

Contract Exemption 2019-02

Issued on May 2, 2019, by

The West Virginia Ethics Commission

Opinion Sought

The **Town of Danville** seeks an exemption to allow it to continue purchasing materials and supplies from Byrnside Hardware and Barker Hardware, which are owned by Town Council Member Fred Byrnside and Town Recorder Tony Hensley, respectively.

Facts Relied Upon By the Commission

Byrnside Hardware and Barker Hardware are the only two hardware stores located in the Town of Danville. The Town previously bought materials and supplies from Danville Lumber Company until it closed in 2018. Town Council Member Fred Byrnside owns Byrnside Hardware and Town Recorder Tony Hensley is one of several owners and officers of Barker Hardware.

On November 1, 2018, the Ethics Commission granted a Contract Exemption authorizing the Town of Danville to purchase supplies from Byrnside Hardware and Barker Hardware for a period not to exceed one year.

In Contract Exemption 2018-07, the Ethics Commission placed the following limitations on the Town's purchases from Byrnside Hardware and Barker Hardware:

First, the total combined purchases from both Byrnside Hardware and Barker Hardware may not exceed \$4,000 for a period of one year beginning on November 1, 2018, and ending on November 1, 2019.

Second, the value of any one item purchased may not exceed \$300.00.

Third, an item may only be purchased from Byrnside Hardware or Barker Hardware when no other business located in Danville has the item. Council Member Byrnside and Recorder Hensley may not attempt to influence Town employees or officials to make purchases from their respective businesses.

Fourth, Council Member Byrnside and Recorder Hensley may not be involved in any of the Town's decisions relating to their respective hardware stores. They must recuse themselves from all matters relating to the Town's decisions to make purchases from, or payments to, their respective hardware stores. For recusal to be proper, Council Member Byrnside and Recorder Hensley must first fully disclose on the record their disqualifying interest, then they must leave the room during the discussion, deliberation

and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that they left the room during all consideration, discussion and vote on the item under consideration. W. Va. Code § 6B-2-5(j)(3).

The Town of Danville has spent a total of \$3,542.28 at both Byrnside Hardware and Barker Hardware since November 1, 2018.¹ It is now seeking another Contract Exemption to be able to purchase supplies from Byrnside Hardware and Barker Hardware in excess of \$4,000 until November 1, 2019. In its request the Town states that the previous exemption amount of \$4,000 is “a very small amount when trying to run a town government.” In the Town’s request for a Contract Exemption in 2018, however, the Town stated “in recent years, it had made around \$4,000 in purchases each fiscal year (July 1- June 30) from Danville Lumber Company” before it went out of business.

The original Contract Exemption limited the purchase of any one item at either hardware store to \$300. From November 1, 2018, through present, the Town purchased one item at Byrnside Hardware that cost \$270 and one item at Barker Hardware that cost \$269.² The Town made an additional eight, single-transaction purchases over \$100 between the two stores. In total, there were 61 separate transactions at Byrnside Hardware and 90 separate transactions at Barker Hardware.

In this request, the Town of Danville cites identical reasons as those cited in its 2018 request as to why the Ethics Commission should grant another exemption but added that “the downturn of Coal Severance Taxes” has tightened its budget. The Town also represents that unexpected equipment repair costs have increased the amount the Town would normally need to spend on hardware supplies in addition to underestimating the historical amount spent at Danville Lumber Company during a fiscal year.

According to Google Maps, the travel time from the Danville Town Offices to Lowe’s Home Improvement in South Charleston, West Virginia is 29 minutes. It also appears to be a 29-minute drive from the Danville Town offices to the Lowe’s Home Improvement in Logan, West Virginia. In its 2018 request, the Town stated that traveling to South Charleston would cause a loss in employee productivity, increased liability exposure caused by employees driving farther and increased gasoline expenses.

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

¹ The Town has spent \$1,970.25 at Byrnside Hardware and \$1,572.03 at Barker Hardware.

² The \$270 purchase from Byrnside Hardware was for hedge trimmers that were \$300 before a discount. The invoice shows a suggested retail price for the hedge trimmers of \$499.95.

a contract which the official or employee may have direct authority to enter into, or over which he or she may have control

...

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.

Opinion

Prohibited Contract

The Ethics Act prohibits public officials from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code § 6B-2-5(d). For purposes of this provision, a "limited interest" is defined as an interest which does not exceed \$1,000 in the profits or benefits of the contracts in a calendar year. W. Va. Code § 6B-2-5(d)(2)(A).

