

CONTRACT EXEMPTION NO. 2013-06

Issued On November 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

EXEMPTION SOUGHT

The **Little Kanawha Conservation District** seeks an exemption to allow Calhoun County Conservation Supervisor Roger Collins to offer private delivery services for a cost-share program that the District offers.

FACTS RELIED UPON BY THE COMMISSION

Conservation Districts (Districts) were created to conserve land from soil erosion. See W. Va. Code § 19-21A-2. A District may consist of land in one or more counties. Landowners in one or more counties may form a District by petitioning the State Conservation Committee.¹

Each county in a District shall elect two non-partisan supervisors.² A candidate for Conservation Supervisor "must be a landowner and an active farmer with a minimum of five years' experience or a retired farmer who has had a minimum of five years' experience and must have the education, training and experience necessary to carry out the duties required in this article."³ Additionally, the Code requires Conservation Supervisors to "be persons who are by training and experience qualified to perform the specialized skill service which are required of them in the performance of their duties under this section and shall be legal residents and landowners in the District."⁴

Districts participate in the state Agricultural Enhancement Program (AgEP) which offers a cost share program to local landowners who qualify for the program. This program provides cost-share for a variety of best management practices farmers can implement to reduce soil erosion, improve water quality and enhance production on their farms, e.g., one cost-share practice involves the spreading of lime.

The AgEP mission is to assist the agriculture cooperators of West Virginia with the voluntary implementation of best management practices on agricultural lands in order to conserve and improve land and water quality. Practices are determined by each District and applications are presented to each District Board for review and approval at monthly board meetings.

¹ W. Va. Code § 19-21A-14 when read in conjunction with 19-21A-5 as amended in 2002.

² W. Va. Code § 19-21A-6. Counties which meet the population requirements shall elect additional supervisors in accordance with this code section. Id.

³ Id.

⁴ W. Va. Code §19-21A-7(a).

Districts have the statutory power to conduct surveys relating to the character of soil erosion.⁵ Districts may also expend public funds for demonstration projects on land within a district for the purpose of determining which “means, methods and measures” best prevent soil erosion.⁶ Some of the Districts’ programs involve cost-sharing whereby landowners receive certain benefits but also pay a portion of the cost.

The Conservation District has a program for lime spreading. Individual farmers or landowners apply to the Conservation District, seeking cost sharing on lime and lime spreading. The Conservation District Board votes to approve each landowner’s application to participate in the program. Thereafter, the landowner is notified of the approved application and the landowner is responsible to purchase and spread lime or other nutrients as required by the program. Collins operates a trucking service that provides off-road deliveries to farmers who purchase lime for their fields. Some of these farms participate in the District’s AgEP program. The District provides funding directly to the farmers, who the pay Collins for the delivery.

In support of the request for a contract exemption, the Requester states:

The Little Kanawha Conservation District is requesting the exemption because Mr. Collins has indicated he will be forced to resign as a Calhoun County Supervisor if he has to make a choice between his personal business or serving in an elected capacity.

If Mr. Collins were to resign, the citizens of Calhoun County would be without one of two elected representatives on the Little Kanawha Conservation District board of supervisors. The District would also be put in a position of seeking a replacement for Mr. Collins who meets the requirements of West Virginia Code §19-21A-6(b).

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides that no elected public official or business with which s/he is associated may be a party to or have an interest in the profits or benefits of a contract which such official may have direct authority to enter into, or over which s/he may have control.

W. Va. Code § 6B-2-5(d)(3) provides that 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

⁵ W. Va. Code § 19-21A-8(1)

⁶ W. Va. Code § 19-21A-8(2)

officials shall also comply with the voting rules prescribed in subsection (j) of this section.

W. Va. Code § 6B-2-5(4) states, in pertinent part, that where the provisions of subdivisions (1) and (2) of this subsection would result in excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency, the affected governmental body or agency may make a written application to the Ethics Commission for an exemption.

W. Va. Code § 6B-2-5(j)(1)(A) provides that Public officials may not vote on a matter in which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code § 6B-2-5(j)(3) provides that for a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

ADVISORY OPINION

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. This prohibition prevents a public entity from doing business with one of its own Board Members. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant a public entity an exemption from this prohibition if the public entity demonstrates that compliance with the prohibition will cause the public entity excessive cost, undue hardship or substantial interference with its operation.

