

CONTRACT EXEMPTION NO. 2013-05

Issued On August 1, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Monongah** asks for an exemption to allow the Town to continue employing its Mayor to operate and supervise the Town's Water Plant.

FACTS RELIED UPON BY THE COMMISSION

The Town of Monongah is located in Marion County, West Virginia. According to the last census, the Town has a population of 1,044. Marion County has a population of 56,586. Monongah is within 5.5 miles of Fairmont, population 18,704; 17 miles from Bridgeport, population 8,149; and 21 miles from Clarksburg, population 16,649.

The Town operates its own Class II water plant. A Class II water treatment and distribution system must be operated by a person holding a Class II certification, or higher, from the West Virginia Department of Health and Human Resources, Office of Environmental Health. In order to obtain a Class II Certification, a person must have at least 2,000 hours of supervised experience in operating a water system. This certification must be renewed every 2 years.

Bill McCombs is the new Mayor of Monongah. He was one of five candidates for mayor in the June 2013 municipal election, which resulted in a tie vote with the incumbent mayor. His name was drawn out of a hat, and he was sworn into office on July 8, 2013. The Town has a Mayor-Council form of government; the Mayor and Council share responsibilities for the hiring, firing, and supervision of all Town employees and departments.

Bill McCombs is also employed by the Town as the Water Plant Supervisor/Operator. He has worked for the Water Department for twenty-two years. He holds a Class II water system operator certification. On a daily basis, he is responsible for: testing the water, starting up and shutting down equipment, checking pumping systems and other equipment, performing routine maintenance and calculations related to water flow and chemical feed rates, keeping logs and inventory, monitoring the plant for compliance with guidelines, and conducting safety inspections.

In addition to Mayor McCombs, the Town employs two part time Class II operators who are unable to become full time. There is one other full time Class II operator employed.

Town Council voted 3-2 to seek a Contract Exemption from the Ethics Commission. According to the request, it would create an undue hardship if Mayor McCombs is prohibited from also being employed by the Town to operate and supervise its water

plant. The letter states that the Town has placed advertisements in the newspaper for a Class II operator in the past and has been unsuccessful in finding qualified individuals to fill the position. It further states that it does not know anyone who is qualified or willing to take the Water Plant Supervisor/Operator position. Given the extensive duties of a chief operator, the Town states that if Mr. McCombs were prohibited from continuing his employment with the Town it would place the Town in a time of hardship.

The WV Office of Environmental Health Services is responsible for ensuring that local water systems comply with the numerous regulations regarding the monitoring and treatment of water. To accomplish this task, the Office of Environmental Health Services has various district offices located throughout the State. The Philippi District Office is responsible for regulating the Town of Monongah's water system and other water systems located within its region. The Supervising Engineer for this office has verified that Monongah has a small population and there are a limited number of certified water operators in certain parts West Virginia. Nonetheless, he has stated that the likelihood that the Town of Monongah could find a qualified operator to fill the Water Plant Supervisor/Operator position would be fairly good in that part of the State.

The two dissenting Council Members contacted Ethics Commission staff to voice their opposition to a Contract Exemption. One stated, "We have a part-time water plant operator that said he is willing to take the position as Chief Water Plant operator when Mr. McCombs retires." His colleague concurred and further stated that when Mr. McCombs was contemplating retirement that he stated that there are people interested in taking his position. This dissenter also stated that the Town's past newspaper advertisements were for part time positions, not for the full time Water Plant Supervisor/Operator position. Further, he is uncertain what newspapers the ads ran in.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) (1) reads:

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 may be a party to or have an interest in a contract which such official 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 employing 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 has previously ruled that a Mayor in a strong Mayor form of government could not also be employed by the municipality (Advisory Opinion 2006-05); and that a Mayor in a Mayor-Council form of government could not also be employed by the municipality (Contract Exemption 2010-03). 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.

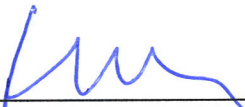
The Commission also recognized that “[T]here may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities.” In this case, the Commission must decide if the situation presented falls within the narrow category of instances when an elected Mayor in a Mayor-Council form of government may also be employed by the Town where he serves as Mayor.

In Contract Exemption 2008-08, the Commission granted an exemption authorizing the Town of Rhodell to continue to employ its mayor as its Water Plant Operator until the next election. The Commission made its decision based on the Town’s location, and the shortage of water plant operators in that part of the State, concluding that it was not practical to require the Town to hire someone else to operate the water system.

Here, however, the Town of Monongah is located in an area where licensed operators are not in short supply. Indeed, it already employs three other Class II operators, albeit two work part time. Given the available labor pool upon which it can easily draw, the Commission finds that the Town has not proven an undue hardship sufficient to justify granting a Contract Exemption. Thus, Mr. McCombs must choose between continuing his employment with, or continuing to serve as Mayor of, the Town of Monongah.

Notwithstanding the denial of the request, the Commission recognizes that if Mr. McCombs were to terminate his employment immediately, substantial interference with the operation of the water plant may ensue. As a result, the Commission hereby grants a three month transition period allowing his continued employment. The Commission recommends that the Town immediately advertise in newspapers of wide circulation throughout the region for a full time Water Plant Supervisor/Operator position. The Town shall, within thirty (30) days, notify the Ethics Commission how it will comply herewith.

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.



Jonathan E. Turak, Vice-Chairperson