

ADVISORY OPINION NO. 92-10

ISSUED BY

THE WEST VIRGINIA ETHICS COMMISSION

ON MAY 7, 1992

GOVERNMENTAL BODY SEEKING OPINION

An Assistant Prosecuting Attorney

OPINION SOUGHT

Is it a violation of the Ethics Act for a County Prosecuting Attorney's spouse to be employed as a County Assistant Prosecuting Attorney?

FACTS RELIED UPON BY THE COMMISSION

The requestor is presently the Assistant Prosecuting Attorney for a County and is unopposed in the upcoming election for the office of Prosecuting Attorney. Since the requestor is running unopposed, he anticipates that he will take office in January of 1993.

The requestor's spouse is also an attorney and will become his law partner in January of 1993. He would like to consider hiring his spouse as an Assistant Prosecuting Attorney.

Pursuant to WV Code §7-7-7, the County Prosecuting Attorney may select and appoint assistants and employees to assist him in the discharge of his official duties. All such appointments, however, are subject to the advice and consent of the County Commission.

Although the County Commission is responsible for approving the overall budget of the Prosecuting Attorney's office, the Prosecuting Attorney has the authority to set the compensation for each **individual** employee.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states in pertinent part that...a public official...may not knowingly and intentionally use his...office or the prestige of his...office for his...own private gain or that of another person...

West Virginia Code Section 6B-2-5(d)(1) states in pertinent part that...no elected...or a member of his...immediate family...may be a party to or have an interest in the profits or benefits of 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...

West Virginia Code Section 61-10-15 states in pertinent part that...It shall be unlawful for any county officer...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract...which as such member he may have any voice, influence or control.

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Private Gain

Pursuant to WV Code §6B-2-5(b)(1), a public official may not use his office or its resulting prestige for his own private gain or for the private gain of another. Nepotism would fall within the purview of this section and could be a violation of the Ethics Act. A Legislative Rule on private gain and nepotism was recently approved by the Legislature.

Pursuant to the Legislative Rule on Private Gain, "Nepotism" is defined as favoritism shown or patronage granted by a public official to relatives in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. The rule includes spouse in the definition of "relatives".

The Legislative Rule on nepotism contains the following guidelines which, if followed, would allow the requestor to avoid the appearance of nepotism:

- A. The public should be given reasonable advance notice of the availability of the job.
 1. Notice should include a description of the job responsibilities, the qualifications required, the pay and the manner in which application for the job can be made.
 2. The method of giving notice will of course vary from job to job but there must be reasonable public awareness of the availability of the job.
 3. The notice must be made soon enough to give those members of the public who are interested in the job an opportunity to make application.

B. An objective, independent third party should be involved in the selection when a family member is among those who have made application for the job.

1. To the extent possible, the public official or public employee should stay out of the selection process altogether. If he or she is one of several people with the authority to hire, others with authority should make the selection. If appropriate, the matter should be handled by his or her supervisor, or in the case of an elected public official by a qualified person in another office.

2. A public official or public employee should at least have some independent person take part in the selection. He or she should avoid using a subordinate for the independent person.

3. If a public official or public employee must share in the decision, he or she should exercise his or her best objective judgment in making the selection, and be prepared to justify his or her selection.

It would not be a presumptive violation of the WV Code 6B-2-5(b)(1) for the County Prosecuting Attorney to employ his spouse as an Assistant Prosecuting Attorney provided he follows the guidelines established above.

West Virginia Code § 7-7-7 provides that the County Prosecuting Attorney, **by and with the advice and consent of the County Commission**, may appoint and employ assistants. It therefore appears that an independent party will be involved in the decision.

The Legislative Rule also provides that a public official may not use his position for the private gain of another by improperly giving bonuses, raises or other employment benefits to such person. West Virginia Code §7-7-7 requires that County Prosecuting Attorneys, in fixing the individual compensation of their assistants, give due consideration to the duties, responsibilities and work required of the assistants and set compensation that is reasonable and proper. The requestor should be aware of the need to appear fair and even-handed when setting compensation and any other benefits if his spouse is hired as an Assistant Prosecutor.

Public Contracts

Pursuant to WV Code §6B-2-5(d)(1) a 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.

Although, employment contracts are subject to the advice and consent of the County Commission, the Prosecuting Attorney is responsible for the selection and hiring of the employees, the instigation of the contract and for setting the individual compensation for his assistants. Therefore, he would have control over the ultimate decision to hire his spouse.

However, WV Code §6B-2-5(d)(1) specifically provides that nothing contained therein shall be construed to prevent or make unlawful the employment of any person with any governmental body. Therefore, it would not be a violation of WV Code 6B-2-5(d)(1) for the County Prosecuting Attorney's spouse to be employed as a County Assistant Prosecuting Attorney.

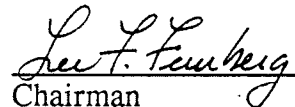
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West Virginia Code §61-10-15 imposes criminal penalties against any County official who is pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which the official may exercise voice, influence or control. Any person who violates this provision is guilty of a misdemeanor and is subject to removal from office.

Since a Prosecuting Attorney would clearly have voice, influence and control over the employment contract of an Assistant Prosecuting Attorney, the requestor would be subject to the sanctions of WV Code §61-10-15 if his spouse is hired for that position.

Further, the West Virginia Supreme Court of Appeals, in Fisher v. Jackson, 107 W.Va. 138, 147 S.E. 541 (1929) held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15.

Therefore, if a Prosecuting Attorney's spouse is employed as a County Assistant Prosecuting Attorney such a situation would give rise to a potential violation of WV Code §61-10-15.


Chairman