

CONTRACT EXEMPTION NO. 2010-03

Issued On July 8, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Village of Beech Bottom** seeks an exemption to allow the Mayor and Council members to be compensated for performing services for the Village in addition to their established salaries.

FACTS RELIED UPON BY THE COMMISSION

The Village of Beech Bottom is a Mayor-Council form of government. Pursuant to W.Va. Code § 8-3-2, the "Mayor and council shall be the governing body **and** the administrative authority." (Emphasis Added).¹ As such, the Mayor and council share responsibilities for the hiring, firing, and supervision of all Village employees and departments.

According to the Requester, the Mayor and Village Council members are provided a salary for each council meeting they attend. Specifically, the Mayor receives \$270.00 per meeting. The Council meets approximately twice a month.

Additionally, by ordinance, the elected Mayor also sits on the Town Water Board. As a member of the Water Board, the Mayor additionally receives \$130.00 for each water board meeting attended.

In October 2009, the Mayor contacted Commission staff and inquired whether the Mayor could continue to perform maintenance and landscaping duties for the Village at an hourly rate and on an as needed basis. The Mayor estimated that it would be about 10-12 hours per week, but there may be weeks in which no hours were required. The Mayor informed Commission staff that there were only 600 residents in the Village of Beech Bottom and no one was able to perform the tasks.

Commission staff advised the Mayor that his continued paid employment could constitute a violation of the Ethics Act. As such, Commission staff suggested that the Village seek a contract exemption. Staff also recommended that the Village should advertise and seek out applicants prior to seeking a contract exemption.

¹ W.Va. Code § 8-3-2 outlines additional city government plans including "Strong Mayor" (council is the governing body and Mayor is the administrative authority) and "Manager-Mayor" (Mayor is an elected member of council; the council is the governing body; and an appointed city manager is the administrative authority).

In March 2010, the Village sent correspondence to the Commission indicating that it advertised for a part-time laborer in February, and had received one applicant. The Village indicated that the applicant withdrew his application after obtaining another employment position. The Village did not re-advertise or seek out other potential candidates for employment.

The Mayor continues to perform maintenance and landscaping jobs for the Village, and is paid an hourly rate. Additionally, according to the Requester, the members of the Council also perform jobs for the Village, and are paid an hourly rate, over and above their council salaries, for this work.

According to the Requester, there are two hourly rates used by the Village. The rates are dependent on the job, and the employment role the individual is performing.

The first is the entry level "Laborer", and the rate of pay is \$9.15 an hour (as of July 1, 2010). The second is the supervisor "Labor Leader", and the rate of pay is \$11.25 an hour (as of July 1, 2010). These rates are set by Council annually by a committee established by the Village Council.

Per the Requester, the Village desires the following exemption:

- (1) Allow the Council members to be paid at the applicable hourly rate for providing "the needed services to the Village" which "are above and beyond the job council members were elected to perform.";
- (2) Allow the Mayor to be paid the applicable hourly rate for performing the following:
 - i. "Plow Snow, spread salt";
 - ii. "Maintain equipment";
 - iii. "Clean out storm sewers"
 - iv. "Maintain playground equipment";
 - v. "Cut vegetation during lawn care season";
 - vi. "Empty trash receptacles around Village";
 - vii. "Supervise youths in the Department of Corrections Community Service"; and
 - viii. "Provide list of jobs and supervise youths in the Governors' Summer Youth Work Program".

Finally, during the course of evaluating this matter, Commission staff discovered that the Mayor additionally is a paid employee of the Water Board of which he is a paid board member. Hence, the Mayor currently receives the following compensation from the Village of Beech Bottom: (1) Mayoral salary; (2) Water Board member salary; (3) hourly rate for work as an employee of the water board; and (4) hourly rate of pay for all the maintenance and landscaping jobs he performs and/or supervises for the Village.

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 public employee ... 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.

ADVISORY OPINION

The Mayor and council members seek an exemption to allow them to perform various jobs for the Village and be paid by the Village for the services. Although the Village seeks to incorporate the council members into the exemption request, the request itself contains no information relative to the council members or the jobs they perform.² Rather, the entirety of the request is specific only to the Mayor.

In light of the lack of information as to the council members, and the jobs or positions for which they seek an exemption, the Commission declines to consider their request. Instead, it shall consider the exemption request solely as to the Mayor. Should the

² The only information Commission staff has been able to discover relating to council members performing jobs was contained in minutes provided by the Village in support of its Contract Exemption request. Specifically, at a Special Meeting conducted on January 21, 2010, the Village Council unanimously passed a motion to authorize "elected officials to perform duties as needed with compensation with the approval of 2 other elected officials[.]"

members of the Village Council desire to seek an exemption, then they may separately seek an exemption in conformity with this opinion.

Therefore, with respect to the Mayor, the Village desires an exemption to compensate the Mayor for performing various jobs for the Village in addition to his mayoral duties. Although there is no formal employment contract to perform these duties, each job and payment from the Village's general fund constitutes a public contract.

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. W.Va. Code § 6B-2-5(d). These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The statute does, however, contain a proviso allowing for the employment of persons with a government body.³ The Commission has had occasion to address this statute on several occasions, and found that in those situations in which the Mayor had limited powers over the administration of employees (e.g. a **City Manager** form of government), then the Mayor may be employed by the City (with certain restrictions). See A.O. 91-21 and A.O. 2003-04.⁴

However, the Commission has also cautioned that W.Va. Code § 6B-2-5(d) must be read in conjunction with the other restrictions in the Ethics Act, including the prohibition against use of public office for private gain. W.Va. Code § 6B-2-5(b).

The Ethics Commission previously ruled in A.O. 2006-05 that a Mayor in a "**Strong-Mayor**" form of government could not also be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees.

