

CONTRACT EXEMPTION 2015-02

Issued On March 12, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

Brooks McCabe, a Commissioner with the Public Service Commission of West Virginia, requests an exemption, if required, from the Ethics Act's prohibition against selling or leasing real property to an entity upon which he took or will take regulatory action.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the sole owner of and broker for WV Commercial, LLC, a commercial real estate brokerage and development firm. Another commercial real estate broker, who represents a business entity which has a matter pending before the Public Service Commission, has approached an associate broker¹ who is an independent contractor for the Requester's firm about renting office space from a client of the Requester's firm.

The Requester states that his firm must deal solely with the other commercial real estate broker and not directly with the entity whose matter is pending before the Public Service Commission ("PSC"). He further explains that he will have no personal involvement or participation in the transaction, and that the "entire process will involve nothing more than an arms-length business transaction" between the lessor and lessee. The lessor and lessee determine their own positions, which are presented through their respective brokers, according to the Requester.

Finally, he states that if the Ethics Commission finds that his situation is barred by W. Va. Code § 6B-2-5(h), his livelihood will be significantly impaired, and that if he is denied an exemption, his inability to participate in the judgment of a pending regulatory case before the PSC would "work a hardship" on the PSC.

The Requester's public office is a full-time position.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(h) states, in relevant part:

- (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:

¹ See Page 2 for statutory definitions of "broker" and "associate broker."

(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or

(B) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working . . .

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor; "seek employment" includes responding to unsolicited offers of employment as well as any direct or indirect contact with a potential employer relating to the availability or conditions of employment in furtherance of obtaining employment; and "subordinate" includes only those agency personnel over whom the public official or public employee has supervisory responsibility.

(3) A full-time public official or full-time public employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibition contained in subdivision (1) of this subsection.

(A) The Ethics Commission shall by legislative rule establish general guidelines or standards for granting an exemption, but shall decide each application on a case-by-case basis;

W. Va. Code § 30-40-4(b) states:

"Associate broker" means any person who qualifies for a broker's license, but who is employed or engaged by a licensed broker to engage in any activity regulated by this article, in the name of and under the direct supervision of the licensed broker.

W. Va. Code § 30-40-4(c) states:

"Broker" means any person who for compensation or with the intention or expectation of receiving or collecting compensation:

(1) Lists, sells, purchases, exchanges, options, rents, manages, leases or auctions any interest in real estate; or

(2) Directs or assists in the procuring of a prospect calculated or intended to result in a real estate transaction;
or

(3) Advertises or holds himself or herself out as engaged in, negotiates or attempts to negotiate, or offers to engage in any activity enumerated in subdivision (1) of this subsection.

ANALYSIS

The request presented in this Contract Exemption consists of three separate issues:

First, does the Requester's brokerage firm working with another brokerage firm on a lease agreement between two entities constitute "seeking to purchase, sell or lease real or personal property" for purposes of W. Va. Code § 6B-2-5(h)?

Secondly, are the actions of the Requester's associate broker imputed to the Requester, in his capacity as the supervising licensed broker, for purposes of W. Va. Code § 6B-2-5(h) even though the Requester states that the associate broker is an independent contractor and not his employee?

Finally, if the Requester is subject to W. Va. Code § 6B-2-5(h)(1), does he provide sufficient reasons for the granting of an exemption under W. Va. Code § 6B-2-5(h)(3)?

Nothing in the Ethics Act clarifies whether a brokerage firm qualifies as an entity "seeking to purchase, sell or lease real or personal property." Further, the Commission has never had the opportunity to rule on whether W. Va. Code § 6B-2-5(h) pertains to agents of entities which buy, sell and rent real property.

The West Virginia Real Estate License Act, at W. Va. Code § 30-40-4(c), defines a real estate broker, in relevant part, as "any person who for compensation or with the intention or expectation of receiving or collecting compensation . . . lists, sells, purchases, exchanges, options, rents, manages, leases or auctions any interest in real estate; or directs or assists in the procuring of a prospect calculated to or intended to result in a real estate transaction." Using this definition as guidance, it is concluded herein that a broker is someone who "seeks to purchase, sell or lease real or personal property." While the Requester is not leasing his own property, W. Va. Code § 6B-2-5(h) does not specify that it must be his own. The prohibition exists to prevent impropriety, as well as the appearance of impropriety, in the agency's lawful exercise of authority. The Requester has a financial interest in the transaction because his firm will be paid a commission upon completion of the rental agreement.

