

CONTRACT EXEMPTION NO. 2008-08
Issued On June 5, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Town of Rhodell** asks for an exemption to allow the Town to continue employing its Mayor to operate the Town's Water System.

FACTS RELIED UPON BY THE COMMISSION

The Town of Rhodell is located in Raleigh County, West Virginia. According to the 2000 census, the Town has a population of 234.

The Town operates its own Class I water system. A Class I water treatment and distribution system must be operated by a person holding a Class I certification, or higher, from the West Virginia Department of Health and Human Resources, Office of Environmental Health. In order to obtain a Class I Certification, a person must have at least 2,000 hours of supervised experience in operating a water system. This certification must be renewed every 2 years and requires 12 hours of continuing education requirements during the 2 year period.

Sherri Blankenship is the Mayor of Rhodell. She came to hold this position through a series of resignations amongst the Town's elected officials. In 2006, the Town's Recorder, Patricia Fortner, resigned. The Town Council appointed Sherri Blankenship as Recorder. Then, three months later, the Town's Mayor resigned. At that time, by operation of statute, Sherri Blankenship assumed the duties of Mayor.¹ Eventually, Patricia Fortner was re-appointed as Recorder.²

The next Town election is in June of 2009. Sherri Blankenship's term as Mayor will end on June 30, 2009. The Town has a strong-mayor form of government.

Sherri Blankenship is also employed by the Town as the Water Plant Operator. She has worked for the Water Department since 1996 except for a brief period in 2003 and 2004 when then Mayor Alvin Reed terminated her employment. The Town Council then voted to rehire her as the Water Plant Operator at its March 24, 2004 meeting.

Sherri Blankenship has a Class III water system operator certification. This level of certification exceeds that required for the operation of a Class I water system.

¹ Sherri Blankenship was previously elected Mayor in 2001. However, she did not complete her four year term and resigned in 2003.

² Patricia Fortner and Sherri Blankenship are sisters.

Sherri Blankenship receives \$250.00 per month as Mayor. She is paid \$400.00 per month for her responsibilities as the Water Plant Operator. As the Water Plant Operator, she has no set hours.

She is responsible for testing the water on a daily basis. According to the Town, it would create an undue hardship and result in excessive cost if Mayor Blankenship is prohibited from also being employed by the Town to operate its water system. There is a shortage of water plant operators in the area. For example, the closest certified water operator lives approximately 30 miles away from Rhodell. To check on the water system would require this person to drive 60 miles a day. Due to the price of gasoline and the amount of time it would take to make a roundtrip to the Town on a daily basis, the Town has indicated that this person is not interested in the position. Additionally, the Town does not know of any other persons in that area who are both qualified and willing to take the job.

The WV Office of Environmental Health Services is responsible for ensuring that local water systems comply with the numerous regulations regarding the monitoring and treatment of water. To accomplish this task, the Office of Environmental Health Services has various district offices located throughout the State. The Beckley District Office is responsible for regulating the Town of Rhodell's water system and other water systems located in southern West Virginia. The Supervising Engineer for this office has verified that there are a limited number of certified water operators in southern West Virginia. He has stated that oftentimes small towns struggle to find certified water operators to hire.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads:

Use of public office for private gain. -- (1) 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. 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.

W.Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or business with which he or she is associated may be a party to or have an interest in ... a contract which such 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....

W. Va. Code § 6B-2-5(d)(3) provides that where the provision of subdivision (1) of this subsection would result ... in excessive cost, undue hardship, or other substantial

interference with the operation of a ... municipality... the affected government body ... may make written application to the ethics commission for an exemption from subdivision (1) ... of this subsection.

ADVISORY OPINION

The West Virginia Ethics Act prohibits public servants from having an interest in a public contract over which they exercise control. Standing alone, this provision does not prohibit a municipality from hiring its Mayor. However, this provision must be read in conjunction with other restrictions in the Ethics Act, including the prohibition against use of office for private gain. W.Va. Code § 6B-2-5(b).

The Ethics Commission previously ruled in A.O. 2006-05 that a Mayor in a strong Mayor form of government could not also be employed by the Town. The Commission reasoned that the spirit and intent of the prohibition against use of office for private gain would be violated if an elected Mayor is employed by his or her governing body on a permanent basis when the Mayor has the power to hire, fire and supervise employees. However, the Commission also recognized that “[T]here may be times, particularly in small towns, where due to an unexpected vacancy created by the death or resignation of an employee that a Mayor may have to temporarily take on additional job responsibilities.” In this case, the Commission must decide if the situation presented falls within the narrow category of instances when an elected Mayor in a strong-mayor form of government may also be employed by the Town where he or she serves as Mayor.

The Town of Rhodell is located in a rural area of West Virginia. The Town is legally required to have a certified Water Plant Operator. Due to its location, and due to the shortage of water plant operators in this part of the State, in the opinion of the Commission, it is not practical to require the Town to hire someone else to operate the water system. The Commission further finds that to require the Town to terminate Sherri Blankenship’s employment and hire someone else to operate the Water Plant would result in excessive cost and undue hardship.

In light of the unique circumstances presented, the Ethics Commission finds that it is within its powers to grant an exemption to the limitations imposed by W.Va. Code § 6B-2-5(d) and § 6B-2-5(b). As such, the Ethics Commission hereby grants the Town of Rhodell an exemption in order that it may continue to employ its Mayor, at a rate not to exceed \$400.00 per month, as the Water Plant Operator. The exemption is effective until July 1, 2009. As of July 1, 2009, if Sherri Blankenship is elected to another term of office as Mayor, she may no longer be employed by the Town of Rhodell.

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

s/s
R. Kemp Morton, Chair