

CONTRACT EXEMPTION 2016-02

Issued on September 1, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

EXEMPTION SOUGHT

The **Wyoming County Health Department** requests an extension of Contract Exemption 2014-02 to allow it to continue contracting with Family Healthcare Associates, Inc.

FACTS RELIED UPON BY THE COMMISSION

On September 4, 2014, the Ethics Commission granted an exemption to the Wyoming County Health Department authorizing it to contract with Family Healthcare Associates, Inc. ("Family Healthcare") to provide family planning, breast and cervical cancer screenings and other medical services. See Contract Exemption 2014-02 incorporated herein by reference. The Contract Exemption was for a period not to exceed two years. The two-year period is close to expiring.

The Wyoming County Health Department seeks to renew the Contract Exemption. In support of its request, its Administrator states:

Since the original request to grant this exemption, nothing has changed in our County. We have the same situation that existed two years ago, there is a lack of medical providers that can or will offer these services. For this reason, I again ask the West Virginia Ethics Commission to grant a contract exemption between the Wyoming County Health Department and Family Healthcare Associates, Inc. which will allow the continuation of these vital services.

Given that our County has been impacted significantly as a result of the downturn in the coal mining industry, I cannot see additional medical providers coming to the area in the near future.

The Requester states Family Healthcare conducts approximately two clinics a month at the Health Department. The clinics are three to four hours in duration. Family Healthcare sends a physician assistant to provide medical services, including screenings, to patients at the clinics.

The Health Department pays Family Healthcare \$45 per hour for services rendered. The Health Department Administrator states that the Health Department paid Family Healthcare approximately \$5,667 in 2015. In 2016, as of August 5, 2016, the Department has paid this company \$2,317.

The Health Department asserted in its initial Contract Exemption request that from a financial standpoint, contracting with Family Healthcare, Inc. was its cheapest option. It further asserted it was not feasible to contract with its previous provider as this provider would only continue to contract with the Health Department if the Health Department assumed responsibility for the malpractice coverage for the services rendered. The Requester states that, based upon information and belief, the cost of purchasing the medical malpractice coverage in 2014 would have been in the range of \$17,500. Additionally, the provider would have charged a rate of \$1,000 per day for providing health care services.

The Wyoming County Health Department sought the original Contract Exemption and this renewal due to the following financial, personal and familial relationships which exist between the Board of Health and Family Healthcare. First, the Board of Health Chairperson resides with one of the owners of Family Healthcare, Inc. who is also its senior physician. Second, the Department's Health Officer is also the son of the senior physician and part owner of this company. Third, the Health Officer has an ownership interest in the company and is an employee of the company.

The Health Officer is a part-time employee of the Health Department. He serves as an ex officio (non-voting) member of its Board.

According to the Health Department's Administrator, it is the Administrator, not the Health Officer, who is responsible for recommending a vendor to provide these medical services. The Board of Health must approve the contract. The Health Administrator is responsible for overseeing the day-to-day administration of the contract. Nevertheless, based upon his statutory duties, the Health Officer is generally responsible for overseeing health services rendered by the Department.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no 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, however,* That nothing herein shall...prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

...

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

In the absence of bribery or a purpose to defraud, an elected or appointed public official or public employee or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor of the business which is awarded a public contract. A limited interest for the purposes of this subsection is:

(A) An interest which does not exceed one thousand dollars in the profits or benefits of the public contract or contracts in a calendar year;

...

W.Va. Code § 6B-2-5(d)(3) states, in relevant part:

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

W.Va. Code § 6B-2-5(d)(4) states, in relevant part:

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.

W.Va. Code § 61-10-15(a) states, in relevant part:

(a) It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: *Provided*, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer,

secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

W.Va. Code § 61-10-15(h) states, in relevant part:

Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of this code for an exemption from subsection (a) of this section.

ADVISORY OPINION

Both W.Va. Code § 6B-2-5(d) and W.Va. Code § 61-10-15 prohibit public officials and public employees from having an interest in public contracts over which they have influence or control. W.Va. Code § 6B-2-5(d)(1), however, makes an exception for part-time appointed public officials so long as they recuse themselves from voting and from the deliberative process. W.Va. Code § 61-10-15, which applies to certain county officials, does not contain this exception.

The Ethics Commission must first determine whether the interests of the Board Chairperson and the Health Officer in the company constitute a financial interest in a public contract for purposes of the Ethics Act, W.Va. Code § 6B-2-5(d), or W.Va. Code § 61-10-15. Next, the Commission must determine whether they exercise voice, influence or control over the Health Department's contracts which triggers the requirement that the Board seek and receive a Contract Exemption before continuing to contract with Family Healthcare.

