ADVISORY OPINION NO. 2014-22

Issued On October 2, 2014, by the

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Death Investigator** asks whether he may be selected to provide medical examiner services as a vendor to the State agency by whom he is employed when his co-workers choose the vendors from a rotation list.[1]

FACTS RELIED UPON BY THE COMMISSION

The State agency is responsible for investigating certain deaths, *e.g.,* suspicious deaths and those which occurred in an unusual or unnatural manner. Pursuant to the agency's enabling legislation, the chief of the State agency shall appoint county medical examiners and assistants to a rotation list and determine the pay for their contracted services. Therefore, the County medical examiners are vendors to the State agency, and are not county employees. The statute provides that one person may be appointed to serve as the county medical examiner for more than one county, and a county medical examiner need not be a resident of the county which he or she serves.

The Requester states that the State agency uses the rotation list in selecting a county examiner for each death case. The Requester states that when a death is reported, a State death investigator simply goes down the rotation list of appointed county medical examiners in the county where the death occurred. If no medical examiner in that county is available, the State investigator moves to the list of appointed medical examiners in the closest county. The Requester states that death investigators may not select themselves from the list. However, he asks whether the on-duty State investigator(s) may select his or her co-worker(s) as a medical examiner from the rotation list when they are off duty.

The chief of the State agency creates the rotation list. In order to be eligible, an applicant to the list must be a medical professional, *e.g.,* doctor, nurse, paramedic, or emergency medical technician, and must pass a test following a week-long class in death investigations which is conducted by the State agency. In practice, according to

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1 In a very similar Advisory Opinion, A.O. 2013-48, the Commission ruled, "In short, the State Investigators are in the position of awarding contracts to their co-workers (and, conceivably, themselves). This situation is fraught with conflicts of interest. Therefore, pursuant to W. Va. Code § 6B-2-5(h)(1) and § 6B-2-5(d), the Requester's employees who have been delegated authority to select County Medical Examiners may not serve as County Medical Examiners under these circumstances." The situation presented herein is distinguishable because it includes the use of a rotation list.

the Requester, in making appointments to the list the chief considers results from criminal background checks, resumes, references and recommendations from the State death investigators. The input from the State investigators is relevant because they have worked with some of the applicants in the field, according to the Requester.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or 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 to another ....

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

> (1) No full-time ... public employee may... be employed by... any person who:
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> * * *
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> (C) Is a **vendor** to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:
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> (i) Drafting bid specifications or requests for proposals;
> (ii) Recommending selection of the vendor;
> (iii) Conducing inspections or investigations;
> (iv) Approving the method of manner of payment to the vendor;
> (v) Providing legal or technical guidance on the formation, implementation or execution of the contract; or

(vi) Taking other nonministerial action which may affect the financial interests of the vendor.

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(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor

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(3) A full-time public official or employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibitions.

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W. Va. Code§ 6B-2-5(d) prohibits a public employee from having a direct pecuniary interest in a contract over which he or she may have direct authority to enter into, or over which he or she may have control. Of course, a State investigator may not select himself from the rotation list to provide medical examiner services to his State agency. However, absent a prohibited financial connection between the State death investigator and his or her co-workers, the death investigator does not have a pecuniary interest in the contracts which may be awarded to his or her co-workers.

Further, W. Va. Code§ 6B-2-5(b) prohibits an employee of a public agency from knowingly and intentionally using his or her office or the prestige of his or her office for private gain to himself or to another. However, if a State investigator selects his co-workers by strict adherence to the rotation list without his subjective input and without favoritism, a State death examiner could make selections of co-workers without violating W. Va. Code§ 6B-2-5(b).

Finally, W. Va. Code § 6B-2-5(h) must be considered in relation to a State investigator's involvement in the creation of the rotation list of medical examiners when he or she is on the list. W. Va. Code§ 6B-2-5(h)(1)(c)(ii) specifically prohibits a public employee from recommending the selection of a vendor when he or she works for a vendor. The Requester's recommendations could directly affect whether certain applicants are chosen by the chief officer. For example, the shorter the list, the more likely the Requester is to be selected for a specific case.

Therefore, a State death investigator may provide medical examiner services to his State agency (1) when a co-worker selects him by strict adherence to the rotation list without subjective input and favoritism by the co-worker; (2) when there is no prohibited financial relationship between the investigator and the co-worker; (3) when the State investigator does not participate in the creation of the

rotation list, and (4) when the investigator does not make recommendations to the chief concerning who should be placed on the list.

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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman