

CONTRACT EXEMPTION NO. 2007-01

Issued on July 12, 2007 By the

WEST VIRGINIA ETHICS COMMISSION

CONTRACT EXEMPTION SOUGHT

The **Jackson County Commission** seeks an exemption to allow one of its Elected Commissioners to continue renting an apartment to a tenant who receives HUD assistance through the County Housing Authority.

FACTS RELIED UPON BY THE COMMISSION

In 2006, Joe Pitts was elected to the Jackson County Commission. Commissioner Pitts owns rental property in Jackson County. One of his tenants receives housing assistance through the U.S. Department of Housing and Urban Development (HUD). The rental agreement between Commissioner Pitts and his tenant, including the provisions relating to the HUD assistance, pre-date his election to the County Commission.

The HUD program is administered locally by the Jackson County Housing Authority. The Housing Authority Members are appointed by the Jackson County Commission.

The Jackson County Commission is asking for a hardship exemption to allow Commissioner Pitts to continue to rent the apartment to his current tenant. The Commission Members, with Commissioner Pitts recusing himself, state that it would create an undue hardship on his tenant, a widow, to ask her to vacate the apartment. Commissioner Pitts is willing to keep the terms and conditions of the rental agreement the same as long as the tenant continues to occupy the premises, and so long as he remains an elected County Commissioner.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part that . . . no elected or appointed official or 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 . . . a contract which such 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. . . .

...

(3) 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 § 61-10-15(a) states in part that . . . It shall be unlawful for . . . any member of any . . . county or district board . . . to be or become pecuniarily interested, **directly or indirectly**, in the proceeds of any contract . . . [over] which as such . . . member . . . he may have any voice, influence or control.

W.Va. Code § 61-10-15 (h) further provides:

Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

The Ethics Act

Pursuant to W.Va. Code § 6B-2-5(d)(1) a public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official.

In this case, the contract in question arises from the contractual relationship between Commissioner Pitts, his tenant and the local Housing Authority for purposes of receiving rental payment with HUD funds. As there is a public contract, the Ethics Commission must determine if it is a public contract over which he has "direct authority and control."

It is the opinion of the Ethics Commission that the authority to appoint the Housing Authority Members does not constitute "direct authority or control" for purposes of W.Va. Code § 6B-2-5(d)(1). As such, there is no prohibition in the Ethics Act against the County Commissioner accepting HUD funds through the County Housing Authority for the rental property in question. Still, to comply with the Ethics Act, Commissioner Pitts should recuse himself from voting on the appointments of local housing authority members and other matters directly affecting the local housing authority for so long as his tenant receives HUD funds and for so long as he remains an elected County Commissioner. Further, Commissioner Pitts may not use his position to receive special treatment from a local housing authority.

West Virginia Code § 61-10-15

W.Va. Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily

interested, either directly or indirectly, in the proceeds from a public contract over which those officials may exercise "voice, influence or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

The Ethics Commission must first determine if Commissioner Pitts exercises "voice, influence or control" over the contract in question. The "voice, influence or control" test is more restrictive than the more narrowly tailored prohibition in the Ethics Act, § 6B-2-5(d), which only prohibits an interest in a public contract in those instances where the public official has "direct authority or control."


The Ethics Commission has held in the past that an Elected County Official's power to appoint constitutes "voice, influence or control" over public contracts administered by the Board or Authority over which the County Official has appointment power. (See A.O. 2004-10a and A.O. 2004-10b). In A.O. 2004-10a and A.O. 2004-10b the Ethics Commission ruled that an elected member of a county school board could not work for a multi-county vocational school which was governed by an administrative board composed of some members who were appointed by the county school board on which the requester served.

Due to the appointment power of the County Commissioner, the Commission finds that he exercises "voice, influence or control" over HUD contracts for purposes of W.Va. Code § 61-10-15. If a public official exercises voice, influence or control over a contract, he or she may not avoid the restrictions imposed by this code section by merely recusing him or herself. Instead, under these circumstances, a County Official may only have an interest in a public contract if the Ethics Commission grants an exemption.

Effective June 10, 2007, the Legislature amended WV Code § 61-10-15 to allow the Ethics Commission to grant exemptions from the prohibitions in this code section if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. In the present case, the lease between the County Commissioner and his tenant, including the provisions relating to the receipt of HUD funds through the local housing authority, predate Mr. Pitt's election to the County Commission. The Commission finds that to require the tenant, a widow, to vacate the premises would impose an undue hardship on her. While in most cases the "hardship" must be suffered directly by the government entity making a request, the Ethics Commission finds that the language in § 61-10-15, in limited circumstances, allows it to grant an exemption when a citizen of the county will experience undue hardship.

While Commissioner Pitts may continue to lease the apartment to his tenant, consistent with the guidance offered in the preceding section, he must recuse himself from voting on the appointment of local housing authority members and other matters directly affecting the local housing authority. Further, he may not use his public position to receive special treatment from the housing authority and shall keep the terms and conditions of the rental agreement relating to the receipt of HUD funds the same as long as the tenant continues to occupy the premises, and so long as he remains an elected County Commissioner.

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 a precedent by other persons.


Member James Shepherd, II for
Kemp Morton, Chairman