

CONTRACT EXEMPTION NO. 2013-07

Issued on November 7, 2013 By the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Cameron** asks for an exemption to allow the City to contract with the Mayor's spouse to provide emergency repairs at the City's Water Plant.

FACTS RELIED UPON BY THE COMMISSION

This contract exemption request has been submitted by the City of Cameron, by and through its City Clerk. Additionally, the City provided various documents in support of its request. The City of Cameron is a Class IV municipality of around 946 residents, and operates a water plant built in 1956, and poorly maintained thereafter.

The City states it has an emergency in the water filtration equipment for the entire community that needs service within the next 4-5 days. According to the request, without the repairs, there will be no water in a few days. It has been deteriorating for some time. Although the City attempted to get public bids, it only received one written bid, which was not responsive to all of the desired work required to be performed, and the cost was out of proportion to the labor at approximately \$30,000.

According to the Requester, plumbing contractors in the area are not interested in performing the necessary work for the City. Due to the Marcellus Shale boom in the Northern Panhandle, they are able to obtain plentiful, higher paying jobs.

Mayor Julie Beresford's husband is a pipefitter/plumbing contractor who does this type of work; he is also a licensed contractor. After receiving the one unacceptable bid, the Mayor asked her husband to evaluate the plant/speak with the long-time employee who runs the plant, to advise what needs to be done and what the estimated cost might be. The Mayor did not tell her husband anything about the other bid ---such as what the other contractor proposed for the needed work or the anticipated cost thereof. Her husband provided for all the needed work that the City anticipated was needed at the plant and estimated the cost at about \$16,292.31.

Thereafter, on October 22, 2013 the Mayor called an emergency meeting and excused herself from Council Chambers. Whereupon Council reviewed and discussed Mr. Beresford's proposal, and then unanimously voted to adopt a Resolution for the Mayor's husband to perform the work and for the City to pay him the amount of his estimate to do so. On October 31, 2013, Council unanimously approved this request to seek a Contract Exemption from the Ethics Commission.

The Requester notes, and the documents confirm, that the Mayor was recused from the discussion and vote relating to contracting with her husband for the repairs and for the City's request for a contract exemption.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

(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 if a public official 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 to influence a government decision affecting his or her financial interest. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.

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(j) provides, in relevant part:

(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

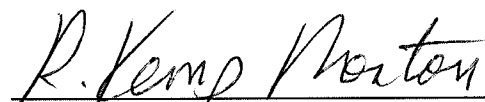
The Ethics Act, W. Va. Code § 6B-2-5(d)(1), prohibits public officials from having an interest in public contracts. These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

As with all contract exemptions, the Requester must demonstrate that the prohibitions of the Ethics Act would constitute excessive cost, undue hardship, or other substantial interference with governmental operations. Based upon the information provided by the Requester, the Commission finds that the Requester has demonstrated that prohibiting it from contracting with the Mayor's husband for repairs to the City's water equipment will result in excessive cost, undue hardship and other substantial interference with governmental operations as there does not appear to be other qualified plumbing contractors available and willing to perform this work.

The estimate for the cost of the repairs is approximately \$16,292.31. Accordingly, the Ethics Commission hereby grants a contract exemption to allow the City to contract with the Mayor's husband for repairs to the City's water equipment in an amount not to exceed \$16,292.31.

This opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Ethics Commission for further advice as it may alter the analysis and render this opinion invalid.

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