

ADVISORY OPINION NO. 2007-03

Issued On May 3, 2007 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks whether his fiancée, who presently works in the Assessor's office, will be permitted to continue her employment after their approaching marriage.

FACTS RELIED UPON BY THE COMMISSION

Later this year, the Assessor plans to marry a woman who works full time in the Assessor's Office. She was hired under the hiring procedures of the Property Valuation Training and Procedures Commission. According to the requester, the county commission employs his fiancée; she would receive salary increases and/or benefits only if the county commission granted them to all county employees.

The Assessor has indicated his willingness "to institute any safeguard or reporting mechanisms to ensure that conflicts of interest do not arise and that the Ethics Commission is fully informed of my compliance".

CODE PROVISIONS RELIED UPON BY COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected ... official ... or member of his or her immediate family ... 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 § 61-10-15 states in pertinent part that . . . it shall be unlawful for any . . . county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract . . . [over] which as such member [she or] he may have any voice, influence or control: *Provided*, however, That nothing herein shall be construed to prevent or make unlawful the employment of the spouse of any such member, officer, secretary, supervisor, superintendent, principal or teacher as principal or teacher, auxiliary or service employee in the public schools of any county, nor to prevent or make unlawful the employment by any joint county and circuit clerk of his or her spouse....

W. Va. Code § 11-1C-8(a) provides:

In order to finance the extra costs associated with the valuation and training mandated by this article, there is hereby created a revolving valuation fund in each county which shall be used exclusively to fund the assessor's office. No persons whose salary is payable from the valuation fund shall be hired under this section without the approval of the valuation commission, the hirings shall be without regard to political favor or affiliation, and the persons hired under this section are subject to the provisions of the ethics act in chapter six-b of this code, including, but not limited to, the conflict of interest provisions under chapter six-b of this code. Notwithstanding any other provisions of this code to the contrary, assessors may employ citizens of any West Virginia county for the purpose of performing, assessing and appraising duties under this chapter upon approval of the employment by the valuation commission.

W. Va. Code §11-2-2 reads: The assessor in every county shall select [her or] his deputies, assistants and other employees in the same manner as is provided for the selection of deputies, assistants and employees of sheriffs and clerks of courts.

W. Va. Code §7-7-7 provides, in pertinent part that certain county officials, including the county assessor, by and with the advice and consent of the county commission, may appoint and employ, to assist them in the discharge of their official duties for and during their respective terms of office, assistants, deputies and employees... Each county official named in this section shall have the authority to discharge any of his or her assistants, deputies or employees by filing with the clerk of the county commission a discharge statement specifying the discharge action.

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Both the Ethics Act and W.Va. Code § 61-10-15, a criminal misdemeanor statute, prohibit public servants from being a party to, or having a financial interest in a public contract over which their public positions give them control. The relevant provision in the Ethics Act further states, however, that the prohibition is not intended to apply to "the employment of any person with any governmental body". Thus, there is nothing in the Ethics Act to prohibit the Assessor's fiancée from continuing her employment with the Assessor's Office after they wed. Notwithstanding this conclusion, our inquiry does not end here.

We must next analyze whether the proposed conduct violates W.Va. Code § 61-10-15, which is more comprehensive. It prohibits covered persons, such as an assessor, from having a personal financial interest, directly or indirectly, in public contracts over which his public position gives him voice, influence or control. The requester states that the county commission is ultimately his fiancée's supervisor and employer, evidently arguing that he has no "voice, influence or control" over his fiancée's employment contract. Yet it is the Assessor who has the ultimate authority to hire individuals to work in the Assessor's office, including those whose salaries are paid through the property valuation fund. Further, the Assessor has the authority to fire her or his employees. See e.g. W. Va. Code § 7-7-7. Thus, the Assessor has sufficient control over his fiancée's employment contract to bring him within the coverage of § 61-10-15.

Long before the creation of this Commission, the Attorney General interpreted § 61-10-15 and provided legal advice to covered persons. In responding to a similar question, in 1955 the Attorney General advised that § 61-10-15 prohibited a county assessor from employing his wife as a clerk in the assessor's office. 46 W. Va. Op. Atty. Gen. 162. Although we are not legally bound to follow opinions issued by the West Virginia Attorney General, we are mindful of the guidance provided therein.

The Attorney General looked to West Virginia Supreme Court case law to determine whether "the employment of the wife of such officer is a contract in which the officer is 'directly or indirectly pecuniary interested'." In Haislip v. White, et al., 124 W. Va. 633, 642 (1942), the Court wrote:

We prefer to rest our decision on the broad principle that there is still a relation existing between husband and wife, and mutual liabilities growing out of the family relation, which creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly within the family circle.

In a later case, the Court again applied this provision to an employment contract. Specifically, the court held that it would violate W. Va. Code § 61-10-15 for a cook to remain employed by the County Board of Education after her spouse was elected to serve on the same Board. Cimino v. Bd. of Ed. of Marion Co., 210 S.E. 2d 485 (1974)

Our Advisory Opinions have consistently followed the Court's rulings. For example, in A.O. 92-10, we held that it would violate § 61-10-15 for a Prosecuting Attorney to hire his spouse; in A.O. 95-22, we ruled that a member of a County Solid Waste Authority Board could not continue to serve in that position if her spouse was simultaneously employed by that agency.

In A.O. 95-24, we found that a County Commissioner who is a candidate for Sheriff had a financial interest in his spouse's employment contract with the Sheriff's department and would also have such an interest if elected Sheriff. In A.O. 96-22, we concluded that it would violate § 61-10-15 for a member of the Board of Directors of a County Health Department to serve on the Board while his spouse is an employee of that Department. Similarly, in A.O. 96-23, we held that if a County Commission candidate were elected, his spouse's employment by the County PSD would violate § 61-10-15.

We held in A.O. 92-11 that although the employment contract between the requester's spouse and the County Board of Education was entered into four years earlier, the requestor may have voice, influence or control over the renewal, modification or enforcement of this particular employment contract. Such a situation would give rise to a potential violation of W. Va. Code § 61-10-15. See also A.O. 2004-10A and A.O. 2004-10B (continuation of contract generates potential violation because of the requester's voice, influence or control over the renewal, modification or enforcement of his employment contract).

The West Virginia Supreme Court, in Serge v. Matney, 273 S.E. 2d 818, 820 (1981) held:

If the legislature wishes to establish exemptions or provide that personnel who have tenure with the county as employees of one of the numerous county agencies can retain their jobs even though their husbands have been elected to ... county [office], then the legislature should do so.

In the most recent legislative session, the Legislature amended the statute to allow the Commission to grant an exemption where it appears that the prohibitions of W.Va. Code § 61-10-15 would result in undue hardship. It does not appear from the recent amendment to the statute that the Legislature intended to exempt employment contracts other than those expressly listed therein. Thus, the Commission finds that despite the authority to grant exemptions to § 61-10-15, we lack the authority to exempt any employment contract not already expressly authorized by the statute.

The Assessor's willingness to institute safeguards to prevent any conflict of interest, though laudable, fails to change the outcome. The Court, in Fisher v. Jackson, 147 S.E. 541 (1929) held that recusal of a public official from voting on a particular matter in which the official has a direct or indirect interest was not sufficient to immunize that official from the sanctions now found in W. Va. Code § 61-10-15.

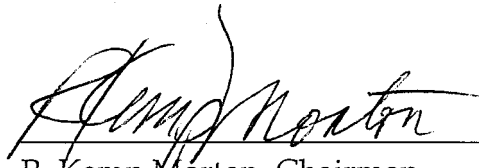
As the West Virginia Supreme Court wrote:

Code, 61-10-15, implements the public policy of this State, and its provisions are clear and unambiguous. **Although harsh, its objects and purposes are salutary.** The purpose of the statute is to protect public funds, and give official recognition to the fact that a person can not properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 53 S.E.2d 735, 739 (1949). (emphasis added)

Notwithstanding the fact that the requester's fiancée entered into her employment contract over six years ago, her continued employment in the Assessor's Office after her marriage to the Assessor would violate § 61-10-15.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.*, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules. Pursuant to W. Va. Code § 6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of W. Va. Code § 61-10-15, and shall have an absolute defense to any criminal prosecution to actions taken in good faith reliance upon such opinion. Further, in accordance with W. Va. Code § 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked.


R. Kemp Morton, Chairman