

CONTRACT EXEMPTION NO. 2011-03

Issued on September 1, 2011 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Webster County Commission** seeks to renew its previous exemption allowing it to rent office space from the County Prosecutor to house the Office of the Prosecuting Attorney.

FACTS RELIED UPON BY THE COMMISSION

On September 4, 2008, the Ethics Commission granted a three year contract exemption to the Webster County Commission to rent office space for the prosecuting attorney's office from the elected prosecuting attorney, Dwayne Vandevender. See Contract Exemption 2008-10.

As reflected in C.E. 2008-10, the County Commission sought an exemption to allow its continued use of office space that was previously used by the prosecuting attorney for his private law practice and the prosecuting attorney office. Previously, Mr. Vandevender was a part-time prosecuting attorney. However, on July 1, 2008, he became a full-time prosecuting attorney and had to discontinue his private law practice.

Since Mr. Vandevender had previously operated the prosecutor's office from his private law office, the County did not have office space for the prosecutor's office in the courthouse. Accordingly, Mr. Vandevender offered to allow the County Commission to continue to use his privately owned office space rent-free until the County Commission renovated the third floor of the County Courthouse. It was anticipated that these renovations would be completed by the Spring of 2009 and that the new space would house the office of the Prosecutor and Family Court Judges. Until the renovations were complete, Prosecutor Vandevender planned on allowing the County Commission to continue to utilize, at no charge, his private office space; provided that, the County paid for the utilities for the portion of the building used by the Prosecutor. The County requested and received a contract exemption from the Ethics Commission to allow it to pay for the utilities. See C.E. 2008-09.

Thereafter, the County discovered there was insufficient space to house both the Prosecutor's Office and Family Court on the third floor of the Courthouse. Accordingly, the County wanted time to locate and renovate new office space for the prosecuting attorney's office, and sought a **second** exemption to allow it to rent, at a cost of \$475 a month, the office space owned by Mr. Vandevender for three years.

In support of the exemption request in 2008, the County Commission stated that there were only a couple of other buildings with office space for rent in Webster Springs, but none of the buildings were suitable to house the Prosecutor's Office. The County additionally stated that a building located near the Courthouse was for sale, and the County wanted to consider various funding options before it committed to purchasing a new building. Based upon the situation and the lack of immediate available space, the Commission granted a three year exemption. See C.E. 2008-10.

Having now reached the three year deadline for the exemption granted in C.E. 2008-10, the Webster County Commission seeks another contract exemption to allow it to continue renting office space for the prosecutor's office from Prosecuting Attorney Vandevender.

While the County Commission does not provide any information relative to the continued lack of space in the courthouse or the availability of other additional office space, it maintains that it does not have office space readily available or suitable for the prosecutor's office. In support of its exemption, the County Commission has provided a copy of a proposed lease which it negotiated with Mr. Vandevender's company, Vandycorp, Inc.¹ The terms of the proposed lease are similar in nature to the prior agreement, except that the rent has increased to \$500.00 a month. The proposed agreement is for a term of one year, with the option for two renewals, and a potential increase in the amount of rent with each renewal.

Accordingly, in light of the pending deadline, the County Commission voted during its August 3, 2011 meeting to seek another contract exemption in accordance with the terms of the negotiated lease.

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.

¹ Given his legal relationship with the County Commission, Mr. Vandevender did not advise the County Commission with respect to this matter. Instead, the Commission consulted outside counsel and negotiated through counsel with Mr. Vandevender.

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

Both the Ethics Act and W.Va. Code § 61-10-15 prohibit county public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public officials away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

In 2008, the Commission granted a three year exemption to allow for the location of new office space for the prosecutor's office and an orderly transition out of Mr. Vandevender's privately-owned office space. To date, this has not occurred. Instead, the County Commission seeks another exemption for three years. It has not provided any information on the availability or cost of other existing office space, or stated why it believes it is in the best interests of the County to continue the existing agreement.

As with all contract exemptions, the Requester must demonstrate that the prohibitions of the Ethics Act and W.Va. Code § 61-10-15 would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. Based upon the information provided by the County Commission, the Ethics Commission is unable to ascertain whether an exemption is warranted.

However, the Commission finds that to require the County Commission to immediately terminate its lease and vacate Mr. Vandevender's building for purposes of complying with the prior contract exemption would result in excessive costs to the County and its citizens due to the expense which would result from, on short notice, finding available space and moving. Further, moving on such short notice would interfere with the efficient and orderly operation of the Prosecutor's office. It would create both an undue burden on the County employees and the public who may have their government services interrupted if, without proper planning, the prosecutor's office has to relocate.

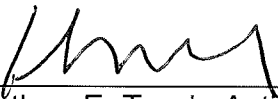
Accordingly, the Ethics Commission hereby grants a temporary contract exemption until **January 15, 2012** to allow the County Commission to continue to lease office space in Mr. Vandevender's building. If the County Commission seeks to continue the lease beyond that date, then it may only do so by submitting another contract exemption request not later than December 1, 2011.

Should the County Commission submit another contract exemption, the County must demonstrate that it made a good faith effort to evaluate what other comparable space, if any, is available to rent and the cost thereof. Further, the County Commission must set forth in its exemption request what efforts were taken to evaluate all potential options which may be available to the County for purposes of making a decision in regard to whether continuing to lease the subject space is in the best interest of the County.

Additionally, in order to comply with the Ethics Act, Dwayne Vandevender, as the owner of the building and potential beneficiary of any future lease agreement for office space, may not be involved in the County Commission's efforts to evaluate other property or options. He must recuse himself from all matters relating to the County Commission's decision to either renew his lease or enter into another lease with another party. For recusal to be proper under the Ethics Act, he must disclose his interest and excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during the discussion and vote on the matter. See W.Va. Code § 6B-2-5(j)(3).

Finally, the Executive Director may in her discretion extend the time of this temporary contract exemption for a three (3) month period if, in her judgment, she finds that there are compelling and demonstrable reasons to extend the temporary contract exemption; however, the County Commission is advised to make every effort to comply with the deadlines imposed herein.

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.



Jonathan E. Turak, Acting Chairperson