

ADVISORY OPINION NO. 94-04
ISSUED BY THE
WEST VIRGINIA ETHICS COMMISSION

ON MARCH 3, 1994

GOVERNMENTAL BODY SEEKING OPINION

A County Board of Education Employee

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for the requestor to be employed by the County Board of Education while his spouse is a member of that Board?

FACTS RELIED UPON BY THE COMMISSION

The requestor is the band director at a high school and serves as the instrumental music coordinator for the County School system. The position of instrumental music coordinator is a part-time non-administrative position with an extended contract term of 261 days per year. Some of the duties of the music coordinator include, working with other music teachers in the county to establish a coordinated, equitable instrumental music program and developing a music curriculum for all levels of instruction. He also monitors the instrumental music program to assure the instructional outcomes are addressed and serves on the interview committee when employing instrumental music personnel. He does not evaluate the other music instructors. The requestor receives an additional \$600 per year to serve as instrumental music coordinator.

The requestor's spouse is seeking election to the county board of education.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...the state government...and local governments have many part-time public officials...serving in elected...capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official...from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official...such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code §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 §6B-2-5(d)(1) states in pertinent part that...no elected...public official or public 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 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 §61-10-15 states in pertinent part that...It shall be unlawful for any member of any county board...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

ADVISORY OPINION

In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which would prohibit the requestor from being employed by the County Board of Education when his spouse is a member of that Board.

If the requestor's spouse is successful in her bid for a seat on the County Board of Education, she will be subject to the provisions established in the Ethics Act. However, her service on the Board simultaneous with the requestor's employment by the Board would not, per se, constitute a violation of the Ethics Act.

Public Contracts

Pursuant to WV Code §6B-2-5(d)(1) no public official or a member of his or her immediate family may have more than a limited interest in the profits or benefits of a public contract over which the public official has direct authority or control. The requestor's spouse, if elected, would have direct authority and control over all contracts, including employment contracts, entered into by the County Board of Education.

However, WV Code §6B-2-5(d)(1) specifically provides that nothing contained within that subsection 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 requestor to be employed by the County Board of Education while his spouse is a member of that Board.

Voting

The requestor's spouse, if elected, should be aware that WV Code §6B-1-2(c) states that a public official should not vote on a matter which becomes personal to him. The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence his vote, or would give the

appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must disclose his interest and physically remove himself from the room during the discussion and decision making process.

In Advisory Opinion #91-41 the Commission determined that the voting prohibition contained in WV Code §6B-1-2(c) does not apply to actions which involve the creation of laws, rules, regulations or policies which affect the public official's or family members' financial interests **as a member of a class**. There is no conflict of interest if the public official or family member is not pecuniarily affected to a greater extent than any other member of the profession, occupation, group or class.

Therefore, the Commission finds that if the requestor's spouse is elected to the county board of education, she should not vote on any matter that may specifically and uniquely affect her spouse to a greater extent than other comparable school board employees.

Private Gain

Pursuant to WV Code §6B-2-5(b)(1), public officials may not use their office or its resulting prestige for personal private gain or for the private gain of another. Therefore, if elected to the school board, the spouse may not use that position's status or influence to obtain, increase or promote the interests of her spouse as an employee of the board.

West Virginia Code §61-10-15

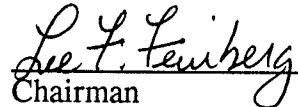
West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. Although this prohibition would include employment contracts, the statute specifically provides that nothing contained within it shall be construed to prevent the employment of the spouse of any such member as a principal, teacher, auxiliary or service employee in the public schools of any county.

The Commission notes that the protection of this proviso is not afforded to various other employment positions such as central office administrator. Central Office Administrator is defined in WV Code §18A-1-1(4) as "The superintendent, associate superintendent, assistant superintendent, and other professional educators, whether by these or other appropriate titles, who are charged with the administering **and** supervising of the whole or some assigned part of the total program of the county-wide school system." (emphasis added)

In this instance, however, the requestor's official job description explicitly states that the position of instrumental music coordinator is **non-administrative**. Therefore, it would not be a violation of WV Code §61-10-15 for the requestor to be employed by the County Board of Education as an instrumental music coordinator while his spouse is a member of that Board. This opinion is based upon the current job description for instrumental music coordinator supplied by the

requestor and drafted by the Assistant Superintendent and Personnel Director of the Board of Education. If the job description changes to reflect new administrative responsibilities, the requestor may be prohibited from serving in that position if his spouse is a member of the Board.

Pursuant to WV Code §6B-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of section fifteen, article ten, chapter sixty-one of the code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.


Chairman