary Thom Kirk.

The Requester asks: "I request that an exemption be granted, because I would personally be financially affected if I was required to breach the lease contract which was entered prior to me being appointed as Cabinet Secretary for Military Affairs and Public Safety."

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

West Virginia Code § 6B-2-5(h) reads, in relevant part:

(h) *Employment by regulated persons and vendors.* –

(1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

...

(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

(i) Drafting bid specifications or requests for proposals;

(ii) Recommending selection of the vendor;

(iii) Conducting inspections or investigations;

- (iv) Approving the method or manner of payment to the vendor;
  - (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or
  - (vi) Taking other nonministerial action which may affect the financial interests of the vendor.
- ...

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

(A) The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption, but shall decide each application on a case-by-case basis;

(B) A person adversely affected by the restriction on the purchase of personal property may make such purchase after seeking and obtaining approval from the commission or in good faith reliance upon an official guideline promulgated by the commission, written advisory opinions issued by the commission, or a legislative rule.

(C) The commission may establish exceptions to the personal property purchase restrictions through the adoption of guidelines, advisory opinions or legislative rule.

...

(5) A full-time public official or full-time public employee may not personally participate in a decision, approval, disapproval, recommendation, rendering advice, investigation, inspection or other substantial exercise of nonministerial administrative discretion involving a vendor with whom he or she is seeking employment or has an agreement concerning future employment.

158 CSR 3-2, Purchase, Sale or Lease of Personal Property, reads, in relevant part:

3.2. The Executive Director or the Ethics Commission shall grant an exemption to purchase personal property upon a finding that:

3.2.a. The negotiations for the proposed transaction were conducted at arm's length and there is no favoritism or appearance of favoritism;

3.2.b. If the potential seller or purchaser currently has a regulatory matter pending before the public official or employee, or a public contract over which the public official or employee exercises control, the official or employee's supervisor will review any decisions made by the official or employee for a six month period following the transaction to ensure there is no favoritism or the appearance of favoritism in regard to the seller or purchaser and that the supervisor's agency is willing and able, based upon existing staffing, to implement this safeguard; and,

3.2.c. There are no public policy reasons to deny the request.

### **Advisory Opinion**

Pursuant to the plain language in the Ethics Act, the Ethics Commission may grant an exemption to persons adversely affected by the limitations in W.Va. Code § 6B-2-5(h), including the limitation on public officials or employees leasing personal property to or from vendors. The Ethics Commission must determine whether the Requester will be adversely affected if he is required to terminate the vehicle lease agreement with Perry & Associates when the lease predates his appointment to the position of Cabinet Secretary for DMAPS.

Neither the Ethics Act nor related Legislative Rule, Title 158, Series 3, establishes specific standards for the Ethics Commission to apply when considering whether to approve an exemption to lease personal property to a vendor. The Ethics Commission's Legislative Rule does, however, establish standards to apply for considering whether to grant an exemption to *purchase* [emphasis added] personal property. The Ethics Commission finds that it is reasonable to consider that standard in evaluating the instant request which relates to leasing personal property.

The Legislative Rule sets forth the following factors for granting an exemption to purchase personal property:

3.2.a. The negotiations for the proposed transaction were conducted at arm's length and there is no favoritism or appearance of favoritism;

3.2.b. If the potential seller or purchaser currently has a regulatory matter pending before the public official or employee, or a public contract over which the public official or employee exercises control, the official or employee's supervisor will review any decisions made by the official or employee for a six month period following the transaction to ensure there is no favoritism or the appearance of favoritism in regard to the seller or purchaser and that the supervisor's agency is willing and able, based upon existing staffing, to implement this safeguard; and,

3.2.c. There are no public policy reasons to deny the request.

The Ethics Commission finds there are no facts to suggest that the parties to the lease agreement failed to negotiate the terms of the lease at arm's length. Further, the Ethics Commission finds there is no favoritism or appearance of favoritism, particularly as the lease predates the Requester's appointment to his current position.

The lease states that the full retail value of the vehicle, a 2015 White Chrysler Town & Country van, is \$32,086.22. (p. 1, para. 2). There are additional annual fees for the license plate (\$45) and inspection sticker (\$13) and the sales and use tax (\$329.44).<sup>2</sup> (p. 2, paras. 7 and 9). The lease states the monthly payment is \$576.53. (p. 2, para. 9).<sup>3</sup>

At the end of the lease period, there is an option to purchase the vehicle for \$1. (para. 5). The lease also grants the lessee an option to purchase the vehicle at any time during the lease by paying the following amounts: (1) The monthly payment multiplied by the number of months remaining in the term; (2) The \$1 residual value of the vehicle and (3) Any fees, taxes and expenses related to the purchase of the vehicle. See lease, p. 8.

The Ethics Commission notes that the Requester states he will remove himself from all matters involving Perry & Associates and will assign them to his Deputy Secretary. The Ethics Commission finds that there are no public policy reasons to deny this request, particularly when the lease agreement predates the Requester's appointment to his current position. Based upon the foregoing, the Ethics Commission finds the Requester will be adversely affected if this Exemption is denied and hereby grants the Exemption subject to the following limitations.

First, the parties may not alter the terms of the lease agreement without first seeking approval from the Ethics Commission.

Second, the Requester may not be involved in any decisions involving the contract between Homeland Security and Perry & Associates.

Third, the Requester must provide a copy of this exemption to his supervisor, the Governor, within two business days of it being approved.

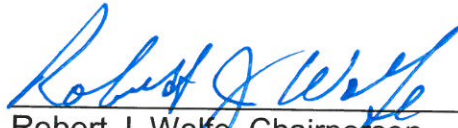
**In conclusion, the Ethics Commission grants an exemption to Requester, Jeff Sandy, to continue to lease the vehicle to Perry & Associates in accordance with the terms of the lease agreement and subject to the limitations imposed herein. The Ethics Commission also authorizes the Requester to sell the vehicle to the lessee in accordance with the terms of the lease agreement as the options to purchase are expressly part of the lease agreement.**

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<sup>2</sup> The lease states the sales use tax is \$1,647.22 and this sum is spread over the term of the lease.

<sup>3</sup> There appears to be a minor discrepancy between the agreed lease amount of \$576.53 and the figures provided in the lease for the amortization of the vehicle over 60 months, the annual fees and sales use tax. The Commission does not find this discrepancy in calculation material to its analysis.

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



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Robert J. Wolfe, Chairperson  
WV Ethics Commission