This is not the first time that the Ethics Commission has applied W. Va. Code § 6B-2-5(d)(1) to District Members. In Advisory Opinion 2010-20, the Commission first concluded that a District Member is an elected member and subject to the prohibitions in West Virginia Code § 6B-2-5(d). As a result, if the District were to expend public funds to improve a District Member's property, then it would constitute a public contract between the property owner/District Member and the District. The Elected Board Member would have a financial interest in this project.⁷ Thus, in Advisory Opinion 2010-

⁷ For purposes of this prohibition, it is not sufficient for public officials to recuse themselves from voting.

20, the Commission concluded that a District may **not** expend public funds to construct a demonstration project on the property owned by one of its Members unless the District seeks and receives a contract exemption to construct the project. In order to obtain a contract exemption, the District must demonstrate that imposing this restriction in the Ethics Act will result in excessive cost, undue hardship, or other substantial interference with the operation of the District. W. Va. Code § 6B-2-5(d)(3).

In Advisory Opinion 2012-42, the Commission ruled that—assuming that the District has the statutory authority to expend public funds for scholarships—a District may award a \$500 annual scholarship to a District supervisor’s child.⁸ The Commission noted that this award was permissible so long as the District supervisor recuses him/herself from all participation in selection of scholarship participants, leaves the room during discussion and decision-making period, and fully discloses his or her interests. The Commission further noted that W. Va. Code § 6B-2-5(d) prohibits public servants from having a financial interest in a public contract. The Ethics Act defines a prohibited financial interest as one greater than \$1,000 per calendar year. W. Va. Code § 6B-2-5(d)(2)(A). Thus, the Commission found that the scholarship was not a prohibited public contract because the scholarship amount is only \$500, less than the \$1,000 per calendar year threshold.

More recently, in Advisory Opinion 2013-25, the Commission was asked whether it was a conflict of interest for a District to reimburse landowners for goods and services purchased from an Elected Board Member and, if so, whether it may be cured by his recusal from voting thereon. The Commission wrote:

Since the Conservation District Board approves the application of each landowner prior to the procurement of the lime and/or spreading, each Board Member has direct authority or control over each such application. Similarly, after a landowner incurs the expense, the Board votes to approve the landowner’s request for reimbursement of her/his payment to a provider for goods or services; thus, each Board Member has direct authority or control over each such reimbursement request. If a Board Member provides the goods or service to a landowner, then that Board Member has a financial interest in the benefits of a public contract. The fact that the landowner pays for the service out of pocket prior to being compensated by the Conservation District does not solve the problem given that the transaction is between the landowner and an Elected Board Member.

Advisory Opinion 2013-25.

⁸ The Commission found no explicit statutory authorization for a District to expend its public money on scholarships and therefore recommended that the District seek an opinion from the W. Va. Attorney General’s Office as to whether Conservation Districts are authorized to grant scholarships.

The Requester states that many trucking companies do not deliver lime to locations that are one mile (or more) off the road. As a result, it would result in an undue hardship to those farmers who would otherwise be unable to obtain lime. In Contract Exemption 2007-01 and Advisory Opinion 2013-25, the Ethics Commission noted that although in most cases the hardship falls on the governing body, in certain circumstances it may be extended to citizens or Conservation District participants.

The District would suffer undue hardship and substantial interference with governmental operations because removing one of the two elected supervisors would leave the County inadequately represented before the District. The legal requirements for serving as a supervisor, namely that the individual operate an active farm (or be retired therefrom), may make replacing a supervisor with one who does not wish to have some level of participation in the AgEP difficult.

Based upon the information provided by the Requester, the Commission finds that the Requester has demonstrated that prohibiting its supervisor from continuing to operate his trucking service while serving as a County Supervisor will result in undue hardship to itself and its program participants and other substantial interference with governmental operations.

Collins must recuse himself from all votes related to any and all lime funds as a part of the AgEP. For recusal to be proper, public servants must first fully disclose on the record their disqualifying interest in any matter before the governing body, then leave the room during the discussion, deliberation and vote on the matter. Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the affected Member left the room during all consideration, discussion and vote on the item under consideration.

This contract exemption is effective until November 7, 2014 at which time the District must submit a new request for an exemption if it seeks to continue to allow the Collins to continue serve as County Conservation Supervisor while operating his private trucking business. Of course if the affected County Supervisor does not seek re-election, resigns or is not re-elected, then this step is not necessary.

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, III, Chairperson