Accordingly, the Commission finds that the Requester's brokerage firm working with another brokerage firm on a lease agreement between two entities constitutes "seeking to purchase, sell or lease real or personal property" for purposes of W. Va. Code § 6B-2-5(h).

The second issue to be decided herein is whether the Requester's associate broker's actions are imputed to the Requester as the owner and primary broker of the brokerage firm. The Requester explains that he will have no personal involvement or participation

in the transaction, and that it will be handled by his firm's "associate broker," who is an independent contractor of the firm and not an employee.

"Associate broker" is defined in W. Va. Code § 30-40-4(b) as "any person who qualifies for a broker's license, but who is employed or engaged by a licensed broker to engage in any activity regulated by this article, in the name of and under the direct supervision of the licensed broker."

Even though the Requester purportedly will not be directly involved in the transaction at issue and the associate broker is an independent contractor with his firm, the associate broker is deemed to be acting "in the name of and under the direct supervision of" the Requester.

The application to register with the West Virginia Real Estate Commission as an "associate broker" requires the applicant to list his "employing" broker. Accordingly, for registration purposes, the broker is "employed" by the brokerage for whom he works.

Therefore, the actions of the firm's associate broker would be imputed to the Requester. Accordingly, the Ethics Commission finds that the Ethics Act, at W. Va. Code § 6B-2-5(h), prohibits the Requester's brokerage firm from seeking to lease property to or from an entity that has a matter on which the Requester's public agency took regulatory action within the preceding 12 months or has a regulatory matter before the agency on which the Requester or a subordinate is working.

Because the Requester is prohibited from engaging in the real estate transaction described herein, the issue of whether he is entitled to an exemption from the prohibition set forth in W. Va. Code § 6B-2-5(h)(1) must be evaluated. A full-time public official or full-time public employee who would be adversely affected by the provisions of W. Va. Code § 6B-2-5(h)(1) may apply to the Ethics Commission for an exemption from the prohibitions therein pursuant to W. Va. Code § 6B-2-5(h)(3).

As justification for an exemption, the Requester states if his private brokerage firm is unable to engage in the real estate transaction described herein, his livelihood which was in existence long before he was appointed to serve as a member of the Public Service Commission will be significantly impaired. He also states that the agreement between his firm and the lessor of the property would be jeopardized, and that his inability to participate in the judgment of certain cases pending before the PSC "works a hardship" on the PSC. He supplied an affidavit from the chairman of the PSC which states that assuming that he and Respondent are the only members of the (three-member) PSC when a statutory deadline arrives, the PSC would be unable to enter a decision if Respondent cannot participate in the case.

The Ethics Commission finds that the fact that the Requester's private brokerage firm may be unable to participate in the leasing of real property if he is not granted an exemption from the prohibition set forth in W.Va. Code § 6B-2-5(h) is not sufficient to

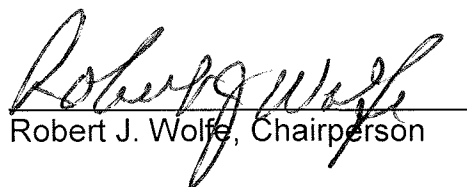
allow him to participate – even indirectly – in the leasing of real property to an entity which has a regulatory matter pending before the Public Service Commission. Further, the fact that the Requester is one of only two Commissioners of the three-member PSC and is needed to participate in a decision regarding the regulated entity at issue does not constitute sufficient grounds to conclude that the Requester would be adversely affected if a contract exemption is not granted. The Ethics Commission is sympathetic to the effect this opinion could have on the PSC, but the hardship exemption in W. Va. Code § 6B-2-5(h) explicitly requires the hardship to be personal to the Requester and not to his employing agency.

Accordingly, the Ethics Commission concludes that the reasons set forth by the Requester are not sufficient to warrant an exemption to the prohibition set forth in W. Va. Code § 6B-2-5(h)(1). In summary, under the facts presented by the Requester, he is prohibited from seeking -- either directly or through an associate broker -- to lease property to or from an entity that has a matter on which he is working or in which he has taken regulatory action within the preceding 12 months in his public capacity, and his request for an exemption from the prohibition in W. Va. Code § 6B-2-5(h)(1) is denied.

Finally, the Requester has offered to consider donating any net proceeds from the transaction which inure to the benefit of his brokerage firm to a charity, excluding the amount that would go to the subordinate agent in question. This is not an option available under the Ethics Act and will not be considered.

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