ADVISORY OPINION 2015-06

Issued on May 7, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Director of a State Agency Division** asks whether the Ethics Act permits a state rating officer to conduct federal rating examinations of her spouse's region.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that each division staff inspector is required by the U.S. Food and Drug Administration ("FDA") to inspect dairy farms in an assigned region within the state. Each state is also required to employ a different staff member to be certified as a state rating officer ("SRO") to perform "check ratings" of all the regions on behalf of the FDA. Periodic audits are performed by the FDA to assure compliance.

State milk program inspectors inspect their allocated farms and assign ratings to farms based on a set of standards. The SRO periodically inspects those farms to review the ratings given by the program inspector. If the ratings are not within a certain range, then the farm is required to make changes to comply with the SRO's rating.

The agency's current SRO will be vacating his position soon and the agency division employs an experienced staff member ("Staff Member") who previously worked in the milk program and is able to assume the duties of the outgoing SRO. However, that Staff Member is married to a current state milk program inspector, and that Staff Member would be reviewing her husband's inspections.

The Requester adds that the Staff Member would not supervise her husband, and that the two of them would be subject to different chains of command. If farms regularly inspected by the husband would later fail a check rating inspection which the Staff Member performs, the farm would be penalized. In addition, the Staff Member's ratings would not directly impact her husband's performance evaluations.

The FDA explained to the Requester that there is no federal rule outlining a conflict of interest for a SRO, and that the Requester must make the final determination as to whether a conflict exists.

CODE SECTIONS RELIED UPON BY THE COMMISSION

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

> 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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

> [N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the 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...

158 W. Va. C.S.R. § 6-3.5 states:

> A public official should not use his or her position for the private gain of a relative or cohabitating sexual partner by improperly giving bonuses, raises or other employment benefits to such person.

ANALYSIS

The Ethics Act prohibits the use of public office for one's personal gain and for the personal gain of others. The Ethics Commission has determined in the past that while the Ethics Act, at W. Va. Code§ 6B-2-5(d), does not prevent a government agency from employing a public official's immediate family member, the Ethics Act does prevent public officials from having *supervisory authority* over someone in whom they have a financial interest.

In Advisory Opinions 2012-24 and 2013-01, the Commission held that a mayor may not supervise immediate family members, and in Advisory Opinion 2013-08, the Commission similarly held that a County Prosecutor's spouse could work as a nurse in the county where he practiced. Finally, in Advisory Opinion 2012-04, the Commission explained:

> [W]hen the public body knows in advance that one of its preferred candidates is a relative, close friend, or fellow member of the public body, in order to avoid violating W. Va. Code § 6B-2-5(b)(1), then the public body must follow the Commission's nepotism guidelines more fully set forth at [158 W. Va. C.S.R. § 6-3].

In the situation presented here, the Staff Member would not have any supervisory authority or control over her husband's position. The Requester states that the couple's positions would have different supervisors, and that the Staff Member would have no influence or control over her husband's position. Therefore, the facts presented by the Requester do not describe a situation where a public employee would be supervising another employee in whom that person has a financial interest.

The Ethics Act also generally prohibits public officials from exercising *regulatory control* over someone in whom they have a financial interest, or situations where a public official's *actions* will directly impact a person or business in whom they have a financial interest. This situation usually arises in the context of an official voting on a specific issue. In Advisory Opinion 2010-13, for example, the Commission held that a Board of Education member could not advocate or vote for increased compensation and benefits for his wife, a Board auditor. The Commission held:

> Generally, a public official may **not** vote on a personnel matter involving her or his spouse .... 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. [emphasis in original]

Further, the Legislative Rules regarding nepotism prohibit a public official from using "his or her position for the private gain of a relative or cohabiting sexual partner by improperly giving bonuses, raises or other employment benefits to such person." See 158 W. Va. C.S.R. § 6-3.5.

The Requester in the instant situation explains that if a farm inspected by a state inspector receives a poor evaluation from the SRO, the responsibility for curing that evaluation falls to the farm owner and not the inspector. The Staff Member's evaluations likewise would not affect her husband's job performance reviews either positively or negatively, and her actions would not directly impact his position. Accordingly, she would not exercise direct regulatory control over her husband.

Based on the facts provided, the Staff Member would have no supervisory or regulatory opportunity to misuse her position to benefit herself or her husband. The facts presented do not describe a situation where a public official or employee regulates, or takes actions that will affect, a person or business in which they have a financial interest.

If the Staff Member's evaluation of farms assigned to her husband could positively or negatively impact her husband's continued employment, performance evaluations, raises, bonuses or similar issues, she may still be employed as an SRO, but another employee would be required to rate farms to which her husband is assigned.

Therefore, the Commission holds that under the specific facts provided, the Ethics Act permits the Requester to hire the Staff Member in question as a State Rating Officer.

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 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, et seq., and does not purport to interpret other laws or rules. This opinion is based on the specific facts of this request, and may not be relied in other situations.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman