

**CONTRACT EXEMPTION NO. 2009-05**

**Issued On September 3, 2009 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

The **Gilmer County Commission** seeks an exemption to permit it to purchase replacement equipment and services from a local store owned by Gilmer County Commissioner Larry B. Chapman.

**FACTS RELIED UPON BY THE COMMISSION**

As part of upkeep and landscaping, the Gilmer County Commission, and its subordinate county departments and boards, use multiple lawn and garden power equipment (lawnmowers, chainsaws, brushcutters and weed-eaters) which require occasional servicing and replacement parts.

Although replacement parts for most equipment may be obtained from general hardware stores, some of the replacement parts for Gilmer County's lawn and garden equipment (namely, Stihl, Poulan Pro, and Shindaiwa) are name-brand specific and are only available from authorized dealers or service repair stores.

With respect to the specific name-brand required parts, Glenville Western Auto store is the only local dealer and service center for these necessary parts and repairs. Located in the City of Glenville, Glenville Western Auto is approximately one (1) mile from the Courthouse and Glenville County offices. Other stores in the area supply general equipment and replacement parts, but are not authorized dealers and/or do not carry the required name-brand specific replacement parts.

Gilmer County Commissioner Larry B. Chapman owns Glenville Western Auto. In addition to selling and servicing dealer-authorized name-brand lawn and garden power equipment, Glenville Western Auto store also sells home appliances, mattresses, and outdoor hunting products.

As a result of Commissioner Chapman's ownership of the store, the Gilmer County workers have not purchased equipment and replacement items from Glenville Western Auto for the past several years. Instead, County workers purchase general equipment and items from other local stores.

However, when a name-brand specific replacement part or repair is necessary, County workers travel outside of the area to obtain the item. According to the Requester, the nearest stores selling the required name-brand specific replacement parts and servicing are located in Clarksburg and Weston. The approximate round trip travel time to either store is approximately one and half hours.

The Requester states that the majority of these replacement parts cost less than fifty-dollars, and that requiring its employees to travel one and a half hours results in lost work-hours for maintenance project, and excessive travel costs. Further, the Requester states that some of these replacement parts cost less than five dollars.

Accordingly, the Requester maintains it has been a hardship upon the County to require the excessive travel and cost to purchase the required replacement part, and seeks an exemption to allow for the purchase of name-brand required replacement parts and repairs for the County lawn and garden power equipment which are unavailable at any other location in the area.

#### **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 or appointed public 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 state, county, ...or other governmental agency, 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: "It shall be unlawful for any member of a county commission, . . . 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 and West Virginia Code § 61-10-15**

The Ethics Act prohibits public servants, including elected County Commissioners, 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, unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d)(1). For purposes of this provision, a limited interest is defined as an interest which does not exceed one thousand dollars in the profits or benefits of the contracts in a calendar year. W.Va. Code § 6B-2-5(d)(2)(A).

In addition to the Ethics Act, an elected County Commissioner must abide by the stricter prohibitions contained in W.Va. Code § 61-10-15. W. Va. Code § 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. Unlike the Ethics Act, the prohibition under W.Va. Code § 61-10-15 does not have a \$1,000.00 threshold.

In this matter, the County Commission desires to have County workers purchase name-brand required replacement items and servicing from a local store owned by a current County Commissioner. Under W.Va. Code § 61-10-15, these purchases, regardless of the amount, are prohibited because of the County Commissioner's pecuniary interest. Similarly, under the Ethics Act, those purchases in excess of \$1,000.00, violate W.Va. Code §6B-2-5(d) because of the County Commissioner's interest in the profits.

Therefore, because an exemption is necessary under both the Ethics Act and W.Va. Code § 61-10-15, the analysis will be combined and shall be deemed applicable to both statutory prohibitions.

### **Undue Hardship, Excessive Cost, and Substantial Interference**

The Commission may grant an exemption from the prohibitions in W. Va. Code § 61-10-15 if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. Similarly, under W.Va. Code § 6B-2-5(d) of the Ethics Act, the Commission may grant an exemption if the prohibition would result in excessive cost, undue hardship, or other substantial interference with the operation of the affected government body.

