

**CONTRACT EXEMPTION NO. 2011-04**

**Issued On November 3, 2011 By The**

**WEST VIRGINIA ETHICS COMMISSION**

**OPINION SOUGHT**

The **Town of Ridgeley** seeks an exemption to allow the Mayor's wife to be compensated for performing services for the Town, on a temporary basis.

**FACTS RELIED UPON BY THE COMMISSION**

The Town of Ridgeley employs one clerk whose husband has been diagnosed with a serious condition that requires her to miss work from time to time. The mayor's wife had worked in the Clerk's office under a previous mayor, so the mayor asked her if she would be interested in helping out for a brief time. When she agreed, he informally polled Council, a majority of whom agreed. When it became apparent that the clerk would continue to need to leave work from time to time, the mayor contacted the Ethics Commission regarding his wife's continued employment.

Thereafter, the Town voted to ask the Ethics Commissions for a temporary waiver during this time until it is determined that the mayor wife's services are no longer needed. The request letter further indicates that Council will review her status on January 1, 2012.

According to the Requester, the mayor's wife has earned around \$1,400 since July. Her hourly rate of pay is \$7.50. She has no interest in permanent employment with the Town.

**CODE PROVISIONS RELIED UPON BY THE COMMISSION**

W. Va. Code § 6B-2-5(b) prohibits the knowing and intentional use of office for private gain.

W. Va. Code § 6B-2-5(d)(1) provides in part that no 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.

W. Va. Code § 6B-2-5(d)(3) generally provides that if the prohibition of subdivision (1) results in excessive cost, undue hardship, or other substantial interference with the operation of government, the affected government body may make written application to the ethics commission for an exemption.

## Advisory Opinion

The Ethics Act prohibits public servants from being a party to or having a financial interest in a contract over which they exercise control. W. Va. Code § 6B-2-5(d). Standing alone, this provision does not prohibit a municipality from hiring its mayor's spouse. 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). These prohibitions were designed by the Legislature to steer public servants away from inherently questionable situations, and were intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

The statute provides an exception, however, for the employment of persons by a government body. The Town of Ridgeley is a strong mayor form of government. Pursuant to W. Va. Code § 8-3-2, Council is the governing body and the mayor is the administrative authority; the mayor and council share responsibilities for the hiring, firing, and compensation of all Town employees. Further, in a strong mayor form of government, the mayor supervises all Town employees. See, e.g. Advisory Opinion 2007-07 (mayor prohibited from appointing son as City Attorney).

The Ethics Commission ruled in Advisory Opinion 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. The Commission recognized, however, that "there 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."

Indeed, in Contract Exemption 2008-08, the Commission granted an exemption to the Town of Rhodell to continue to employ its mayor as its Water Plant Operator. Due to its location and the shortage of water plant operators in that part of the State, the Commission found that it was not practical to require the Town to hire someone else to operate the water system. The Commission specifically found that to require the Town to terminate the mayor's employment and hire someone else to operate the Water Plant would result in excessive cost and undue hardship.

Here, the Town seeks an exemption to allow the mayor's **wife** to work for and be compensated by the Town for as long as her services are needed, up to January 2012. Since the mayor and his wife share a household, he has a direct financial interest in her employment with the Town. Thus, the advisory opinions and contract exemptions cited herein that address a mayor's employment are instructive as to the question presented, and the Town was right to seek an exemption from the Commission. Indeed, municipal officials who intend to hire their relatives should contact the Commission unless it is truly an unexpected vacancy that must be filled immediately to ensure the continued operation of the government.

Many years ago, the Commission was asked if it violates the Ethics Act for a City to employ the mayor's spouse without giving public notice of the position. The Commission noted that it would not be a presumptive violation of the Ethics Act to employ a mayor's spouse, but concluded that "in this instance, there is no previously existing public employment position available and it appears from the facts presented that the position is being created specifically for the public official's spouse." Advisory Opinion 1992-20.

The Commission may grant a contract exemption if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a government body. The burden is on the government body to demonstrate sufficient evidence and facts to support an exemption. The Requester wants to ensure that someone is working when the clerk is out; the goal is to keep Town Hall—and therefore town government—open. Otherwise, the vacancy in the Clerk's office substantially interferes with the Town's operations.

In the letter to the Commission, the Requester stated:

Not everyone is willing to stop what they are doing or are willing to come and work for \$7.50 an hour with no benefits. Especially when they would not know that at anytime it can come to an end with no prior notice other than thank you for sitting in but we will not need your services anymore.

The Commission recognizes that when an unexpected vacancy occurs, particularly in small towns, public officials must take prompt action to ensure that someone performs those job responsibilities. Further, the Commission is mindful that when a government employee needs to leave work to care for a sick relative, it adversely affects the operation of government, especially a small town, as is the case here. Thus, the Commission finds that it would substantially interfere with the operation of the Town of Ridgeley's government if the mayor's wife were not permitted to continue to fill in on an as-needed, temporary basis as described.

As a result of the foregoing, the Commission hereby grants the requested temporary exemption. If, when the Town reviews the status of the mayor's wife on January 1, 2012, it determines that it still needs her services, a Town official other than the mayor shall contact the Ethics Commission for further advice and direction.

The Commission notes that exemptions may only 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 precedent by other persons. This exemption is effective from the date of issuance.

  
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R. Kemp Morton, Chairperson