

CONTRACT EXEMPTION NO. 2007-03

Issued on November 1, 2007 By the

WEST VIRGINIA ETHICS COMMISSION

CONTRACT EXEMPTION SOUGHT

The **Hancock County Commission** seeks an exemption to relocate an emergency communications antenna onto property owned by a County Commissioner.

FACTS RELIED UPON BY THE COMMISSION

The Hancock County Commission is in the process of replacing its radio communications system which is more than twenty years old. This equipment provides communication among all emergency responders in the county, including the sheriff, police officers in three municipalities, and a municipal fire department, as well as volunteer fire departments and ambulance services.

The Commission has employed a vendor, Luttamus Communications, to upgrade and replace this communications infrastructure. The vendor has conducted propagation studies to ascertain the extent of radio coverage throughout the county. The vendor has concluded that radio coverage could be significantly improved by relocating an existing radio tower from a location known as Flatts Cemetery to a nearby higher elevation. According to the vendor, the prime location for the relocated antenna is on property jointly owned by Jeff Davis, who currently serves as a Hancock County Commissioner, and his brother. Commissioner Davis and his brother are willing to lease their property to the County for \$500 per month with a 4% increase per year for maintenance on a 99 year lease. The County Commission has not entertained the possibility of purchasing the parcel at fair market value, or of condemning it and taking it by eminent domain.

According to the County's Office of Technology and Communication, if the County were to purchase and install a 150 foot tower on the site of the existing 90 foot tower, it would also significantly improve radio coverage throughout the county. The County would pay a one time cost of approximately \$35,000 for a higher tower at the Flatts Cemetery. Relocating the tower to Commissioner Davis' property would be a minimal improvement over the increased coverage resulting from raising the tower at the existing location.

The other members of the Hancock County Commission are seeking a hardship exemption which would permit the Commission, without participation in the decision by Commissioner Davis, to obtain the necessary property rights to relocate the communications tower onto Commissioner Davis' property.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part:

. . . no elected or appointed official or 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 . . . 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.

* * *

(3) 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.

W. Va. Code § 61-10-15(a) states in part:

It shall be unlawful for . . . any member of any . . . county or district board . . . to be or become pecuniarily interested, **directly or indirectly**, in the proceeds of any contract . . . [over] which as such . . . member . . . he may have any voice, influence or control.

W. Va. Code § 61-10-15 (h) further provides:

Where the provisions of subsection (a) of this section 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 governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-B of the Code, for an exemption from subsection (a) of this section.

ADVISORY OPINION

Pursuant to W. Va. Code § 6B-2-5(d)(1) an elected public official may not have more than a limited interest in the profits or benefits of a public contract over which he has direct authority or control unless his or her governing body seeks, and receives, an exemption to contract with the public official. Commissioner Davis' position as a current County Commissioner gives him direct authority over this contract to lease property for installation of a radio antenna.

W. Va. Code § 61-10-15, a similar but separate criminal statute, contains a stricter standard than the Ethics Act, and imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds from a public contract over which those officials may exercise "voice, influence or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office. As a current County Commissioner, Commissioner Davis has control over the contract in question.

These prohibitions prevent a County from doing business with a member of its Commission and were designed by the Legislature to steer public servants away from inherently questionable situations. These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Effective June 10, 2007, the Legislature amended WV Code § 61-10-15 to allow the Ethics Commission to grant exemptions from the prohibitions in this code section if the prohibition results in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency. The Ethics Commission decides whether to grant or deny exemptions under the Ethics Act and W. Va. Code § 61-10-15 on a case-by-case basis.

In the present matter, the Ethics Commission finds that the County has failed to demonstrate the degree of excessive cost, undue hardship, or other substantial interference required to justify an exemption. Specifically, the Commission finds that incurring the cost of \$35,000 to install a higher tower at Flatts Cemetery does not constitute undue hardship, excessive cost or substantial interference with the County's operation. Indeed, the cost to the County over the life of the 99 year lease will far exceed the initial outlay. The Ethics Commission would rather err on the side of caution and avoid any appearance of impropriety in the proposed contract between the County and Commissioner Davis. Thus, the Commission hereby denies an exemption from the provisions of W. Va. Code § 6B-2-5 (d) or W. Va. § 61-10-15.

Therefore, it would violate W. Va. Code § 6B-2-5(d)(1) and W. Va. § 61-10-15 for the Hancock County Commission to relocate the communications antenna to the property owned by Commissioner Davis.

Inasmuch as exemptions are only granted on a case-by-case basis, this decision is limited to the facts and circumstances of this particular case, and may not be relied upon as a precedent by other persons.


R. Kemp Morton, Chair