In the present case, the Requester maintains that requiring its County workers to travel outside the County to purchase replacement parts or to have equipment serviced has been a hardship, has caused excessive cost, and substantially interferes with its operations. In particular, the Requester notes that a one and one half hour round-trip travel for a five dollar replacement part is cost prohibitive, and contradictory to the efficient use of County employee time and money.

This particular exemption request is not unique to Gilmer County. In fact, there is a growing trend by power equipment manufacturers to require brand-name specific replacement parts and servicing. Yet there are a limited number of authorized dealers and service centers that offer the required parts and services.

Several years ago, the Commission addressed a similar issue relating to the purchase and servicing of Stihl equipment. In Contract Exemption 2007-04, the Commission denied an exemption to the City of Ripley for the purchase of new equipment, but allowed a limited exemption for servicing of the equipment and incidental purchases. Specifically, the Commission held:

Based upon the foregoing, the Ethics Commission grants the City of Ripley an exemption for incidental purchases from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to purchase parts and accessories, and to obtain services from Moore's that are otherwise not available in Jackson County. The exemption is granted with one limitation: should the City determine it needs to purchase a new tool or other piece of equipment (other than a Stihl part or accessory for an existing tool) that exceeds the cost of \$100.00 (one hundred dollars), it may not make any such purchase from Moore's.

Similarly, in Contract Exemption 2008-14, the Commission denied an exemption to the City of Weirton for the purchase of goods owned by a City Council member, except on

an emergency basis or if the item was not otherwise available in the Weirton area. In making this ruling, the Commission stated:

The Commission cannot, however, authorize future purchases of road signs, lawn mowers, or other items that are available on the open market, especially since these purchases were anticipated, not emergencies.

More recently, in Contract Exemption 2009-03, the Commission granted “a limited exemption for the servicing of existing Stihl equipment owned by the [Raleigh County Solid Waste] Authority as well as for the purchase of Stihl accessories and replacement parts for existing Stihl equipment products.”

The Commission hereby finds that the County will incur excessive cost and undue hardship if it has to go outside the County for replacement parts and repairs to its existing name-brand equipment and/or replace every name-brand product it owns.

Therefore, the Commission hereby grants the Gilmer County Commission (and its subordinate departments and boards) an exemption to allow it to purchase name-brand replacement parts and accessories for currently owned lawn and garden power equipment, and to obtain service and repair of existing name-brand authorized dealer equipment from Glenville Western Auto, with the following conditions: (1) this exemption shall only be for the purchase and servicing of parts that are not otherwise available at another store or dealer within a 20 mile radius of Glenville, W.Va., and (2) the County’s purchases of goods and services from Glenville Western Auto shall not exceed a total of \$900 in a calendar year.

In granting this limited exemption, the Commission finds that the County Commission would experience undue hardship and substantial interference with its operations if it had to travel to another dealer or authorized store outside the County to have equipment serviced, or to obtain a replacement part. According to the Requester, the County has been attempting to comply with the prohibitions for the past several years, but has been experiencing excessive cost and time with obtaining these replacement parts and repairs from other sources.

The Commission also finds that the County Commission would incur excessive cost if it had to replace every name-brand-only product it owns. Instead, using and servicing existing equipment curtails the necessity of future purchases or greater expense of public funds. By contrast, the Commission finds that the County will **not** be unduly burdened by purchasing **new** equipment and tools from other dealerships or sources. Since there is no evidence that the County purchases new equipment frequently, requiring it to purchase new equipment at another store and/or having it shipped from another location would not be cost-prohibitive or significantly interfere with the County’s operations.

Further, the Commission notes that multiple hardware stores and supply shops operate in the area, and the County will not be unduly burdened, or have its operations substantially interfered with, by purchasing non-specific general tools and items at locations other than Glenville Western Auto.

Wherefore, it would not violate W. Va. Code § 6B-2-5(d)(1) or W.Va. Code § 61-10-15 for Commissioner Chapman to sell replacement parts and services to the County, with the limitations set forth above, *provided* he recuses himself when related matters arise at County Commission meetings. For his recusal to be effective, he must excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the period, fully disclosing his or her interests, and recusing himself from voting on the issue.

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.

  
Drema Radford, Vice-Chair