ADVISORY OPINION NO. 2014-19

Issued on June 5, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Regulatory Agency** asks if it may employ as a Division Director someone who owns stock in a company, and whose spouse is employed, in the regulated industry.

FACTS RELIED UPON BY THE COMMISSION

Pursuant to State law, the State Agency regulates the transportation of natural gas and hazardous liquids by pipeline throughout the State of West Virginia. Specifically, the Requester regulates utilities and other entities that operate transportation facilities where the transportation takes place solely within the state. Additionally, the Requester regulates the interstate activities of certain other entities through agency designation by agreement with the United States Department of Transportation (USDOT).

In order to carry out its regulatory authority, the State Agency recently created a separate pipeline safety division consisting of a division director, approximately five safety inspectors and clerical support staff. All of these employees are covered civil service positions. The new division formerly operated as part of another division within the State Agency.

The Requester is interested in hiring a highly qualified applicant (applicant) who possesses considerable experience in pipeline safety regulation to be the director of the new division. The applicant and the applicant's spouse own approximately 10,000 shares of stock in two separate 401K plans (as former employees) of a Fortune 500 company. The company has approximately 315 million shares of common stock outstanding. This company owns several businesses, including one based in Charleston, West Virginia that is **not** regulated by the State Agency as a utility. In 2013, however, the Requester reported that it regulated the safety activities of the Charleston-based business pursuant to the State Agency's agreement with the USDOT.

According to the Requester, the USDOT terminated its agreement with the State Agency earlier this year, but the Requester has asked for reconsideration of that decision. In addition, it is possible that the Requester will enter into single purpose contracts with the USDOT to carry out focused inspection activities of certain interstate facilities, including the Charleston-based business. Finally, the Charleston-based business has recently formed a "midstream" subsidiary that will most likely own intrastate facilities that will be subject to the Requester's jurisdiction under State law, regardless of the State Agency's federal agent status with the USDOT.

The applicant's spouse also works as the director of reservoir and operations for an energy company, but owns no stock therein. The Requester believes that the spouse's company is engaged in drilling and production of natural gas but not transportation that would be to its jurisdiction. Additionally, the applicant's spouse is a former employee of another energy company and owns approximately 10,000 shares of stock. The company has approximately 649 million shares of common stock outstanding. One of the company's subsidiary companies is subject to the Requester's safety jurisdiction.

The State Agency is a special revenue agency and partially funds its safety activities by assessing regulated companies, which generates approximately $385,000 in annual revenue. The Requester states that the payment of the Division Director's salary is not directly tied to this assessment, that the Division Director plays no role in determining any assessment, and that the assessment is based on statutory formula.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits the use of public office for private gain.

W. Va. Code§ 68-2-5(d)(1) prohibits public employees from having a financial interest in a contract which she exercises authority or control, with the exception of employment contracts.

W. Va. Code§ 6B-2-5(e) states:

> No present or former public official or employee may knowingly and improperly disclose any confidential information acquired by him or her in the course of his or her official duties nor use such information to further his or her personal interests or the interests of another person.

W. Va. Code § 6B-2-5(f) provides:

> No present or former ... public employee shall, during or after his or her public employment ..., represent a client or act in a representative capacity with or without compensation on behalf of any person in a contested case, rate-making proceeding, license or permit application, regulation filing or other particular matter involving a specific party or parties which arose during his or her period of public ... employment and in which he or she personally and substantially participated in a decision-making, advisory or staff support capacity, unless the appropriate government agency, after consultation, consents to such representation.

W. Va. Code§ 68-2-5(g)(1) reads in relevant part:

> No elected or appointed public official and no full-time staff attorney or accountant shall, during his or her public service or public employment ... with a governmental entity authorized to hear contested cases or promulgate or propose rules, appear in a representative capacity before the governmental entity ... in the following matters:
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> (A) A contested case involving an administrative sanction, action or refusal to act;
> (B) To support or oppose a proposed rule;
> (C) To support or contest the issuance or denial of a license or permit;
> (D) A rate-making proceeding; and
> (E) To influence the expenditure of public funds.

W. Va. Code§ 6B-2-5(h)(1) generally prohibits full-time public employees from seeking employment with or being employed by a vendor or by any person who is subject to their regulatory authority, under certain circumstances.

