ADVISORY OPINION NO. 2010-13

Issued On July 8, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Member of a County Board of Education** (BOE) whose wife is employed by the BOE as one of four auditors in the Finance Department located in the Central Office asks for guidance as to when he may participate in the discussions and/or vote on matters affecting his wife's employment, including the BOE's annual budget.

FACTS RELIED UPON BY THE COMMISSION

The Requester was elected to the BOE in 2008. His wife had been, and continues to be, employed by the BOE as one of four auditors in the Finance Department located in the Central Office. Members of the BOE are expected to vote on, among other items, the annual budget which may include, from time to time, a raise for the BOE's auditors.

Auditors are classified as service, not professional, employees. Matters may come before the BOE which may affect the auditors' employment contracts or the terms of their employment.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(d)(1) provides in part that no elected official may be a party to or have an interest in 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....

W. Va. Code§ 61-10-15(a) states, in pertinent part:

> It is unlawful for ... any member of any ... 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 ... if, as a member, ... 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 ... as a principal or teacher or **auxiliary or service employee in the public schools of any county ....**
> (emphasis supplied)

W. Va. Code § 6B-2-5(b) prohibits the knowing and intentional use of office for private gain.
W. Va. Code§ 6B-2-5U) reads in relevant part:

> (1) Public officials, excluding members of the Legislature who are

governed by subsection (i) of this section, may not vote on a matter:

* * *

(C) A personnel matter involving the public official's spouse or relative;

* * *

(II) A public official may vote:

(A) If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses ...

* * *

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

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The Ethics Commission notes that before it can answer the question presented, it must resolve the question of the Requester's wife's continued employment. Although the Ethics Act expressly prohibits certain public officials, including BOE members, from having an interest in a contract over which they exercise control, it expressly sanctions the employment of spouses. Yet, as a county elected official, the Requester is subject to the stricter provisions of W. Va. Code§ 61-10-15, a criminal misdemeanor statute.

Thus, the continued employment of the Requester's wife is governed by W. Va. Code § 61-10-15. In Advisory Opinion 2010-03, a candidate for a county BOE asked the Commission whether W. Va. Code§ 61-10-15 allows the continued employment of her spouse, employed by the BOE as a Chief Mechanic. The Commission analyzed W. Va. Code§ 61-10-15 which authorizes the employment of BOE members spouses in the following positions: principals or teachers, or auxiliary or service employees in the public schools of any county. The Commission concluded that a Chief Mechanic is a service position, pursuant to W. Va. Code§ 18-1-1 (a service position is a non-teaching employee who serves the school or schools as a whole). According to the job description provided, an auditor is one who, inter alia, "performs annual school audits and works with each school". Thus, the Commission concludes that an auditor is a service position.

Next, the Commission turns to the Ethics Act's prohibition against use of public position for private gain. Clearly, the Requester needs to exercise caution in his public position in order to avoid even the appearance of impropriety. While the Requester may **generally** advocate for better working conditions for all BOE employees-including increased compensation and benefits-he may not **specifically** do so on behalf of his wife and/or on behalf of the auditors as a group. He may not lobby his colleagues in an attempt to influence their votes on matters affecting the terms and conditions of his wife's employment and/or the terms and conditions of the auditors' employment. The Requester may not use his position as a member of the BOE to obtain, increase or promote the interests of his spouse as a BOE employee.

Finally, the Ethics Act sets forth specific rules regarding when elected public officials may vote. The overriding purpose of the rules on voting is to ensure that a public official does not vote on a matter in which he or she has a financial interest.

The Legislative findings in the Ethics Act state:

> (c) The Legislature finds that the state government and its many public bodies and local governments have many part-time public officials and public employees serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official or public employee from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, 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.
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> W.Va. Code§ 6B-1-2(c)

Generally, a public official may **not** vote on a personnel matter involving her or his spouse. The voting provision further provides, however, that a public official **may** vote on matters 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 of five or more.** 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.

Thus, the Requester should not vote on any matter that may specifically and uniquely affect his spouse to a greater extent than other comparable school board employees. Specifically, the Requester must recuse himself from voting on the renewal, modification or enforcement of his spouse's employment contract.

Finally, as it relates to voting on the overall budget, the Commission looks to its ruling in AO 2006-06 where it discussed potential conflicts of members of the Legislature voting on funding for organizations with which they are associated:

> The Commission elects to take this opportunity to provide guidance on voting in these circumstances to public officials who are either elected or appointed members of a governing body and are also employed by a nonprofit which may receive funding from the governing body on which they serve. The Commission finds that if the governing body is considering a budget for which there is a line item appropriation to a nonprofit corporation by which an elected or appointed member of a governing body is employed, then the elected or appointed member should not be precluded from voting on the entire budget. However, before casting a vote the elected or appointed member should first disclose his or her employment by the nonprofit organization in order that the general public is aware of the interest.If the governing body is specifically addressing whether an appropriation should be included for the nonprofit corporation, then the public official should physically remove him or herself from the room during that portion of the discussion. The Commission finds that disclosure of the employment by a nonprofit organization promotes transparency in government to which the public is entitled while at the same time allowing the public official to fulfill his or her responsibility of voting on whether a budget should be accepted or rejected.

Although the foregoing comments relate specifically to members of non-profit organizations, the Commission finds the guidance equally applicable to the situation presented here. Thus, the Commission hereby finds that the Requester may continue to participate in the discussion and vote on the overall budget. In the event that there is a line item in the budget concerning his spouse's compensation and/or the compensation of the auditors **and** if the BOE specifically addresses any such line item, then he must recuse himself from participating in the discussion and decision-making process by fully disclosing his disqualifying interest, physically removing himself from the room during the period, and recusing himself from voting on the issue. W. Va. Code § 6B-2-5U)(3). *See also* AO 2009-08. Once the BOE concludes its discussion and deliberation (including voting, if required) on any such line item, then the Requester may return to the room and participate in the discussion, deliberation and vote on the budget in its entirety.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code§ 6B-1-1, *et seq.,* 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 other public agencies unless and nti it is amended or revoked, or the law is changed.

/s/ Jonathan E. Turak

Jonathan E. Turak, Acting Chairperson