ADVISORY OPINION NO. 2010-03

Issued On March 4, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Candidate for a County Board of Education** (BOE) whose husband is employed by the BOE as Chief Mechanic asks whether, in the event that she is elected to the BOE, her husband may continue his employment with the BOE.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a candidate for a County Board of Education (BOE). Her husband is employed by the same BOE as Chief Mechanic. According to the Requester, his job is not at the Central Office or at one of the public schools, but is physically located at the bus garage.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official … may not knowingly and intentionally use … her office or the prestige of … her office for … her own private gain or that of another person.

W. Va. Code § 6B-2-5(d)(1) reads, in pertinent part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected … official … or member of … her immediate family …may be a party to or have an interest in the profits or benefits of a contract which the official … may have direct authority to enter into, or over which … 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 § 18-1-1(h) and § 18A-1-1(e) define service personnel as any:

> nonteaching school employee who is not included in the meaning of "teacher" as defined in this section, and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, **maintenance**, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen-a of this code means service person or service personnel as defined in this section.
> (emphasis supplied)

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If the Requester 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 and to the prohibitions contained in W. Va. Code § 61-10-15.

Public Contracts

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". W. Va. Code § 6B-2-5(d)(1) Thus, there is nothing in the Ethics Act which prohibits a BOE member's spouse from being employed by the same BOE. Notwithstanding this conclusion, our inquiry does not end here.

West Virginia Code § 61-10-15

We must next analyze whether W. Va. Code § 61-10-15, which is more comprehensive, authorizes the Requester's spouse's employment. This statute prohibits a covered person, such as a BOE member, from having a personal financial interest, directly or indirectly, in public contracts over which her public position gives her voice, influence or control. Unlike the Ethics Act, it does not specifically make an exception for the employment of any person by any governmental body. Instead, it is stricter than the Ethics Act and also contains strict anti-nepotism provisions which prohibit, with limited exceptions, the employment of immediate family members by county officials, including county school board officials. As for school board members, their spouses may be employed in the following positions: principals or teachers, or auxiliary or service employees in the public schools of any county.

The Commission has not had many opportunities to interpret this proviso as it relates to the employment of a BOE member's spouse with the same BOE. In Advisory Opinion 92-11, the Commission first noted that the protection of this proviso is not afforded to various employment positions such as central office administrator. Central office

administrator is defined in W. Va. 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." The Commission concluded that the position of Special Education Director met the definition of central office administrator, and therefore the BOE candidate could not serve on the BOE while his spouse was employed in that position by the same BOE.[1]

By contrast, in Advisory Opinion 94-04, the Commission held that the position of Instrumental Music Coordinator, a part-time non-administrative position, did not meet the definition of Central Office Administrator, and therefore the BOE member could serve on the BOE while her spouse was employed in that position by the same BOE.[2]

In a court case wherein a teacher's union sought to remove certain school officials from office for alleged violations of W. Va. Code § 61-10-15, the decision focuses on the distinction between teacher and central office administrator. *See* WVEA v. Preston Co. Bd. of Ed., 297 S.E.2d 444 (W. Va. 1982). The Court wrote: "Legislative recognition that there are differences between individuals working in a specific school directly with students (principals and teachers), and those in a central office administering a school system and supervising other professional personnel, is logical." Id. at 447.
It may also be argued that, under West Virginia's school laws, public school employees fall into one of two discrete categories, professional employees and service employees. The Supreme Court of Appeals recognized this legal dichotomy in the case of Crow v. Wayne County Board of Education, 599 S.E.2d 822, at 825 (W. Va. 2004):

> West Virginia Code 18A-1-1(a) specifically provides that: "School personnel shall be comprised of two categories: Professional personnel and service personnel." The two types of personnel are defined in different ways. Professional personnel are described as persons who meet certification requirements of the state or licensing requirements of the state, or both, and include professional educators or other professional employees. It is also stated that "professional educators" has the same meaning as teacher as defined by the Code. W. Va. Code 18A-1-1(b) and (c). "Service personnel," on the other hand, are defined by W. Va. Code 18A-1-1(e), which states: "Service personnel' means those who serve the school or schools as a whole, in a nonprofessional capacity, including

[1] *See also* Advisory Opinion 94-18 wherein the Commission concluded that the position of Special Education Director/Elementary Education Director/Staff Development Coordinator/Education Diagnostician fit the definition of Central Office Administrator, and therefore the BOE candidate could not serve on the BOE while his spouse was employed in that position by the same BOE. The Commission noted that although the position did not require an administrative certificate, the job was posted as 75% administrative and 25% teaching.

