

Advisory Opinion 2021-20

Issued on September 2, 2021, by

The West Virginia Ethics Commission

Opinion Sought

A **County Commission** asks whether the Sheriff's son may be employed as the Director of Courthouse Security if the Sheriff delegates responsibility for this hiring and supervision to his Chief Deputy.

Facts Relied Upon by the Commission

The County Commission and the Sheriff are responsible for providing security at the County Courthouse. The County Commission has entered an Order which delineates those responsibilities: the Order provides that the County Commission is responsible for funding the salaries of Courthouse security personnel and the Sheriff and his Chief of Courthouse Security are responsible for hiring and supervising those employees. The County Commission states, however, that the Supreme Court of Appeals of West Virginia considers county commissions to be joint employers of all persons in the employ of an elected county official.¹

The Sheriff's son is currently employed by the County as a Courthouse Security Officer. The Chief of Courthouse Security has recently retired. The Sheriff's Office published an advertisement in a newspaper seeking applicants for the position. The Sheriff knew his son was a potential applicant, and he therefore delegated the responsibility for hiring for the position to his Chief Deputy.

The Chief Deputy has selected the Sheriff's son for the position. Before the Sheriff's son formally assumes the role, the County Commission wants to ensure that the nepotism restrictions in the Ethics Act and related Legislative Rule allow an elected official's subordinate to make a hiring decision involving the elected official's relative. Similarly, the County Commission seeks guidance on whether the Chief Deputy may supervise the son and what other safeguards may be needed to comply with the Ethics Act.

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.

¹ W. Va. Code § 7-7-7 (establishing rules for the employment of assistants, deputies, and employees by elected county officials).

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.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

3.5.c. Notwithstanding the limitations in this subsection, if a public official or public employee must participate in decisions affecting the employment, working conditions or supervision of the public official or public employee's relative or a person with whom the public official or public employee resides, then:

3.5.c.1. An independent third party shall be involved in the process. A public official or public employee may not use a subordinate for the independent third party unless it is an elected public official who may not lawfully delegate the powers of his or her office, e.g., county assessor or county clerk; and,

3.5.c.2. The public official or employee shall exercise his or her best objective judgment in making the decision and be prepared to justify his or her decision.

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.

Advisory Opinion

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, however, bar an elected official's relative from being employed with a public agency which an elected official is statutorily charged with administering so long as the nepotism rules are followed.²

In the instant case, the Sheriff's son is already employed by the Sheriff's Office as a Security Officer for the Courthouse. The Chief of Security retired, and the Sheriff's Office placed an advertisement in the local newspaper seeking applicants for the position. The Requester states that the Sheriff, knowing that his son was a potential applicant, delegated the responsibility for hiring for the position to his Chief Deputy. The Chief Deputy has selected the Sheriff's son for the position, but the County Commission seeks to ensure that is permissible for the Sheriff's Office to hire (or promote) the Sheriff's son to the position because the Chief Deputy is the Sheriff's subordinate.

The Legislative Rule states: "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 R. § 158-6-3.5.a. The extent of the Sheriff's involvement in the hiring process, as described by the Requester, was that the Sheriff delegated the responsibility for hiring a person to serve as the Chief of Security to his Chief Deputy.

Construing the requirements of the Legislative Rule, the Ethics Commission finds that it was permissible for the Sheriff to delegate the responsibility for overseeing the hiring process to his Chief Deputy. First, the Sheriff's act of removing himself from the hiring process is consistent with the requirement in the Rule that the Sheriff remove himself "to the extent possible" from an employment decision affecting a relative.³ Second, although the Chief Deputy is his subordinate, the Rule permits an elected official, who may not lawfully delegate the powers exercised by his or her office, to use a subordinate as an independent third party.⁴

² The stricter restrictions of W. Va. Code § 61-10-15 apply if a county official is seeking to hire a spouse, a dependent child, or a child or relative with whom the county official has a financial relationship. Based upon information and belief, the Sheriff has no financial relationship with his adult son. Hence, the restrictions in § 61-10-15 do not apply.

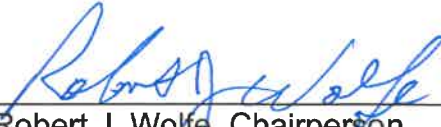
³ W. Va. Code R. § 158-6-3.5.a. The Sheriff has removed himself to the "extent possible" because the County Commission has charged his office with the responsibility of hiring and supervising Courthouse security employees. Because the County Commission has charged him with these responsibilities, his Office arguably has a nondelegable duty to hire employees for the security personnel positions.

⁴ W. Va. Code R. § 158-6-3 (2017) provides:

In conclusion, the Ethics Commission finds that the Sheriff may allow his Chief Deputy to be responsible for hiring for the position of Chief of Security, even if his Chief Deputy is a subordinate and the Sheriff's son is a candidate for the position. Applying the same language in the Legislative Rule, the Ethics Commission finds that the Sheriff may have his Chief Deputy supervise his son if the Sheriff removes himself from decisions affecting the working conditions of his son to the extent possible. The Sheriff may not act to unlawfully favor his son or give him unfair advantage in the hiring process or in the workplace.⁵ The Sheriff may be involved in decisions which affect the working conditions of his son if his son is affected as a class of five or more employees.⁶

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, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.

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 or the law is changed.


Robert J. Wolfe, Chairperson
West Virginia Ethics Commission

3.5.c. Notwithstanding the limitations in this subsection, if a public official or public employee must participate in decisions affecting the employment, working conditions or supervision of the public official or public employee's relative or a person with whom the public official or public employee resides, then:

3.5.c.1. An independent third party shall be involved in the process. A public official or public employee may not use a subordinate for the independent third party unless it is an elected public official who may not lawfully delegate the powers of his or her office, e.g., county assessor or county clerk; and,

3.5.c.2. The public official or employee shall exercise his or her best objective judgment in making the decision, and be prepared to justify his or her decision.

⁵ In Advisory Opinion 2020-13, the Ethics Commission held that a school principal's spouse, sister, and brother-in-law may be employed at the same school where he served as the principal because it was the superintendent or the superintendent's designee who supervised them. The present situation differs from that presented in Advisory Opinion 2020-13 to the extent that the Sheriff is an elected official and exercises all the powers of his office: hence, he does not report to a supervisor. Nevertheless, the Legislative Rule addresses such a scenario by allowing the use of an elected official's subordinate to act as an independent third party in hiring and supervision decisions which affect the elected official's relative, but the Rule does not authorize an elected official or his or her subordinate to use their positions to unlawfully favor a relative.

⁶ W. Va. Code R. § 158-6-3.5(b) (2017)