ADVISORY OPINION 2015-15

Issued on October 1, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Superintendent of a County Board of Education** asks whether the Board of Education's employment of the Superintendent's spouse as a literacy coach constitutes a violation of W.Va. Code§ 61-10-15.

FACTS RELIED UPON BY THE COMMISSION

Requester states that the Board of Education has posted positions for five literacy coaches. Requester provided the Commission with a job posting which describes the qualifications, key duties and responsibilities of a literacy coach. According to Requester, the literacy coach is essentially a teacher of other teachers. The literacy coach works with other teachers for the sole purpose of improving literacy instruction and educational outcomes for students. The literacy coach assists teachers in understanding the assessment of students' reading abilities, the collection and interpretation of data from the assessments and the disaggregation of the data for the purpose of providing individualized reading instruction with a goal of targeting each student's specific deficits as a reader.

The job posting describes the key duties and responsibilities of a literacy coach as follows:

1. Promote effective instructional practices in helping students to collaborate, communicate, problem solve and critically think about the content;

2. Articulate appropriate instructional technology practices as described in the standards for students and teachers;

3. Ability to collaborate in the evaluation, selection and the implementation of materials and software as aligned with the core standards for literacy;

4. Work with the curriculum staff to develop and implement content and the integration of projects into the core scope and sequence;

5. Provide support and oversight to school in terms of assisting the School Leadership Team with monitoring the Strategic Plan goals and action steps related to developing effective instructional, curricular and assessment practices;

6. Must participate in ongoing professional development related to literacy collaborative design work;

7. Must be willing to travel countywide and work a flexible schedule before school and after-school trainings, and

8. Must travel frequently.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(d)(1) reads 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 ....

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

> It is unlawful for any ... superintendent, principal or teacher of public schools ... 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 ... 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 . . . superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county ....

ADVISORY OPINION

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, purchase or sale over which their public position gives them control.

However, the relevant provision in the Ethics Act further states that the prohibition does not apply to "the employment of any person with any governmental body." W.Va. Code§ 6B-2-5(d)(1). Accordingly, the Ethics Act does not prohibit Requester's spouse from being employed by the Board of Education as a literacy coach. *See* A.O. 2011-10 ("there is nothing in the Ethics Act which prohibits a BOE superintendent's spouse from being employed by the same BOE"). However, as Requester presupposes, the Commission must next address whether the more stringent and comprehensive provisions contained in W.Va. Code § 61-10-15 authorize the proposed employment of Requester's spouse.

Unlike the Ethics Act, W.Va. Code§ 61-10-15 does not specifically make an exception for the employment of any person by any governmental body. Instead, it applies a more limited exception allowing a spouse of a Superintendent to be employed by a Board of Education as "a principal or teacher or auxiliary or service employee." W.Va. Code§ 61-10-15(a). As Requester recognized in the written request, the only permissible category that could apply to a literacy coach under the statute is that of a teacher. Thus, the Commission must determine whether a literacy coach qualifies as a teacher for purposes of the exception to the prohibition in W.Va. Code§ 61-10-15(a).

W.Va. Code§ 61-10-15 does not define the term "teacher." However, the West Virginia Supreme Court of Appeals has provided guidance on this precise issue. In *West Virginia Educ. Ass'n v. Preston County Bd. of Educ.,* the Court found that the term "teacher" as it is used in W. Va. Code§ 61-10-15 is comparable to Chapter 18A-1-1(c)'s "classroom teacher," which is defined as "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his time in this capacity." *West Virginia Educ. Ass'n,* 171 W.Va. 38, 41, 297 S.E.2d 444, 447 (1982); W.Va. Code 18A-1-1(c)(1). The Ethics Commission has previously relied on this definition when determining what qualifies as a teacher for purposes of the exception found in W.Va. Code§ 61-10-15.

For example, in A.O. 2006-16 the Commission was asked whether a County Board of Education may contract with the Superintendent's spouse to conduct training sessions for teachers. The spouse was to be hired "to provide such services as preparing facilities for training and testing, working with students conducting testing for instructional purposes, and face-to-face training with teachers who will be using DIBELS[1] to assess reading skills." A.O. 2006-16. Relying on the definition of "classroom teacher" as discussed above, as well as two previous Advisory Opinions which determined that a part-time football coach and a work-based learning coordinator did not come within the exception to W.Va. Code§ 61-10-15, the Commission concluded that employment of the

[1] DIBELS is a reading assessment tool called Dynamic Indicators Basic Early Literacy Skills.

Superintendent's spouse to provide DIBELS training was prohibited under W.Va. Code§ 61-10-15. *Id.; See also* A.O. 2000-14; A.O. 99-15.

The Ethics Commission finds that the position of literacy coach, as described both by the job description and by the Requester, is not one which provides for the majority of time to be spent in a direct instructional or counseling relationship with pupils. A literacy coach instead spends the majority of the time, as Requester aptly describes, as "a teacher of teachers." The literacy coach assists *teachers* in understanding assessments, the collection and interpretation of those assessments, and utilizing those assessments to provide individualized reading instruction. Therefore, the Commission concludes that a literacy coach is not a "teacher" for purposes of the exception in W.Va. Code§ 61-10-15. W. Va. Code§ 61-10-15 accordingly prohibits the County Board of Education from employing the Requester's spouse as a literacy coach.

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

/s/ Jack Buckalew
Jack Buckalew, Acting Chairperson