

CONTRACT EXEMPTION NO. 2012-06

**Issued on January 10, 2013 By the
WEST VIRGINIA ETHICS COMMISSION**

OPINION SOUGHT

The **Town of Junior** seeks an exemption to allow its Mayor to be compensated as a temporary employee in emergency situations.

FACTS RELIED UPON BY THE COMMISSION

The Town of Junior is a Class IV municipality of around 500 residents. The Town operates as a Mayor-Council form of government in which the Mayor and Town Council jointly act as the governing body and administrative authority of the municipality. See W.Va. Code § 8-3-2.

According to the Requester, the Town employs two workers to operate the Town's sewer plant. In addition to operating the plant, the workers fix water leaks, read water meters, and perform maintenance on Town properties. Over the past year, the Town has suffered from a shortage of workers, and recent attempts to fill the positions have been unsuccessful. As an example, the Town states that it hired an employee in August who subsequently quit two weeks later.

On those occasions when the Town is short an employee, the Mayor has filled in as a paid worker. According to the Town, the Mayor has been paid an average rate of \$10.82 an hour for this work. This compensation is in addition to his Mayoral salary.

Recently, the Town was able to hire a second employee and is now fully staffed. While the Town does not currently utilize the Mayor as a temporary employee, the Town seeks an exemption in case it again becomes short-staffed. In particular, the Town seeks an exemption to allow the Mayor, when short-staffed, to be compensated on a temporary basis when needed to assist in repairing water leaks and in other emergency situations.

In support of the exemption, the Town states that it has a limited budget and small population from which to seek workers. In that regard, the Town cites its difficulty in staying fully staffed. The Town additionally states that the Mayor will only help out in the event of an emergency and that the Mayor's hours will be closely monitored by the Town Council.

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) provides:

Interests in public contracts.-(1) 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 or member of his or her immediate family or business with which he or she is associated 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: ...

(2)...[A] limited interest for the purposes of this subsection is:

- (A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;
- (B) An interest as a creditor of a public employee or official who exercises control over the contract, or a member of his or her immediate family, if the amount is less than five thousand dollars.

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

Additionally, W. Va. Code § 6B-2-5(d)(4) 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 § 6B-2-5 provides:

- (j) Limitations on Voting.
 - (1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:
 - (A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. . . .

ADVISORY OPINION

The Town seeks a contract exemption in order to compensate the Mayor as an employee should the Town become understaffed in the future. While contract exemptions are prospective in nature, the request is unique as the Town currently has no need for the exemption. Typically, the absence of a need negates the granting of an exemption.

However, given the past difficulties in securing workers, and in an effort to remind the Town of the limitations associated with compensating a public official as a Town employee, the Commission shall address the merits of the request.

Necessity of an Exemption

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). While no formal written contract exists, the compensation of the Mayor as a fill-in worker constitutes a public contract with the Mayor. Further, as the elected Mayor in a Mayor-Council form of government, the Mayor has direct control and authority over the awarding/approval of public contracts. See Contract Exemption 2010-03. Hence, pursuant to W.Va. Code § 6B-2-5(d), the Mayor is generally prohibited from being a **compensated** worker for the Town.¹

There are, however, exceptions to this prohibition. See W.Va. Code § 6B-2-5(d)(1) and (2). While the Mayor is not a part-time **appointed** official, the infrequent nature of this potential work may ultimately be less than \$1,000.00 in a calendar year. In such cases, the Legislature has allowed an exception for a public official to contract with the Town.

¹There is no prohibition against the Mayor performing work for the Town without compensation.

Whether the Mayor's compensated work would exceed the \$1,000.00 is unknown in this matter as the Town only seeks to employ the Mayor on an emergency, as-needed basis. Thus, it is possible that the Mayor's fill-in work would not even reach the \$1,000.00 threshold and an exemption would be unnecessary. However, the converse is also true, and, if the amount exceeds \$1,000.00, the Mayor would be prohibited from being employed by the Town.