The Ethics Commission finds that the Chairperson of the Board of Health has a financial interest in the public contract in question for the reasons set forth in Contract Exemption 2014-02, i.e., she and the owner of Family Healthcare reside together. Further, as the Board Chairperson, she exercises control over the Department's contracts.

The Ethics Commission finds that the Health Officer has a financial interest in the contract as he has an ownership interest in, and is an employee of, Family Healthcare. The Commission further finds he is an appointed public official who has responsibility for

overseeing the health services administered by the Department, including services provided by contract health care providers.¹

Based upon the financial interests of the Chairperson and Health Officer in the company, and based upon their control over the Department's public contracts, the Ethics Commission finds, to comply with W.Va. Code § 61-10-15, it is necessary for the Board of Health to obtain a contract exemption to continue its contract with Family Healthcare.²

The Ethics Commission is authorized to exempt agencies from the prohibitions in W.Va. Code § 61-10-15 if the restrictions in this Code section "would result in...excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency ..." W.Va. Code § 61-10-15(e). Based upon the financial information provided, it appears that the Health Department is only paying Family Healthcare, on average, \$5,500 per year for the medical services it provides to patients at the Health Department. In contrast, if it contracted with its previous provider, the cost of procuring the medical malpractice coverage would be in the range of \$17,000 in addition to the \$1,000 per day fee. While the \$17,000 quote for malpractice insurance is from 2014, the Commission has no reason to believe the cost of this insurance would be significantly less in 2016.

Based upon the foregoing, the Ethics Commission hereby grants the Health Department an exemption to continue to contract with Family Healthcare Associates, Inc.

In conclusion, the Wyoming County Health Department is granted an exemption to continue to contract with Family Healthcare Associates for a contract period not to exceed two years. At the expiration of two years, if the Board of Health seeks to continue contracting with Family Healthcare Associates, it must submit a new request for an exemption if its Board Members or Health Officer still have a financial relationship with the company. Prior to the Board of Health seeking to renew this contract exemption, it should submit written evidence that an attempt was made to obtain quotes from other providers in Wyoming County or nearby counties to ensure no other providers are willing and able to provide the same services at or around the current contract price.

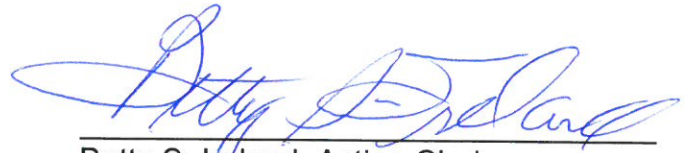
Neither the Board of Health Chairperson nor the Board of Health Officer may be involved in decisions affecting the contract. The Board of Health Chairperson must

¹ A health officer is a statutory created position. W.Va. Code § 16-2-12. He or she is appointed by a local board of health with the approval of the county commission. *Id.* He or she generally has power "[t]o supervise and direct the activities of the local board's health services, employees and facilities." W.Va. Code § 16-2-13(b). A local health officer is authorized to delegate these powers with the approval of the board. *Id.*

² The Ethics Act contains an exception for part-time appointed officials. Hence, if only the Ethics Act applied, it would not be necessary for the Board of Health to obtain a contract exemption so long as the Board Chairperson and Health Officer removed themselves from participating in decisions relating to the contract and recused themselves from voting.

recuse herself from deliberations and voting on matters related to Family Healthcare.

The Commission notes that exemptions must be granted on a case-by-case basis. Therefore, this Contract Exemption is limited to the facts and circumstances of this particular case, and may not be relied upon as precedent by other persons.



Betty S. Ireland, Acting Chairperson
WV Ethics Commission

CONTRACT EXEMPTION NO. 2014-02

Issued On September 4, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Wyoming County Health Department** seeks a contract exemption to allow its governing board to enter into a contract with a local physicians group where the governing board's chairperson resides with the senior physician in the group, and the senior physician's son is the Health Officer for the Wyoming County Health Department.

FACTS RELIED UPON BY THE COMMISSION

County boards of health, which govern county health departments, are required to provide community health promotion, environmental health protection and communicable or reportable disease prevention and control pursuant to W. Va. Code § 16-2-11(a)(1)(i)-(iii). Further, boards of health may "provide primary health care services, clinical and categorical programs, and enhanced public health services" pursuant to W. Va. Code § 16-2-11(b)(1). "Local health departments" are defined by W. Va. Code § 16-2-2(n) as "the staff of the local board of health." Local health departments are charged with carrying out these requirements for their respective boards.

