

CONTRACT EXEMPTIONS NOs. 2008-04 & 2008-05

Issued On June 5, 2008 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

The **Belington City Council** asks for exemptions to permit it to obtain goods and services from two local auto repair businesses owned by members of Belington City Council. The first is Auto Dynamics, owned by Belington City Council Member Craig Bolton III; the other is Ryan's Repair Service, owned by Belington City Council Member Mark Ryan.

FACTS RELIED UPON BY THE COMMISSION

Craig Bolton III was elected to serve on Belington's City Council on April 1, 2005. The election for the seat he holds occurs on March 10, 2009. Mark Ryan was elected to serve on Belington's City Council on April 1, 2007. The election for the seat he holds occurs on March 8, 2011.

According to the Requester, there are four auto repair businesses in the City of Belington. The others are Town and Country CPD¹, and J and S Repair². The City contracts with all four businesses. It also uses the services of an out of town business for needed work on large trucks. The Mayor and Street Supervisor schedule vehicle maintenance and repair work on a rotational basis among the four local businesses. In the event that the scheduled business cannot perform the needed work for any reason, the City contracts with the next business which can perform the needed work in a timely manner. In Fiscal Year 2007, the City spent \$8195.53 for auto repair services.³ In Fiscal Year 2007, Belington's annual budget was \$395,686.

For the past twenty years, the City of Belington has transacted business with Auto Dynamics. Since Mr. Bolton was elected to Council, the amount of business between the City and Auto Dynamics has been consistent with transactions over the past twenty years. In Fiscal Year 2007 the City paid Auto Dynamics \$898.71 for services rendered. According to the Requester, Auto Dynamics provides the most emergency work and most body work as it is the only auto repair business that provides welding services.

¹ Council Member Bolton's father owns Town & Country CPD. Since his father is not dependent upon him, the prohibition against contracting with a member of an official's immediate family does not apply. See W. Va. Code § 6B-1-3(f). Further, Council Member Bolton has no financial interest in his father's business, and *vice versa*.

² J and S Repair opened for business in February 2008 and is mostly used for repairing vehicles from the owner's used car lot.

³ \$1,940.55 went to the out of town business for truck repair mentioned earlier.

For over fifty years, the City of Belington has transacted business with Ryan's Repair Service. Since Mr. Ryan was elected to Council, the amount of business between the City and Ryan's Repair Service has been consistent with transactions over the past twenty years or more. In Fiscal Year 2007, the City paid Ryan's Repair Service \$2,582.62 for services rendered. According to the Requester, Ryan's is the only local auto repair business that is open Saturdays and evenings. This is especially convenient for the police department. The police department operates five of the City's ten vehicles, most of which are over five years old.

According to the Requester, given the limited number of employees and equipment, it would interfere with the City's ability to provide services if it were limited to using only two auto repair businesses and repairs could not be timely made.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

W.Va. Code § 6B-2-5(d)(2)(A) provides in part that ... an elected ... official ... or business with which he or she is associated shall not be considered as having a financial interest in a public contract when [that] interest does not exceed one thousand dollars ... in a calendar year.

W. Va. Code § 6B-2-5(d)(3) provides that 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 [or her] 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) provides that where the provisions of subdivisions (1) and (2) 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 subdivisions (1) and (2) of this subsection.

W. Va. Code § 6B-2-5(j)(1)(A) reads: Public officials... may not vote on a matter...in which they ... have a financial interest.

W. Va. Code § 6B-2-5(j)(3) reads: 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.

ADVISORY OPINION

The Ethics Act prohibits public servants from being a party to or having a financial interest in a public contract which they have the power to award or control. This prohibition prevents a City from doing business with a business in which one of its Council members has an ownership interest, as here. This prohibition, like the others in the Act, is designed by the Legislature to keep public servants out of harm's way. The prohibition is intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety. It aims to steer public servants away from inherently questionable situations.

The Ethics Act also provides, however, that the Ethics Commission may grant an agency an exemption from this prohibition if the agency demonstrates that its enforcement will cause the agency excessive cost, undue hardship or substantial interference with its operation. If the City is to obtain an exemption, it must demonstrate that compliance with the prohibition is certain to produce substantial harm. It must show that real and significant hardship will result, hardship which outweighs the important role the prohibition plays in preserving propriety and the appearance of propriety in public contracts.

During the 2008 regular legislative session, the Ethics Act was amended to establish 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. Because the City of Belington does **not** ordinarily purchase more than \$1,000 each year from Auto Dynamics, it is not necessary to determine whether the Commission should grant an exemption. The City of Belington has an exemption by operation of statute. If, however, the City finds that it needs to spend in excess of \$1,000 annually at Auto Dynamics, it must make a formal request of the Commission for a hardship exemption. Before seeking an exemption, the City should seek competitive bids for all auto repair services expected to cost over \$1,000.

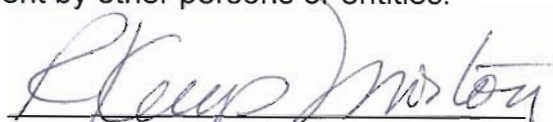
Since Ryan's Repairs received more than \$1,000 for services rendered, the Commission must determine whether to grant an exemption for future contracts with Ryan's Repairs. The Commission has granted various contract exemptions in the past, recognizing that small towns have a limited number of employees and financial resources. There are only four auto repair businesses in the City. Without the requested exemption, it has access to only three, none of which appear to offer the range of services that Ryan's Repairs provides. Further, no other local auto repair business is open on Saturdays and evenings.

Here, the City of Belington has demonstrated the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption for it to contract with Ryan's Repair Service. Specifically, the Commission finds that requiring the City to rely on other local repair businesses that do not offer expanded hours of operation constitutes undue hardship, excessive cost and/or substantial interference with the City's operation. Moreover, the City has demonstrated that it equally relies on all four businesses to keep its vehicle fleet operational. To limit its ability to use any one of the four businesses would severely hamper its ability to keep its vehicles, including emergency vehicles, in working order.

Based upon the foregoing, the Ethics Commission grants the City of Belington an exemption from the prohibition of W.Va. Code § 6B-2-5(d) to allow it to obtain goods and services from Ryan's Repair Service. This exemption is effective until March 8, 2011. As of March 8, 2011, if the City wants to continue to contract with Ryan's Repairs, and if Mark Ryan is still an elected official in the City, then the City should seek another contract exemption. Before seeking an exemption, the City should seek competitive bids for all auto repair services expected to cost over \$1,000.

Pursuant to W. Va. Code § 6B-2-5(j), Council Member Ryan must fully disclose his involvement in any sale or service between the City of Belington and Ryan's Repair Service. Further, he must excuse himself from any evaluation, discussion or vote to approve any such sale or service.

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 these particular cases, and may not be relied upon as a precedent by other persons or entities.


R. Kemp Morton, Chair