

ADVISORY OPINION NO. 2009-01

Issued On February 5, 2009 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

- (1) An elected County Commissioner asks whether his spouse may be employed by a County Hospital.
- (2) An elected County Commissioner asks if, pursuant to W.Va. Code § 61-10-15, the Ethics Commission has the authority to grant a contract exemption to allow the employment of his spouse by a County Hospital?

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected County Commissioner. In the County where he serves, there is a County Hospital.

Counties are statutorily authorized to acquire or construct a public hospital. W.Va. Code § 7-3-14. The West Virginia code further requires that the administration and management of a county hospital shall be vested in a board of trustees consisting of not less than five members appointed by the County Commission. W.Va. Code § 7-3-15. The County Commission has the power to remove the trustees for incompetency, neglect of duty or malfeasance. In the County where the Requester serves, the County Commission appoints a member of the County Commission to the hospital's board of trustees. The board of trustees is charged with the responsibility of employing persons at the hospital and fixing their compensation.

The Requester states that the County does not directly fund the Hospital. As authorized by statute, the County allocates \$200,000.00 per year for the operation of the hospital from the Hotel/Motel Tax. W.Va. Code § 7-18-14. The County Commission, in its discretion, may also allocate county funds to the Hospital for special projects.

The Requester's spouse is a licensed medical professional. He states that for public policy reasons his spouse and other medical professionals should not be prohibited from working at a county hospital when these hospitals at times, due to their rural nature and lack of funding, have difficulty recruiting qualified applicants.

The Requester states that if his spouse is permitted to work at the hospital, he would not sit as the County Commission's representative on the Board of Trustees. Moreover, he would not participate in, or vote upon, the Commission's appointment of trustees to the Hospital Board.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(d)(1) provides in part that ... no elected .. official ... or member of his or her immediate family ... may be a party to or have an interest in ... a contract which such official ... 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 states in pertinent part that ...(a)...it shall be unlawful for any ... county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such member [she or] he may have any voice, influence or control: *Provided*, however, That nothing herein shall be construed to prevent or make unlawful the employment of the spouse of any such member, officer, secretary, supervisor, superintendent, principal or teacher as principal or teacher, auxiliary or service employee in the public schools of any county, nor to prevent or make unlawful the employment by any joint county and circuit clerk of his or her spouse....

(h) Where the provisions of subsection (a) of this section would result in the loss of a quorum in a public body or agency, in excessive cost, undue hardship, or other substantial interference with the operation of a governmental body or agency, the affected governmental body or agency may make written application to the West Virginia Ethics Commission pursuant to subsection (d), section five, article two, chapter six-b of the code, for an exemption from subsection (a) of this section.

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. The relevant provision in the Ethics Act further states, however, that the prohibition is not intended to apply to "the employment of any person with any governmental body". Thus, there is nothing in the Ethics Act which prohibits a County Commissioner's spouse from being employed by a county hospital. Notwithstanding this conclusion, our inquiry does not end here.

We must next analyze whether the proposed employment would violate W.Va. Code § 61-10-15, which is more comprehensive. It prohibits covered persons, such as a county commissioner, from having a personal financial interest, directly or indirectly, in public contracts over which his public position gives him voice, influence or control. Unlike the Ethics Act, it does not specifically make an exception for the employment of any person by any governmental body. Instead, it is stricter than the Ethics Act and only permits employment of spouses or immediate family members of certain county officials, including school board members, in the following positions: principals or teachers, auxiliary or service employees in the public schools of any county and positions in the office of a joint county and circuit clerk.

The Ethics Commission must first examine whether the power of a County Commission to appoint the board of trustees to a county hospital vests a County Commission with voice, influence and control over county hospital contracts, including employment contracts. The Ethics Commission examined this issue in AO. 2004-1OB. In that case a newly elected County Board of Education Member asked whether he could continue his employment with a multi-county vocational school. The County Board of Education (BOE) where he served was charged with the responsibility of appointing one of its own Board Members to the multi-county vocational school board. Each county's superintendent also had to serve on the board. The Ethics Commission concluded that this appointment power constituted voice, influence or control over the vocational school. In turn it concluded that for the BOE Member to continue his employment would violate § 61-10-15. Similarly, in State v. Neary, 365 S.E.2d 395, 400 (W.Va. 1987) the Supreme Court held that the power of a County Commissioner to nominate and vote for a Public Service District Board Member gave the County Commissioner voice, influence and control over PSD contracts. Thus, the Ethics Commission finds that the appointment power of a county commissioner constitutes voice, influence or control over county hospitals and the contracts entered into by the hospital board of trustees.

Next, the Ethics Commission must examine if recusal by a County Commissioner over matters including appointment of hospital trustees and in limited circumstances, evaluating and granting funding requests, removes the County Commissioner from having voice, influence and control. The West Virginia Supreme Court has stated:

West Virginia Code, 61-10-15, implements the public policy of this State, and its provisions are clear and unambiguous. **Although harsh, its objects and purposes are salutary.** The purpose of the statute is to protect public funds, and give official recognition to the fact that a person can not properly represent the public in transacting business with himself. To permit such conduct would open the door to fraud. The statute is designed to remove from public officers any and all temptation for personal advantage.

Alexander v. Ritchie, 53 S.E.2d 735, 739 (1949) (Emphasis added). In Fisher v. Jackson, 147 S.E. 541 (W Va. 1929) the Court held that "to remit a member of a district school board, by reason of nonaction on his part in regard to a particular matter ... would defeat the very purpose of the statute." Id. at 542. Based upon the prior holdings of the West Virginia Supreme Court and its interpretation of the plain language in § 61-10-15, the Ethics Commission finds that recusal or nonaction is insufficient to remove an elected or appointed official from the ambit of public officials who exercise voice, influence or control.

It is therefore the opinion of the Ethics Commission that § 61-10-15 prohibits the employment of a spouse of a County Commissioner by a County Hospital. As such, the Commission must determine if it has authority to grant a hardship exemption to this prohibition.¹

In Advisory Opinion 2007-03, after a lengthy analysis of relevant case law and advisory opinions cited therein, the Commission declined to grant an exemption to a county assessor whose fiancée worked in his office. The Commission ruled, "Notwithstanding the fact that the requester's fiancée entered into her employment contract over six years ago, her continued employment in the Assessor's Office after her marriage to the Assessor would violate § 61-10-15."

In the 2007 legislative session, the Legislature amended the statute to allow the Commission to grant an exemption where it appears that the prohibitions of W.Va. Code § 61-10-15 would result in undue hardship. It does not appear from the recent amendment to the statute that the Legislature intended to exempt employment contracts other than those expressly listed therein. Thus, the Commission finds that despite the authority to grant exemptions to § 61-10-15, we lack the authority to exempt any employment contract not already expressly authorized by the statute.

The West Virginia Supreme Court, in Serge v. Matney, 273 S.E. 2d 818, 805 (W.Va 1981) held:

If the legislature wishes to establish exemptions or provide that personnel who have tenure with the county as employees of one of the numerous county agencies can retain their jobs even though their husbands have been elected to ... county [office], then the legislature should do so.

The Commission recognizes that, depending upon the circumstances, prohibiting licensed medical personnel from being able to work at a rural county hospital may cause a harsh result. Absent a legislative amendment to W.Va. Code § 61-10-15, the Commission is powerless to grant employment exemptions beyond those expressly contained therein. As such, it leaves to the discretion of the Legislature the decision as to whether an exception for county hospitals should be added to this code provision.

¹ Ordinarily, requests for such exemptions should come from the governing body rather than the individual affected (or here, the spouse thereof). Since the Requester has standing to request an Advisory Opinion as to the meaning and application of the Ethics Act and W. Va. Code § 61-10-15, however, we will continue our analysis and ruling

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-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§ 6B-2-3, this opinion has precedential effect and may be relied upon in good faith by other public officials and employees unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
R. Kemp Morton, Chairman