

CONTRACT EXEMPTION NO. 2015-01

Issued on February 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The Requester is the West Virginia School of Osteopathic Medicine, which desires to purchase real property owned by its President, Michael Adelman.

FACTS RELIED UPON BY THE COMMISSION

Since 2002, the President has owned and resided in a townhouse close to campus which the President purchased when he began his employment with the Requester. In 2011, the Requester, through its Board of Governors ("the Board"), developed and approved a five-year Institutional Strategic Plan and a 10-year Campus Master Plan (collectively "the plan"). Part of that plan was to eliminate a house due to safety deficiencies in the building. The house used to accommodate up to 15 visiting faculty members and short-term students. In its place, the plan directed the Requester to consider purchasing on-campus and off-campus housing.

Consistent with the plan, the Board directed its finance committee to conduct a search for additional housing. The finance committee concentrated on available townhouses within city limits due to their larger sizes and close proximity to campus. The finance committee considered several properties with the assistance of a realtor. The Requester chose a unit of four townhouses which met its needs with the intent to purchase each townhouse as it becomes available. By acquiring all four townhouses, the Requester would control the parking lot and allow it more cost-efficient maintenance and improvements.

The Requester knew that one of the townhouses was owned by its President at the time it approved the plan to acquire the townhouses over time. The Requester states that purchasing the townhouse was a good fit to the plan because the President was expected to move upon the conclusion of his term of employment in 2018. The Board amended its master plan to include the acquisition of the unit of townhouses and has since bought one of the townhouses. Prior to purchasing the first townhouse, the Requester sought and received a property appraisal. The Requester states that the President exercised no influence in its decision to pursue purchasing the unit of townhouses or his particular townhouse.

As anticipated, in 2014, as part of the President's retirement planning, he began discussions with the Requester regarding whether the Board would purchase the property from him or whether he should wait and place the property on the open market. The Requester offered his townhouse to the President for a price below market value, to donate his adjacent lot, and enter into a landlord/tenant relationship for the duration of

his tenure. The Requester accepted the offer in September 2014, contingent upon approval from the Ethics Commission.

The Requester explains that its Board of Governors has sole control over the acquisition of property. It further asserts that the President does not serve on the board or finance committee and has no vote or control over such decisions. The President also does not have any delegated authority to purchase real property or to enter into a contract to purchase real property on behalf of the Requester.

The Requester does not believe a contract exemption is required from the Ethics Commission, but in the event that one is required, it requests one be granted because denying the Requester the ability to enter into said contract would create an undue hardship due to increased property cost, increased maintenance and repair costs, monitoring duties and cost, decreased control over its housing properties and interference with its long-term plans.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b)(1) reads, in relevant part:

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.... 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.

* * *

(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.

* * *

W. Va. Code § 6B-2-5(d)(1) reads, in relevant 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: Provided, That nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body.

* * *

(3) A full-time public official or employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibitions.

W. Va. Code § 6B-2-5(d)(4) states:

Where the provisions of subdivisions (1) and (2) of this subsection would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a state, county, municipality, county school board or other governmental agency, the affected governmental body or agency may make written application to the Ethics Commission for an exemption from subdivisions (1) and (2) of this subsection.

ADVISORY OPINION

An expressed goal of the Ethics Act is to assist public servants in avoiding conflicts between their public service and any outside personal interests and to avoid the appearance of impropriety. W. Va. Code § 6B-1-2(d). The Commission must consider W. Va. Code § 6B-2-5(d)(1), which prohibits a public official or employee from having a pecuniary interest in the proceeds of a contract when he had “direct authority to enter into” the contract or “over which he or she may have control.”

The Requester states that the President does not have such authority or control over the contract because the President is not a member of the Board and the Board has not delegated such purchasing authority to the President. The Commission will first consider past Advisory Opinions and Contract Exemptions to determine whether it agrees with the Requester’s position.