³ W.Va. Code § 6B-2-5(d)(1) states, in part: "In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected or appointed public official or public employee . . . 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: **Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body[.]**" (Emphasis added). However, this proviso may not be relied upon by elected and appointed County officials who are subject to the more stringent prohibitions embodied in W.Va. Code § 61-10-15.

⁴ In A.O. 91-21 the Commission ruled that there was nothing in the Ethics Act which would prohibit a City employee from running for Mayor when the City had a City Manager form of government. Under this form of government, neither the Town Council nor Mayor is responsible for the day to day management of the City; instead this responsibility is delegated to the City Manager. Similarly in A.O. 2003-04, the Commission held that a Mayor could serve as a temporary city manager where the Mayor was elected from among the Council's members and had no more authority than the other members.

The Commission further summarized the basis for this prohibition as follows:

Although both positions are part-time and the Mayor would be able to fulfill both job responsibilities during the course of a work week, an inescapable conflict exists as the Mayor must supervise the City's employees. The conflict could not be avoided by the Mayor recusing himself on relevant votes or even delegating management responsibilities over his other positions. While the Mayor may be able to balance these job responsibilities and perform his positions in an impartial manner, as a matter of public policy and due to the conflicting nature of the duties and responsibilities, the Ethics Commission finds that the Ethics Act prohibits the Mayor from also being regularly employed by the City.

Advisory Opinion 2006-05; See also C.E. 2009-01.⁵

While the Commission has addressed W.Va. Code § 6B-2-5(d)(1) in the context of Strong-Mayor and City Manager-Council forms of government, the Commission has not yet had occasion to address the specific question in a **Mayor-Council** form of government. In this form of government, the "Mayor and council shall be the governing body **and** the administrative authority." W.Va. Code § 8-3-2 (Emphasis Added). As such, the Mayor and council share responsibilities for the hiring, firing, and supervision of all Village employees and departments.

The Commission hereby finds that because the Mayor and Council members share the administrative powers of the Village, the Mayor is in a position similar to that of a Mayor in a Strong-Mayor form of government. Hence, the analysis and prior precedents of a Strong-Mayor form of government are applicable to the Mayor in a Mayor-Council form of government. Accordingly, the Commission finds that the Mayor is prohibited under the Ethics Act from being regularly employed by the Village.

In reaching this conclusion, the Commission notes that there may be exceptions to this general rule, particularly in situations in which the total annual compensation is less than \$1,000.00. However, the Village has not presented a basis or sufficient facts upon which to establish whether this exception may apply.⁶ Therefore, if the Village desires to compensate for work performed, it will need to obtain a contract exemption.

⁵ In Contract Exemption 2009-01, the Commission found that it would violate W. Va. Code § 6B-2-5(d)(1) for the Mayor of the Town of Mabscott to continue to be employed as Police Chief; Head of the Street Department; and/or Assistant Fire Chief during his service as the Town's Mayor. The Commission's ruling relied upon prior precedent and prohibition of employment of the Mayor in a Strong-Mayor form of government.

⁶ The Commission has never addressed the application of this monetary threshold in an employment context.

Undue Hardship, Excessive Cost, and Substantial Interference

The Commission may grant an exemption from the prohibitions in W. Va. Code § 6B-2-5(d) if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The burden is upon the Requester to demonstrate sufficient evidence and facts in support of an exemption. The Village has not provided any evidence in support of a hardship or of an excessive cost to the Village. Moreover, it has not demonstrated that prohibiting it from hiring the Mayor would create a "substantial interference with operation of the Village." Aside from one employment advertisement in February, the Village has not provided any facts or documents reflecting further attempts to hire a part-time laborer.

Rather, the Requester, in support of an exemption, stated:

Current employment practices have followed traditions of the past, when work was needed done (sic) on an intermittent basis; individuals were hired by the Mayor, or occasionally members of Council- to do work as it arose. In a small village such as ours, the pool of individuals offering to [perform] such work is limited, but those individuals also have direct access to those they have elected.

Only when the pool of interested parties willing to work became non-existence (sic), and elected officials were left to ensure tasks were accomplished did the past practices come into self-questioning by Council. It was the opinion of Council that hourly wages were more cost effective to the Village as opposed to contracting out such jobs. However, after attending a seminar sponsored by your office, Council has reflected on past and current practices and is developing a better solution to our current situation.

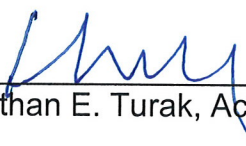
The Commission has previously recognized that "[t]here may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities." A.O. 2006-05. The Commission has also recognized that municipalities as with many public and private sector entities, are facing difficult financial times.

While the Commission recognizes the importance of saving money and the lack of resources in small municipalities, the Commission has a duty to uphold a basic tenant in the West Virginia Ethics Act, *i.e.* that elected public servants may not have an interest in a public contract over which they exercise control unless the governing body proves that disallowing the contract will result in excessive cost, undue hardship, or other substantial interference with its operations. In this case, the Commission finds that the Village has not met its burden. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5(d).

The Village shall, within thirty (30) days, notify the Ethics Commission how it will comply with this opinion. Further, in an effort to facilitate and foster the changes which the Villages maintains it is attempting to implement, the Village is hereby granted a transition period of ninety (90) days from the date of this opinion to comply with this opinion.

During this time, the Commission would encourage the Village to take measurable efforts to hire a part-time laborer in order to alleviate the situations which create the need for this contract exemption. Additionally, if such efforts are unfruitful, the Commission welcomes the Village to reapply for an exemption.

In conclusion, the Commission notes that exemptions may only 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. This exemption is effective from the date of issuance.



Jonathan E. Turak, Acting Chairperson