The Town of Danville desires to contract with its Recorder and Council Member's respective businesses to purchase materials and supplies. As noted in Contract Exemption 2018-07, Council Member Byrnside and Recorder Hensley each has a financial interest in financial transactions with their respective businesses and both have the requisite authority or control over the Town's contracts to implicate W. Va. Code § 6B-2-5(d).

Contract Exemption

The Ethics Commission may grant an exemption from the prohibition in W. Va. Code § 6B-2-5(d)(1) if the prohibition would result in excessive cost, undue hardship or other substantial interference with the operation of a governmental body or agency.

Much of the Town's instant exemption request is identical to its 2018 request. The Town has abided by the limitations set forth in Contract Exemption 2018-07 for purchasing materials and supplies at Byrnside Hardware and Barker Hardware. It is still the Town's position that the 29-minute trip to South Charleston would create excessive cost, undue hardship and substantial interference with the operation of the Town by causing a loss of employee productivity, increased liability for traveling employees and increased gasoline expenses. In the instant request, the Town added that the original \$4,000 exemption was too small an amount to run a town government and the Town has "a very tight budget" due to a decrease in coal and severance taxes.

The Ethics Commission notes that the \$4,000 limit in Contract Exemption 2018-07 was not assigned arbitrarily by the Ethics Commission. The limit was based on assertions from the Town that in prior fiscal years it made under \$4,000 in purchases at Danville Lumber Company. The Town represents that unexpected maintenance costs have arisen since the beginning of spring. The costs include parts and maintenance to equipment necessary to maintain Town property such as mowers and weed eaters. The Town further represents that it may have underestimated the amount it historically spent at Danville Lumber Company.

As reflected in Contract Exemption 2018-07, the Ethics Commission has consistently found that requiring municipal employees to travel long distances to make purchases creates an undue hardship which warrants a Contract Exemption. See Advisory Opinion 2016-01, Advisory Opinion 2008-06 and Advisory Opinion 2007-04. The Ethics Commission, however, previously granted such an exemption to the Town of Danville for one year with a purchase limit of \$4,000. The Ethics Commission finds that this does not change the analysis of whether traveling 29 minutes to the nearest hardware store places an undue hardship on the Town. The Town will still incur a loss in employee productivity, increased liability exposure caused by employees driving farther and increased gasoline expenses creating undue hardship and substantial interference with governmental operations.

Given the foregoing, the Ethics Commission holds that the Town of Danville may continue to contract with Byrnside Hardware and Barker Hardware for purchases

once it exceeds the original \$4,000 limitation given to the Town in Contract Exemption 2018-07 with the following limitations:

First, the total combined purchases from both Byrnside Hardware and Barker Hardware may not exceed \$2,000 for a period beginning on the day the Town expends the original \$4,000 granted to it in Contract Exemption 2018-07 and ending on November 1, 2019. The Ethics Commission notes that the additional amount granted is based on the Town's assertions of unexpected expenses for this year and may not be relied upon for future Contract Exemption requests, if any.


Second, the value of any one item purchased may not exceed \$300.00.

Third, an item may only be purchased from Byrnside Hardware or Barker Hardware when no other business located in Danville has the item. Council Member Byrnside and Recorder Hensley may not attempt to influence Town employees or officials to make purchases from their respective businesses.

Fourth, Council Member Byrnside and Recorder Hensley may not be involved in any of the Town's decisions relating to their respective hardware stores. They must recuse themselves from all matters relating to the Town's decisions to make purchases from, or payments to, their respective hardware stores. For recusal to be proper, Council Member Byrnside and Recorder Hensley must first fully disclose on the record their disqualifying interest, then they must leave the room during the discussion, deliberation and vote on the matter. In addition, the minutes or record of the meeting must reflect the basis for the recusal and that they left the room during all consideration, discussion and vote on the item under consideration. W. Va. Code § 6B-2-5(j)(3).

This Contract Exemption is effective until November 1, 2019. After November 1, 2019, if the Town continues to purchase materials or supplies from either Byrnside Hardware or Barker Hardware and the purchases to either exceed the \$1,000 limited financial interest, the Town must receive a new Contract Exemption in order to continue purchasing materials or supplies from either Byrnside Hardware or Barker Hardware.

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 or entities.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission