# ADVISORY OPINION NO. 2014-04

**Issued On February 6, 2014 by**

**THE WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

An **Assistant Park Superintendent,** whose brother has a contract to operate a marina at the same park, asks whether he may serve as Park Superintendent and, if so, whether he may be involved with the marina.

## FACTS RELIED UPON BY THE COMMISSION

In 2010, the State Agency responsible for overseeing the parks system received two responses to a Request for Proposals to operate the park marina under a concession lease contract. One was from the Requester's brother. Both proposals were reviewed by a team that did not include the Requester, and neither the Superintendent nor the Administrator consulted with the Requester. The review team chose the proposal submitted by the Requester's brother.

The Agency contacted the Ethics Commission for advice on this potential conflict of interest. Specifically, the Agency asked, "would the removal of the assistant superintendent from any oversight of marina operations and contract administration suffice to preclude any ongoing conflict of interest?"

Staff informally advised that the Ethics Act did not prohibit the letting of the contract to a business owned by the Assistant Superintendent's brother provided that the following conditions were met: (1) the Assistant Superintendent had no financial interest in the business; (2) the Assistant Superintendent was not involved in evaluating or reviewing the requests for proposals or making recommendations in regard thereto; and, (3) the Assistant Superintendent was removed from any oversight of the operation of the marina.

Thereafter, the State Agency awarded a ten-year contract to the Requester's brother. The contract is subject to one ten-year extension if performance is satisfactory.

**Now,** the Requester is considering taking the position of Superintendent at the same park. He asks whether he may serve as Park Superintendent and, if so, whether he may be involved with the marina.

## CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits public officials from knowingly and intentionally using their offices or the prestige thereof for their own private gain or that of another person.

W. Va. Code§ 6B-2-5(d)(1) provides in 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: *Provided, however,* That nothing herein shall be construed to prohibit a member of the Legislature from entering into a contract with any governmental body, or prohibit a part-time appointed public official from entering into a contract which the part-time appointed public official may have direct authority to enter into or over which he or she may have control when the official has not participated in the review or evaluation thereof, has been recused from deciding or evaluating and has been excused from voting on the contract and has fully disclosed the extent of his or her interest in the contract.

W. Va. Code § 6B-1-3 includes the following definitions:

> (f) "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.
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> (l) "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law.

**ADVISORY OPINION**

Pursuant to W. Va. Code§ 6B-2-5(d)(1) a public servant or **a member of his or her immediate family** may not have more than a limited interest in the profits or benefits of a public contract over which the public servant has direct authority or control. Although the definition of "relative" includes siblings, the definition of "immediate family" does not. Instead, it is more narrowly drawn. Since the definition of "immediate family" does not include sibling, even if the Requester assumes the position of Park Superintendent at the same park, the contract between his brother and the State Agency is **not** prohibited by W. Va. Code§ 6B-2-S(d).

The Commission is mindful that the mere fact that the Requester's brother operates the

park's marina could cause the public to perceive an appearance of impropriety. Not everyone will know that the contract was awarded four years before the Requester became Park Superintendent, and that he was not involved in selecting the contractor.

Further, the contract between the State Agency and the Requester's brother imposes certain obligations on the Park Superintendent. For example, the Requester's brother is required to furnish the Park Superintendent a listing of all prices the concession charges for the information and approval of the State Agency. He must also submit a schedule of operating hours to the Park Superintendent for the State Agency's approval.

According to the job description provided by the Requester, a Park Superintendent is responsible for handling and resolving written and verbal complaints. Additionally, a Park Superintendent inspects leased, concessionaire-operated facilities and initiates corrective action if necessary to ensure contract compliance.

Nevertheless, the Ethics Act's prohibition against having an interest in a public contract simply does not prevent the Requester from assuming the position of Park Superintendent while his brother operates the park marina under a concession lease contract. The Legislature explicitly distinguished between immediate family and relatives in the definition section of the Ethics Act.

The Legislature made a conscious decision to limit the prohibition against interests in public contracts to immediate family members, and not to relatives. Presumably, this choice was based on the inherent financial relationship between spouses, adults and their dependent children and grandchildren, and adults and their dependent parents. By contrast, an adult sibling is not presumptively financially dependent on another sibling.

Therefore, the Commission hereby finds that the Requester **may** serve as Park Superintendent.

Limitations apply. The Ethics Act prohibits the use of public office for the private gain of another. Thus, the Requester may not use his position to protect his brother from any complaints made about the operation of the marina. To avoid the appearance of impropriety, the Commission recommends that the Requester ensure that an independent third-party investigates any complaints and report them to the Requester's supervisor. Further, the Requester should not independently inspect the concessionaire operated facilities or initiate corrective action. To the extent that another independent third-party, e.g., a different Park Superintendent, is available to do so, then that portion of the Requester's job duties should be re-assigned. If that is impracticable, then at minimum the Requester should perform such inspections and oversee any necessary corrective action with another non-subordinate employee to ensure that there is no favoritism.

The Requester is hereby directed to provide a copy of this advisory opinion to the State Agency before he assumes the position of Park Superintendent. Thereafter, the State Agency should review this opinion and independently determine whether the Requester's employment as Park Superintendent is feasible under the conditions imposed herein.

The Ethics Commission commends the Requester for seeking this opinion, and the State Agency for seeking advice before initially entering into the contract.

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