It is well settled that governing bodies must receive a contract exception before contracting with members of their governing bodies. For example, a city must get an exemption before contracting with its mayor or one of its council members, and a county must get an exemption before contracting with one of its own county commissioners, e.g., Contract Exemptions 2009-04, 2009-05, 2014-01, 2012-06 and 2014-04.

Further, the Ethics Commission has previously found that governing bodies do not need a contract exemption when contracting with certain public employees who do NOT exercise authority or control over the contract. See, e.g., Advisory Opinion 2012-36, where the Commission held that a state employee, whose agency is responsible for housing the State’s historical documents, may contract with the State of West Virginia to compile the official papers of a former Governor because the employee (and her position) had no authority over the contract. Therefore, she was not in a position to use her employment to secure the contract.

It is less settled, however, whether a high-ranking official such as the President, who has broad control but not specific control over the contract at hand, has the requisite direct authority or control to necessitate a contract exemption. For example, the Commission declined to answer the question of whether a county board of education may contract with the business of an assistant principal to provide an after-school driver's education program to students in the county school system. The Commission stated, "The Assistant Principal does not have direct authority or control over the letting of the contract by the County Board of Education. This fact may relieve him from the prohibitions in the Ethics Act, but the Ethics Commission elects to save the answer to this question for another day, as it finds that the stricter limitations imposed by W. Va. Code § 61-10-15 prohibit the Assistant Principal from having an interest in this contract."

In Advisory Opinion 2012-29, the Commission prohibited a county director of emergency services from contracting with the same county to provide services as the mitigation project manager. In reaching this conclusion, the Commission noted that the Requester was involved in the approval and securing of the grant, even though the Requester had no formal voting authority on the County Commission. In particular, the county commission delegated the grant process to the Requester. That is not the case here. The Requester here has not delegated such authority to the President.

In Advisory Opinion 2012-45, the Commission held, "Although the Requester is a private attorney hired to represent the County Commission, given the broad range of his responsibilities, he is comparable to a County Manager or Prosecuting Attorney. Thus, the Commission finds that the nature of the Requester's responsibilities as the County's Attorney vests in him the direct authority or control over the County's public contracts contemplated by W. Va. Code § 6B-2-5(d)."

To err on the side of caution, the Commission holds that the President's position includes broad authority over all the business of the Requester similar to that of a city manager.

Therefore, the Commission holds that the Requester must seek a contract exemption. 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. W. Va. Code § 6B-2-5(d)(4).

The Commission grants the requested contract exemption. The Commission notes that denying the Requester the ability to enter into said contract would create an undue hardship due to increased property cost, increased maintenance and repair costs, monitoring duties and cost, decreased control over its housing properties and interference with its long-term plans. The Commission further notes that it granted a contract exemption in Contract Exemption 2010-07 to a board of education (BOE) which allowed the assistant prosecuting attorney to sell it property where the prosecuting attorney stated he would not engage in discussions with the BOE relating to the property, but would remove himself from rendering any legal advice to the BOE regarding the purchase of the property. Moreover, in his capacity as an Assistant Prosecutor, he removed himself from any negotiations between the BOE and architects,

engineers or construction companies. The Prosecutor became the point of contact for the BOE on these matters. Similarly, the President in the instant situation has been removed from the process relating to the acquisition of the townhouses.

Limitations apply to the granting of this contract exemption, however. The Requester may not use his position to influence the purchase of the property, *e.g.*, he may not communicate with the Board or attempt to influence it or its committees on matters relating to whether and how much to pay for the President's townhouse. Moreover, the decision of the Requester to purchase the property and the amount paid for it must be based upon the best interests of the Requester and not upon favoritism. See Advisory Opinions 2010-07 and 2012-02 for similar restrictions.

In conclusion, the Commission grants the Requester's request for a contract exemption based upon undue hardship. The Requester may purchase real property owned by its President subject to the limitations set forth herein.

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

Contract Exemptions are granted on a case-by-case basis. This opinion is limited to the facts and circumstances of this particular case and may not be relied upon as precedent by other persons or agencies.


Robert J. Wolfe, Chairperson
WV Ethics Commission