ADVISORY OPINION NO. 2014-17

Issued On May 1, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Sheriff** asks if there are any ethics implications if a business owned and operated by his father-in-law bids on a contract with the Sheriff's Department.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the County Sheriff. The Sheriff's Department has used the services of a local garage for vehicle maintenance and towing for several years. According to the Requester, he now intends to bid out such services for the purposes of fairness and financial consciousness for the citizens of the county.

The Requester's father-in-law owns and operates a business in the county, and may potentially bid on the contract. Neither he nor his spouse has a financial interest in the business owned and operated by the Requester's father-in-law. Further, neither the Requester nor his spouse has a financial relationship with his father-in-law.

The Requester states that he has no intention of actively participating in supervising the bid process.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) reads, 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.

Further, W. Va. Code§ 6B-2-5(d)(1) states, in relevant part:

> [N]o elected ... official ... or member of his or 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 he or she may have control....

W. Va. Code§ 6B-1-3(f) reads, in relevant part:

> "Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents.

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

> It is unlawful for ... 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 ... [an] officer ..., he or she may have any voice, influence or control....

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 over which their public positions give them control. W. Va. Code § 6B-2-5(d)(1). Since the Requester is a county officer, the Commission must also consider W. Va. Code§ 61-10-15.

First, notwithstanding the Requester's statement that he has no intention of actively participating in supervising the bid process, by virtue of his position he will exercise control over the proposed contract. Even if he does not personally supervise or actively participate, his subordinates will. The Sheriff has the ultimate authority over contracts with the Sheriff's Department. Further, the Requester will have voice, influence or control over the renewal, modification or enforcement of the contract.

Next, inasmuch as the Requester has voice, influence or control, the Commission must determine whether the Requester has a prohibited financial interest in a potential contract with a business owned and operated by his father-in-law. Since the definition of "immediate family member" does not include father-in-law, then the prohibitions do not automatically apply. If, however, the Requester or his spouse has a financial relationship with the father-in-law, then the Sheriff has at least an indirect financial interest in the potential contract which would violate W. Va. Code § 61-10-15. *See* Advisory Opinions 2013-52, 2012-11, and 2012-03.

Here, however, the Requester has stated that there is no financial relationship between the Requester (or his spouse) and his father-in-law. Therefore, the Sheriff does not have "an interest in the profits or benefits of the contract" under W. Va. Code § 6B-2-5(d) orW. Va. Code§ 61-10-15.

Accordingly, the Ethics Commission hereby finds that a contract between the Sheriff's Department and the business owned and operated by his father-in-law is **not** prohibited

by either the Ethics Act or W. Va. Code§ 61-10-15.

Limitations apply. The private gain provision of the Ethics Act prohibits favoritism in the selection process by virtue of the familial relationship. W. Va. Code§ 68-2-5(b). The Ethics Commission has not been made aware of any facts to suggest that the proposal is based on favoritism. Nevertheless, the Requester should follow the requirements of the county bid process when selecting the business to award the contract.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *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 § 68-2-3, 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.

/s/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson