

CONTRACT EXEMPTION 2016-03

Issued on October 6, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **City of Belington** requests a Contract Exemption to allow it to use its Mayor's wrecker service for the towing and impoundment of vehicles.

FACTS RELIED UPON BY THE COMMISSION

The City of Belington ("City") is located in Barbour County, West Virginia, and has a population of fewer than 1,900 residents. The Requester's current Mayor, Matthew Ryan, was elected to a two-year term that began on April 1, 2015, and will end on March 31, 2017. Ryan owns Ryan's Recker (sic) Service, which received \$524.50 from Requester during the period of July 1, 2015, through June 30, 2016. The City states that, with the exception of one instance, all of the services provided by Ryan were at the request of law enforcement pursuant to the towing request guidelines in the Barbour County Emergency Communications Standard Operating Procedures Manual ("guidelines"). The other instance involved Ryan towing a City vehicle that had gone over an embankment. The City seeks a Contract Exemption for Ryan's Recker Service to continue to provide towing and impoundment services.

The City has provided the Barbour County guidelines for responding to tow requests from law enforcement officers. The guidelines provide that a rotation log be used for each tow request by law enforcement, starting with the top listed tow company and taking turns down the list. Companies that either accept a tow or are unavailable to accept a tow are placed at the bottom of the list. The guidelines additionally provide that Barbour County contains North and South Divisions. Each division consists of tow companies that operate in the division, and each division maintains its own rotation log. The City states that Ryan's Recker Service and one other tow company, Shahan's Salvage, are located in the South Division, which is where the City is located.

The guidelines provide for two types of requests from a law enforcement officer: Owner Requests and Next-in-Line Requests. With either request, the dispatcher is required to make contact with the appropriate towing company. If the request is an Owner Request, the dispatcher makes contact with the tow company chosen by the vehicle owner. If the request is a Next-in-Line Request, the dispatcher determines the location of the tow and ascertains the appropriate company by consulting the relevant tow log. The dispatcher handling the tow requests is employed by the Barbour County Communications Center. Neither the City nor Mayor Ryan is involved in the decision of which tow company is contacted.

The City states that it subsequently receives a bill for the towing and impoundment of vehicles made at the request of its law enforcement officers. City council subsequently approves the bill payment. The City states that its Mayor has no involvement or oversight over these payments. In addition, in the case of criminal forfeitures, the City is reimbursed the towing and impoundment bill from the sale of the assets.

PROVISIONS RELIED UPON BY THE COMMISSION

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

- (1) 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 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.

...

- (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. Public officials shall also comply with the voting rules prescribed in subsection (j) of this section.
- (4) 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.

158 CSR 8-3 states in relevant part:

- 3.1. A limited interest is:

- a. An amount not to exceed \$1,000.00 in the gross revenues in a public contract or contracts per calendar year. The \$1,000.00 limit is applicable to gross revenues received through a public contract by a public official or employee, an immediate family member thereof or a business with which the public official or employee or immediate family member is associated.

...

- 3.2. If a public official or employee has more than a limited interest in a public contract, then such an interest is only permissible if the public agency with whom the public official or employee works or serves seeks and receives a contract exemption in accordance with W. Va. Code § 6B-2-5(d)(4)). This requirement does not apply to part-time appointed officials who, in accordance with the Ethics Act, may have an interest in a public contract if they recuse themselves from the decision-making process.

ADVISORY OPINION

W.Va. Code § 6B-2-5(d) prohibits public officials and public employees from having an interest in public contracts over which they have direct authority or control. “This prohibition prevents a City from doing business with a business owned by its Mayor or other City officials or employees who exercise control over its contracts.” Contract Exemption 2010-02. The instant request involves two separate types of occasions in which the City is billed for services provided by the Mayor’s wrecker service. The first type involves a tow request from law enforcement pursuant to the Barbour County Commission’s tow request guidelines. The second type involves the Mayor directly towing a City vehicle pursuant to the City’s direction. The opinion will address each in turn.

When a law enforcement officer requests a tow under Barbour County’s tow request guidelines, the dispatcher at the Barbour County Communications Center is contacted. The dispatcher subsequently contacts the appropriate tow company according to the tow request guidelines. Accordingly, when Ryan’s Recker Service is contacted by a dispatcher in this situation, neither the City nor the Mayor has authority or control over whether Ryan’s Recker Service is contacted. Pursuant to the guidelines, the dispatcher is mandated to either contact the tow service at the vehicle owner’s request or to contact the next available tow company according to the tow log.

The Mayor has no direct authority or control over selecting which tow company will be used in the practice being followed by the City for towing requests made by law enforcement. Since the Mayor has no such direct authority or control, the City is not required to seek a Contract Exemption to allow it to pay its Mayor for law enforcement towing requests made pursuant to the guidelines. Additionally, while the City states that its Mayor has no involvement or oversight over approving the

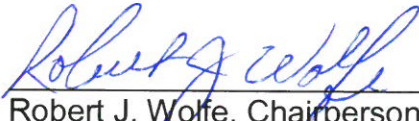
subsequent bills for such towing, the Commission nonetheless reminds the City that its Mayor is prohibited from doing so where the bill is to be paid to Ryan's Recker Service. W.Va. Code § 6B-2-5(d)(3); W.Va. Code § 6B-2-5(j).

In regard to those occasions where the City directly selects and contracts with the Mayor to perform towing services, a Contract Exemption is needed. See, i.e., Contract Exemptions 2016-01; 2012-03; 2010-02. However, the Ethics Act includes an automatic exemption from the prohibition on having an interest in a public contract where the interest in a contract or series of contracts does not exceed \$1,000 in a calendar year. W.Va. Code § 6B-2-5(d)(2); 158 CSR 8-3.1.

Because the City does not ordinarily expend more than \$1,000 each year from Ryan's Recker Service, it is not necessary for the Ethics Commission to determine whether to grant a Contract Exemption. The City has an exemption by operation of statute. If, however, the City needs to spend in excess of \$1,000 annually at Ryan's Recker Service, it must make a request to the Ethics Commission for a hardship exemption. Before seeking such an exemption, the City must seek competitive bids or quotes from all qualified towing services and offer sufficient proof of hardship that would result to the Town if the Mayor's wrecker service could not be used.

The Commission reminds the City that even when the Mayor has a limited financial interest, the Mayor may not make, participate in making, or in any way attempt to use his office or employment to influence the City's decision affecting his limited financial interest. W.Va. Code § 6B-2-5(d)(3).

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.


Robert J. Wolfe, Chairperson
WV Ethics Commission