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At first blush, it might appear that the applicant's stock holdings and the applicant's spouse's employment in the regulated industry would prohibit the applicant's employment with the State Agency. A close examination of their stock holdings shows that their ownership is less than five percent (5%). For example, the applicant and the applicant's spouse own .00003175% of stock in the company by which they were formerly employed; and the applicant's spouse owns .00001541% of stock in another former employer's company.[1]

Further, by virtue of the position of Division Director, the applicant is required to file annually a Financial Disclosure Statement with the Ethics Commission. See W. Va. Code§ 6B-2-6(a)(3) and Advisory Opinion 2014-13 (public servants holding the title of "director" are covered by this statutory requirement). These filings provide a measure of transparency in that filers are required to disclose, *inter alia,* their employer's identity and their spouse's employer's identity. They are also required to disclose the name and

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[1] Although not directly applicable here, the Legislative Rule, W. Va. C.S.R. § 158-8-4, concerning interest in a public contract provides as follows:

> Public officials or public employees or members of their immediate family are considered to be "associated" with a business if they or their immediate family member are a director, officer or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

Further, by analogy, W. Va. Code§ 6B-2-5U)(1)(A) prohibits public officials from voting on matters:

> In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

As a result, even if either of these standards applied, the applicant and the applicant's spouse would not be considered to be "associated" with the businesses involved.

address of each business in which they or their spouses have or had in the last year an interest of at least $10,000 at fair market value. They are further required to identify, by category, every source of income over $1,000, including distributions from retirement accounts received during the preceding calendar year, and a brief description of the nature of the income producing activities for which the income was received. See *generallyW.* Va. Code§ 68-2-7.

Notwithstanding the foregoing, a careful consideration of certain provisions of the Ethics Act is warranted.

Pursuant to W. Va. Code § 6B-2-5(d)(1), a public employee may not have more than a limited interest in the profits or benefits of a public contract over which s/he has direct authority or control. Here, however, there are no facts to suggest that the applicant will be exercising control over contracts with any of the companies identified in the fact section. Instead, the applicant may engage in regulating some or all of said companies. To the extent that the State Agency assesses fees to these companies, the applicant has no discretion in the amount thereof, as the assessment is based on statutory formula Moreover, (d) contains an employment exemption. Therefore, W. Va. Code§ 6B-2-5(d) does not prohibit the applicant's employment with the Requester.

Next, there are no facts to suggest that the applicant will be appearing in a representative capacity before the State Agency on behalf of any of the affected companies involving a specific party or parties which arose during her or his period of public employment and in which s/he personally and substantially participated in a decision-making, advisory or staff support capacity. Assuming that the applicant will not appear in a representative capacity, then W. Va. Code § 6B-2-5(f) does not prohibit the applicant's employment with the Requester.

W. Va. Code§ 6B-2-5(g)(1), known as the revolving door, only applies to elected or appointed public officials, and full-time staff attorneys and accountants. Thus, this provision does not prohibit the applicant's employment with the Requester.

Finally, W. Va. Code§ 68-2-5(h)(1) generally prohibits full-time public employees from seeking employment with or being employed by a vendor or by any person who is subject to their regulatory authority, under certain circumstances. There is no similar provision in the Ethics Act prohibiting an employee of a regulated entity from seeking employment with or being employed by the governmental regulator. As a result, W. Va. Code § 68-2-5(h) does not prohibit the applicant's employment with the Requester.

Accordingly, no provision of the Ethics Act prohibits a Regulatory State Agency from employing someone who owns stock in a company, and/or whose spouse is employed, in the regulated industry. Additionally, the situation presented does not present an inescapable conflict barring the applicant's employment. In Advisory Opinion 96-56, the Commission observed:

> Cases arise in which an inescapable conflict exists between the public responsibilities of a part-time public servant and the demands of a second position, public or private. In such a situation, where the public servant cannot be expected to perform both positions without creating either substantial problems or the appearance of impropriety, both positions may not be held.

See also Advisory Opinion 2012-17 and opinions cited therein which address situations wherein an inescapable conflict presents a bar to public employment or service. There is no inescapable conflict here, and the Ethics Commission hereby finds that the Requester may employ the applicant despite her or his financial interest in the regulated industry.

Limitations apply. The applicant may not use her or his public position for the private gain of the applicant, the applicant's spouse, or the companies in which they own stock. The applicant may not use her or his public position to attempt to persuade the Requester to take official action to benefit the applicant, the applicant's spouse, or the companies in which they own stock. W. Va. Code§ 6B-2-5(b). Further, the applicant may not knowingly and improperly disclose any confidential information acquired in the course of her or his official duties, or use such information to further her or his personal interests or the interests of another person. W. Va. Code§ 6B-2-5(e).

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 until it is amended or revoked, or the law is changed.

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