

Advisory Opinion 2021-04

Issued on March 4, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **Prosecutor** asks whether she may hire her boyfriend to serve as an Assistant Prosecutor if they do not live together or have a financial relationship.

Facts Relied Upon by the Commission

The Requester is a newly elected Prosecutor. When she was elected, the Prosecutor's Office had two Assistant Prosecutors, but one quit before the Requester was sworn into office.

The Requester requested and received permission from the County Commission to fill the vacant position. She called several attorneys she had worked with in the past to determine if they were interested in the job, and they indicated that they were not. She did not advertise for the position and believes that few people would be interested in it because the County Commission may eliminate the position in the upcoming fiscal year which begins on July 1.

The only resume the Requester received for the position was from her boyfriend. The Requester hired her boyfriend for the Assistant Prosecutor position. The Requester states that her boyfriend is qualified for the job and that they have no financial relationship. She further states that they do not live together.

The Requester did not fire any Prosecutor's Office employees when she assumed her position. She indicates that the County has no requirement that the Prosecutor advertise open positions. The Requester further states that 1) she has not seen a position in the County advertised and 2) other County officeholders hired employees through the same process she utilized. The Requester further asks for guidance regarding a time frame in which she must terminate her boyfriend's employment if the hiring is found to be impermissible.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3(m) defines relative as:

[S]pouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

W. Va. Code § 6B-2-5(b) states, in relevant part:

(1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

...

(4) A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: *Provided*, That as used in this subdivision, "employment or working conditions" shall only apply to government employment: *Provided, however*, That government employment includes only those governmental entities specified in subsection (a) of this section.

W. Va. Code R. § 158-6-3 (2017) states:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

3.3. "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law.

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

.....

W. Va. Code § 61-10-15

(a) It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: Provided, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

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The anti-nepotism provisions in the Ethics Act and related Legislative Rule prohibit public officials and employees from giving an unfair advantage to relatives and persons with whom they reside. W. Va. Code § 6B-2-5(b)(4) and W. Va. Code R. § 158-6-3 (2017). The nepotism restrictions do not expressly govern the instant situation as the Prosecutor and her boyfriend do not live together.¹ The Ethics Commission must determine, therefore, whether the more general private gain restriction in the Act prohibits the Requester (“Prosecutor”) from hiring her boyfriend.

The relevant private gain provision states: “A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.” W. Va. Code § 6B-2-5(b)(1). The Ethics Act does not define the term “private gain.” One dictionary definition of the term “gain” is “resources or *advantage acquired or increased.*”² [emphasis added]

¹ Similarly, the more stringent restrictions in W. Va. Code § 61-10-15 do not apply as the Prosecutor and her boyfriend do not have a financial relationship or live together. See Advisory Opinion 2012-11 (holding that when a public official resides with a person, it creates a rebuttable presumption that the public official has a financial relationship with that person for purposes of W. Va. Code § 61-10-15.)

² “Gain.” *Merriam-Webster.com Dictionary*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/gain>. Accessed 18 Feb. 2021.

The Prosecutor did not formally advertise the job opening for an Assistant Prosecutor. The Prosecutor states that she reached out to several colleagues to determine their interest in the position and, that after those persons stated that they had no interest, she hired her boyfriend.³ The Prosecutor states that she assumed other persons would not be interested in the position since it may be eliminated within the next six months, but it is unknown whether the job position will be eliminated or whether others may have been willing to accept the position knowing it might be temporary.

The Ethics Commission's Legislative Rule governing nepotism states: "Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public." While neither the Ethics Act nor Legislative Rule defines "private gain," one definition of the term gain is "advantage acquired." *Id.*

The Ethics Act and relevant Legislative Rule do not provide a bright-line rule to apply to this situation; therefore, the Commission will not create one but will analyze the asserted facts under the private gain provision of the Ethics Act, at W. Va. § Code 6B-2-5(b). The Requester called several attorneys she had worked with in the past to determine if they were interested in the job, and they were not. The Requester speculated that other qualified attorneys would not be interested in the position because it may have been temporary and chose to not advertise the position to the public.

The Commission finds, therefore, that, the Requester's boyfriend received an unfair advantage in being hired for the vacant Assistant Prosecutor position in violation of the Ethics Act's private gain provision.⁴ The Ethics Commission finds that the Prosecutor may not continue to employ her boyfriend.

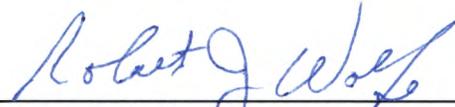
The Prosecutor also asks, if the employment of her boyfriend is not allowed, then when must she terminate his employment. The Commission finds that she must terminate his employment within 30 days of the issuance of this Opinion.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act at W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. § 61-10-15, and does not purport to interpret other laws or rules.

³ In Advisory Opinion 1992-20, the Ethics Commission stated that a public official may avoid the appearance of nepotism by, in part, noticing the open position "early enough in the hiring process to give those members of the public who are interested in the job an opportunity to" apply. While that Opinion dealt with nepotism, the Ethics Commission finds the holding relevant to the situation presented.

⁴ The Ethics Commission declines to address whether the hiring of a boyfriend or girlfriend may be permissible when the position is advertised and independent parties are involved in the interview and selection process as those facts and that question is not before the Commission. This Opinion is, instead, based upon the facts presented.

In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked or the law is changed.

A handwritten signature in blue ink that reads "Robert J. Wolfe". The signature is written in a cursive style with a horizontal line underneath it.

Robert J. Wolfe, Chairperson
West Virginia Ethics Commission