Accordingly, the Wyoming County Health Department (WCHD), as the staff of the Wyoming County Board of Health (BOH), provides family planning, breast and cervical cancer screenings and other medical services. The WCHD's current medical provider has given it two options to continue receiving these services. The first is to become a satellite organization of the health provider. This option has been determined by the Wyoming County Prosecutor¹ to be impermissible on legal grounds. The second option is to contract with the current provider and assume responsibility for malpractice coverage. This option was rejected as being purportedly outside the financial capabilities of the WCHD. The Requester explains that the administrators searched for alternate providers from areas as far away as Charleston, but that due to economic considerations no agreements could be reached.

The only feasible option available to the WCHD is to contract with a local physicians group for it to provide a nurse practitioner at an affordable rate which includes malpractice coverage.

The BOH, as the governing board of the WCHD, would vote on this contract. The BOH Chairperson, who is part-time, lives with the senior physician in the physicians group. The Chairperson's position is appointed by the County Commission. Further, the senior

¹ The County Prosecutor acts as statutory counsel for the Wyoming County Health Department.

physician's son is the health officer for the health department. The position of Health Officer is appointed by the BOH.

CODE SECTIONS RELIED UPON BY THE COMMISSION

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

[N]o 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 . . . *Provided, however*, That nothing herein shall be construed to prohibit . . . a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-2-5(d)(3) states, in relevant part:

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

W. Va. Code § 61-10-15(a) states, in relevant part:

It is unlawful for any member of a county commission . . . or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, [or] supervisor . . . he or she may have any voice, influence or control[.]

Finally, W. Va. Code § 61-10-15(h) states, in relevant part:

Where the provisions of subsection (a) of this section would result in the loss of quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make a written application to the West Virginia Ethics Commission

pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ANALYSIS

Both W. Va. Code § 6B-2-5(d) and W. Va. Code § 61-10-15 prohibit public officials from having an interest in public contracts over which those officials have influence or control. W. Va. Code § 6B-2-5(d)(1), however, makes an exception for part-time appointed public officials as long as they recuse themselves from voting and from the deliberative process. W. Va. Code § 61-10-15 does not contain such an exception. The BOH Chairperson, based on the information provided, is a part-time official appointed by the County Commission.² Therefore, she can comply with the Ethics Act by recusing herself from voting and from the deliberative process.

With regard to the senior physician's son, he has no voice, influence or control over this contract in his position as Health Officer. Therefore, neither W.Va. Code § 6B-2-5(d)(1) or § 61-10-15(a) would prohibit the contract at issue.

However, the analysis is not concluded with these determinations. It also must be determined whether the BOH, as a county board, is subject to the strictures of W. Va. Code § 61-10-15. The Commission considered a similar situation in Advisory Opinion 2012-12. There the Commission found that "County Board of Health members and their Health Officers are subject to the stricter limitations in W. Va. Code § 61-10-15," including the prohibition against direct and indirect pecuniary interest in contracts.

The next issue, then, is whether the BOH Chairperson's relationship with the senior physician constitutes "pecuniary interest" for purposes of W. Va. Code § 61-10-15. The Ethics Commission addressed this interest in Advisory Opinion 2012-11, where it explained that "there is a rebuttable presumption that where two adults share a home or otherwise live together, regardless of whether it is a romantic or platonic relationship, they have at least an indirect financial interest in the employment contract of the other." Accordingly, W. Va. Code § 61-10-15 prohibits the contract because the BOH Chairperson lives with the head of the physicians group in question.

W. Va. Code § 61-10-15(h), however, permits the Ethics Commission to exempt agencies from this prohibition in part for "excessive cost, undue hardship, or other substantial interference with the operation of a governmental agency." The WCHD has been presented with two legally or financially untenable options from its current medical service provider. It also has not been able to come to an agreement with providers in other counties because of financial restraints.


Based on the information provided, there are no other viable options available to the WCHD other than the local physician group. The Requester states that it will not be able to offer these medical services without the contract exemption. Further, without the

² See, e.g., School Board Advisory Opinion 2010-01, where the Commission ruled that Board of Health members are public officials under W.Va. Code § 18-5-1a(a).

exemption being granted herein, the WCHD is in danger of not being able to carry out the BOH's statutory duties. The Ethics Commission agrees with the Requester that these services are essential for the welfare of the citizens of Wyoming County. Therefore, the Ethics Commission finds that the WCHD will suffer undue hardship and substantial interference with its operations if it is not allowed to contract with the local physicians group.

Accordingly, the Ethics Commission hereby grants the WCHD an exemption to enter into a contract with the physicians group described herein for one contract period not to exceed two years. However, the BOH Chairperson must recuse herself from deliberation and voting on matters related to that physicians group. 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. W. Va. Code § 6B-2-5(j)(3).

This decision 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 new or omitted facts may alter the analysis and render this decision invalid.


Robert J. Wolfe, Chairman
West Virginia Ethics Commission