

**CONTRACT EXEMPTION NO. 2010-06**

**Issued On August 5, 2010 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

The **Town of Handley** asks for an exemption to allow the Town to continue employing its Mayor as the Town's Police Chief.

**FACTS RELIED UPON BY THE COMMISSION**

On January 8, 2009 the Ethics Commission granted the Town of Handley a contract exemption to allow it to continue employing its Mayor as the Town's Chief of Police. The exemption was effective until July 1, 2010. See CE 2008-13.

The Town of Handley holds an election every two years, and most recently had an election in June 2010. The Executive Director of the Ethics Commission granted a brief extension of the original contract exemption since the new Town Officials would not be elected and sworn in until July 2010.

The Mayor was re-elected. The new Town Officials were sworn into office on July 20, 2010. On that date, they also had a meeting of the Town Council at which time they voted to request an exemption from the West Virginia Ethics Commission to allow the Town to continue to employ the Mayor as the Chief of Police at the rate of \$250.00 per month. According to the Town's Recorder, the meeting was properly noticed, this item was placed on the agenda, and the Mayor recused himself from the discussion and vote on this matter.<sup>1</sup>

The facts provided in the initial contract exemption are generally the same. The Town of Handley is located in Kanawha County, West Virginia. According to the 2000 census, the Town has a population of 336. In its request letter the Town states that it only has one business which conducts most of its business outside Town limits.

The Mayoral salary is \$100 per month. The Town of Handley has a Strong Mayor form of government; the Mayor is responsible for appointing the Town's Police Chief. The Town Council, however, establishes the Police Department's budget and sets the salary for the Police Chief and all police officers.

The Town's annual budget is just over \$72,000. In 2006, after encountering difficulty in filling the Police Chief vacancy, the Town Council agreed to pay Mayor Ford an

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<sup>1</sup> For recusal to be proper under the Ethics Act, public officials must disclose their interests and excuse themselves from participating in the discussion and decision-making process by physically removing themselves from the room during the discussion and vote on the matter.

additional \$250 per month to serve as Police Chief. According to the requester, Police Chief Ford is always on call. While the County Sheriff's Department helps out as needed, it cannot cover the Town of Handley on a regular basis.

When it requested an exemption in 2009, the Town had a part-time police officer. This officer left the Town's employment in March or April 2010. The Town has received inquiries from individuals interested in filling this position; however, according to the Recorder, none of the applicants are certified and the Town cannot afford to pay for their training and certification. Since a new Council has been elected, they intend to officially advertise for the part-time police officer position. Even if it is filled, they still seek to continue to employ the Mayor as the Chief of Police.

When the Commission granted the initial exemption, as a condition of the exemption, the Commission required Handley's Town Council to adopt, as authorized by Town of Handley Ordinance Article III, Division I, Sec. 2.34 a., a resolution giving it, rather than the Mayor, direct oversight and supervision of the Town Police Chief, and allowing citizens direct access to Town Council regarding police matters that may arise.

According to the Recorder, the Town never formally adopted the resolution as ordered. She states that a Police Committee was formed to allow citizens redress, but that it has never met nor has it been requested to meet. She provided no further explanation for the Town's failure to comply with the Commission's directive.

### **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 and 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 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....

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.

### **ADVISORY OPINION**

The West Virginia Ethics Act prohibits public servants from having an interest in a public contract over which they exercise control. Standing alone, this provision does not prohibit a municipality from hiring its Mayor. This provision must be read in conjunction with other restrictions in the Ethics Act, including the prohibition against use of 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.

The Commission may grant an exemption if it finds that denying the exemption will result in excessive cost, undue hardship, or other substantial interference with the operation of a municipality. The Ethics Commission takes administrative notice that the current minimum wage is \$7.25 per hour. The Mayor, when acting as Chief of Police, does not have an hourly requirement or regular work hours; however, he is expected to be on call at all times. If the Town were to allocate \$250.00 per month towards hiring another individual, not the Mayor, to serve as the Chief of Police, assuming it was able to hire someone at the minimum wage of \$7.25 per hour, that would only pay for 34.5 hours of work per month. From a practical standpoint, the Commission believes that few people would be willing to serve in this position at the rate of \$250.00 per month if they are expected to, at all times, be on call.

The Commission also finds that the Town of Handley has demonstrated that, but for Mayor Ford's willingness to serve as the Town's Police Chief, it would only have the services of the Sheriff's Department and, at some point in the future, a part time police officer. Hence, considering the relevant facts, the Commission finds that it would result in excessive cost and an undue hardship to prohibit the Town from hiring its Mayor as the Chief of Police.

In light of the circumstances presented, the Ethics Commission finds that it is within its powers to grant an exemption from the limitations imposed by W.Va. Code § 6B-2-5(d) and § 6B-2-5(b). As such, the Ethics Commission hereby grants the Town of Handley an exemption in order that it may continue to employ its Mayor as the Police Chief, at a rate not to exceed \$250.00 per month provided that the following conditions are met:

By no later than September 5, 2010 it must adopt the Resolution as directed by the Commission in C.E. 2008-13. A copy of the agenda of the meeting where this item was discussed, minutes and ordinance must be forwarded to the Executive Director of the Ethics Commission by September 15, 2010. If the Resolution is not adopted, and

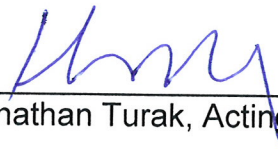
forwarded with the additional documents by the September 15, 2010 deadline, then this Contract Exemption is null and void.

Moreover, if, as Chief of Police, the Mayor is assigned a police cruiser, he may only use it for official business. Even though he may be on call 24/7, he may **not** use the cruiser (or other Town of Handley vehicle) for his personal or private use including, without limitation, social, recreational and private business trips. This step ensures that he receives no additional fringe benefits, such as personal use of a public vehicle, which would result in compensation beyond which this opinion authorizes.

If the Town complies with the aforesaid conditions, then this exemption is effective until **August 5, 2012** at which time the Town must submit a new request for an exemption in order for Mayor Ford to continue to be employed as the Town of Handley's Police Chief.

In the ensuing year, the Commission further directs the Town of Handley to pursue any and all sources of outside funding to finance a Police Chief position, e.g. a federal grant or State funding. As the Recorder noted in the request letter, "The Police Chief position is available if funding can be obtained and a satisfactory applicant can be found to accept the position." If the Town is successful in its efforts to secure such funding, it shall advertise for the position of Police Chief for not less than one month in newspapers and other media that reach the entire State of West Virginia. The Mayor shall recuse himself from participation in advertising, interviewing, and selecting candidates for the position. Any request for future contract exemptions shall include copies of all such advertisements, copies of any and all applications for the position, as well as an explanation as to why the Town was unable to fill the position with a qualified applicant. If the Town is unsuccessful in its efforts to secure outside funding, then it shall submit an overview of the steps it took to seek the funding with any future contract exemption request.

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 or entities.

  
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Jonathan Turak, Acting Chairperson