In addition, other prohibitions under the Ethics Act may still apply and prevent the expenditure of public funds to a public servant for providing services to the Town. See e.g. W.Va. Code § 6B-2-5(b)(prohibiting use of public office for private gain). In Advisory Opinion 2006-05, the Commission held that Mayors in a Strong Mayor form of government may not be employed by their municipality. The Commission reasoned that the spirit and intent of the prohibition against use of public 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.²

Given the uncertainty of an emergency or staff-shortage, and in an effort to be transparent in the process, the Town desires a contract exemption to remove any questions about the Mayor's fill-in work.

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 Town's prior staffing shortages demonstrate the potential substantial interference with governmental operations, especially in times of emergency. Further, the Town has also demonstrated its inability to retain workers long-term.

Additionally, the Commission has recognized that municipalities, as with many public and private sector entities, are facing difficult financial times. C.E. 2012-03. 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.

² Relatedly, the Commission has also addressed whether Council members may be employed by a municipality. See Contract Exemption 2012-05 (granting contract exemption to council member in small town). The Commission distinguishes between contract exemption requests for Mayors and Council Members who do not operate as the City's chief executive officer.

Notwithstanding, the Commission is concerned about granting an exemption for which there is currently not a need. More importantly, it is hesitant to establish a precedent whereby it grants an exemption for a contract that may only exist in the future, and approve the expenditure of funds for conduct that is not fully defined. This type of blanket exemption could lead to abuse by a public official, especially when the public official serves as the Mayor or Council Member that controls the hiring of employees and budget.

Indeed, the prohibitions in the Ethics Act 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. Balancing these concerns with the historical difficulties associated with staffing the Town's sewer operation, the Commission hereby grants a limited exemption, with conditions.

Accordingly, the Commission hereby grants a contract exemption to the Town of Junior until **January 15, 2014, with and subject to**, the following conditions:

First, this exemption only allows the Mayor to be compensated for **emergency** fill-in work. He is not authorized to perform other general work (e.g. cutting grass, general maintenance) on a regular basis.

Second, in the event of a future vacancy and/or a staffing shortage, the Town must take demonstrable steps to hire a replacement employee. The Town may not allow the Mayor, or another official, to use the vacancy as an opportunity to convert the "emergency" into a long-term employment situation. Aside from complying with the terms of this exemption, the failure to timely and reasonably seek a replacement could also constitute the improper use of public office for private gain in violation of W.Va. Code § 6B-2-5(b).

Third, the compensation to be paid to the Mayor for filling-in as an emergency worker shall be an hourly rate equal to the Federal Minimum Wage rate. The imposition of this rate removes improper motives or subjectiveness in the setting of the rate of compensation by either the Mayor or Council members.

Fourth, the total compensation paid to the Mayor for the fill-in work in the calendar year may not exceed \$5,000.00. Should the Town reach this threshold prior to the expiration of this exemption, then it should seek a new Contract Exemption from the Commission. Any such exemption request should demonstrate the reason for the excessive payments for fill-in work, attempts by the Town to hire a replacement, and an anticipation of future work to be performed by the Mayor.

Fifth, should the Mayor perform fill-in work, the Mayor shall submit in writing to the Town Council an itemization of the hours and specific services rendered by the Mayor. The Town Council shall review the itemization and approve payment to the Mayor for the fill-in work.

Sixth, the Mayor must recuse himself from participating in the discussion and decision-making process relating to the approval of his compensation for fill-in work. Pursuant to W.Va. Code § 6B-2-5(j), in order for recusal to be effective, the Mayor must physically removing himself from the room during the period, fully disclose his interests, and not participate in any voting or discussion on the issue.

In granting the foregoing exemption, the Commission wishes to commend the Town for seeking this exemption and bringing transparency to this situation. Should the Town have any questions relating to recusal and/or the conditions imposed herein, it should contact the Commission's Executive Director for advice.

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.


R. Kemp Morton, Chairperson