

CONTRACT EXEMPTION NO. 2008-09

Issued on July 10, 2008 By the

WEST VIRGINIA ETHICS COMMISSION

CONTRACT EXEMPTION SOUGHT

The **Webster County Commission** seeks an exemption to allow the County Commission to pay for the utilities incurred by the County Prosecutor at his private office space, which he is allowing the County to use rent-free.

FACTS RELIED UPON BY THE COMMISSION

In 2001, Dwayne Vandevender was elected part-time prosecutor for Webster County. During this time, Vandevender ran the Prosecutor's Office and his own private office out of a building controlled and owned by a corporation, in which he was principal shareholder. Following his previous two predecessors, Vandevender used his own office, at no charge to the County, because the space available through the County Commission was small and insufficient for the needs of the Prosecutor's Office.

On July 1, 2008, Vandevender will become the full-time Prosecuting Attorney for Webster County. As a result, Vandevender will close his private practice. The County still does not have a space available to meet the needs for a Prosecutor's Office. Currently, the County Commission has plans to renovate the third floor of the Courthouse to provide space for the Prosecuting Attorney. This plan cannot be completed until Spring 2009 at the earliest.

Vandevender is offering to allow the Prosecutor's Office to remain at his own private office space at no cost to the county, provided that the County Commission pay the actual costs of the utilities for the office space so that he has no out of pocket costs for use of the office space.

He shares the first floor of his building between a dental office and his law office. The dentist's office shares duct work for the heat/air conditioning, the electric meter for the lighting and the water meter. However, since this office is only a satellite office for the dentist, he is only in the office one or two days a month.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. – (1) A public official or public employee may not knowingly or 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)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be 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

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial interference with the operation of a ... municipality ... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

W. Va. Code § 61-10-15(a) states in part that ... It shall be unlawful for ... any elected county official ... 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 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 a 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 relation between the Prosecuting Attorney and owner of the building, Dwayne Vandevender and the Webster County Commission, who would be paying for the utilities. While it is

arguable that paying utility bills does not constitute a prohibited interest in a public contract, this issue need not be addressed here. As for the reasons set forth below, the Commission does hereby grant an exemption.

The Ethics Commission may 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 Prosecuting Attorney has used his own private office for the past seven years to the benefit of Webster County. If the County is not permitted to use this space, it will have to lease office space. In the opinion of the Commission it would impose an undue hardship on the County to require it to expend County funds to lease space when the Prosecutor's office space is being offered free of charge.

While Prosecuting Attorney Vandevender may continue to use his own private offices for the benefit of the County as the Prosecutor's Office, he must prorate the costs of the utilities between the dental office and the Prosecutor's Office based upon a good faith estimate. The County may only pay for the prorated share of the utilities attributed to the Prosecutor's Office, not the dentist's office. Based upon the amount of time the tenant/dentist uses the office floor, the Commission finds that the County should allocate a sum no less than 6.5% of the total cost of utilities for this floor of the building to the tenant/dentist. If the tenant/dentist changes his current practices and begins to use the office space more than 2 days a month, then the Prosecutor should consult with the Ethics Commission regarding what constitutes a fair allocation of cost.

West Virginia Code § 61-10-15

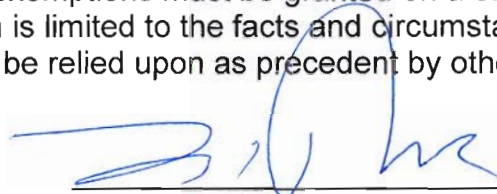
W. Va. Code § 61-10-15, a separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which those officials may exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

Once again, the Legislature amended W. Va. Code § 61-10-15 to allow the Ethics Commission to grant exemptions for 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. For the reasons set forth in the preceding section, the Ethics Commission grants an exemption to this prohibition.

The exemptions to these code provisions are limited as follows: First, the exemption is effective until January 1, 2010. If at that time the County Commission seeks to continue this arrangement, it shall seek advice from the Ethics Commission. Second, County funds may not be used to make repairs or

capital improvements to the office space until and unless it first seeks advice from the Ethics Commission. Third, the Prosecutor may not use his public position to receive any special treatment for his building, for as long as he remains County Prosecuting Attorney.

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.

A handwritten signature in blue ink, appearing to read "L. Rowe", is written over a horizontal line.

Larry L. Rowe, Acting Chairman