

CONTRACT EXEMPTION NO. 2013-03

Issued on July 11, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Raleigh County Commission** seeks an exemption to award a contract to a cleaning company owned by County employees Mary Sizemore and Dennis Sizemore.

FACTS RELIED UPON BY THE COMMISSION

The Raleigh County Commission (County Commission) bid out custodial work for all County-owned buildings, but the County courts raised issues of security within their offices in the Judicial Annex. In the past, the Judicial Annex has been cleaned by employees of the County Circuit Clerk's office due to the same concerns.

The County Commission seeks to contract with a cleaning company to clean the Judicial Annex for \$3,000 per month. The cleaning company is owned and operated by Mary Sizemore, a deputy clerk in the Circuit Clerk's Office, and Dennis Sizemore, her husband and an employee of the County. The County Commission would like to employ this cleaning company because Mary Sizemore, as an employee of the Circuit Clerk's Office, already has the necessary security clearance to access the secure areas of the Judicial Annex.

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:

[N]o 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...

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 pertinent part:

(a) It is unlawful for any ...county ...officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: Provided, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer... as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

ADVISORY OPINION

Both the Ethics Act and § 61-10-15 prohibit public employees from having an interest in public contracts. 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). 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 Ethics Act prohibits public servants from using their public office for private gain, and from receiving compensation for "the performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services." W.Va. Code § 6B-2-5(b). While Circuit Clerk employees have previously cleaned the Judicial Annex, this is not a part of a deputy clerk's usual and customary duties. As a result, the limitations contained with the private gain provision do not apply.

Here, a County Commission is seeking to contract with two county employees who own and operate a cleaning company to clean the Judicial Annex. The County Commission wishes to contract with the Sizemores' cleaning company because Mary Sizemore is an employee of the Circuit Clerk and would therefore pose no additional security risk.

Dennis Sizemore, though a County employee, is not employed by any of the County Courts and is stationed in the County garage.

According to the Requester, the Sizemores do not have authority or control over the County Commission's contracts. As a result, the contract is not prohibited by the Ethics Act. Mary Sizemore is an employee of the Circuit Clerk's office. Neither she nor her husband are public officers as contemplated by W. Va. Code § 61-10-15, and therefore, its stricter prohibitions do not apply to them.

As a result of the above analysis, the Ethics Commission finds that the proposed contract is permissible.



Jonathan E. Turak, Vice-Chairperson