[2] The Commission cautioned in its conclusion: "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."

such areas as secretarial, custodial, maintenance, transportation, school lunch and as aides."

Here, the Ethics Commission must first examine whether the position of Chief Mechanic is a professional educator position, or one of the positions that the statute permits a spouse to hold. Specifically, is the Chief Mechanic a professional educator and/or one of those "other appropriate titles" charged with administering and supervising some part of the total program of the county-wide school system? Or, is the Chief Mechanic merely a service employee?

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, in a nonprofessional capacity, including areas such as maintenance and transportation. According to the job description, the Chief Mechanic is responsible for all mechanical equipment for the county school system. The job description further classifies the position as service personnel, and nothing in the minimum qualifications fits the definition of professional educator. Accordingly, the Commission hereby concludes that the position of Chief Mechanic is a service position. Hence, it falls within the exception which allows the spouse of a BOE member to be employed as an auxiliary or service employee.

The Commission must next examine whether the final modifying phrase "in the public schools" is intended to require otherwise permitted positions to be physically located in a public school. This phrase is not defined in W. Va. Code § 18-1-1 or in § 18A-1-1. Did the Legislature intend to distinguish between Central Office and the individual schools? Does "in the public schools" refer to the county school system as a unit? This is a question of first impression for the Commission, and rules of statutory construction require us to attempt to give meaning to every word in the statute. *See* Napier v. Napier, 564 S.E.2d 418 (W. Va. 2002).[3]

The Commission first notes that, in addition to the individual schools and the Central Office, there are other physical locations where BOE employees report for work, e.g. bus garage, central site for cooking meals for transport to the individual schools, and a school system's sanitation plant. Further, some employees do not have a set location at which they work, but travel from school to school, or, in the case of homebound instructors, to their assigned students' homes.

A more logical interpretation would be that the phrase "in the public schools of any county" refers to a public school system in general, rather than a geographic delineation of where a particular employee reports for work or performs his or her duties. We have

[3] "'It has been a traditional rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.' *State ex rel. Johnson v. Robinson*, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). Moreover, '[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.' Syl. pt. 1, *Miners in Gen. Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941), *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982)…."

all heard people, in ordinary conversation, use the term "the public schools" to refer to the public school system as a whole, just as they might use the term "school district" or "school system."

This interpretation is supported by references throughout Chapter 18. For example, W. Va. Code § 18-1-1 is replete with references to “school” and its various forms:

> (a) “School means the students and teachers assembled in one or more buildings, organized as a unit;
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> ***
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> (h) “Service person” … means any nonteaching school employee … who serves the school or schools as a whole…
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Similarly, W. Va. Code § 18A-1-1 is replete with references to “school” and its various forms:

> (c)(4) "Central office administrator" means a superintendent, associate superintendent, assistant superintendent and other professional educators who are charged with administering and supervising the whole or some assigned part of the total program of the countywide school system. …
>
> (d) "Other professional employee" means a person from another profession who is properly licensed and who is employed to serve the public schools. …
>
> (e) "Service person" … means a nonteaching school employee … who serves the school or schools as a whole….

Other references throughout Chapters 18 and 18A support the Commission’s conclusion that, for purposes of applying the provisions of W. Va. Code § 61-10-15, the phrase “in the public schools” refers to the county-wide school system, and not a physical location.

As a result of the foregoing analysis, the Commission finds that it would **not** violate W. Va. Code § 61-10-15 for the Requester’s spouse to remain employed by the County Board of Education as Chief Mechanic if the Requester is elected to the same BOE.

Private Gain

Pursuant to W. Va. Code § 6B-2-5(b), public officials may not use their office or its resulting prestige for personal private gain or for the private gain of another. Therefore, the Requester, if elected, may not use her position as a member of the BOE to obtain, increase or promote the interests of her spouse as a BOE employee.

CONCLUSION

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. 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.

Pursuant to W. Va. 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.

/s/ R. Kemp Morton, Chairman
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