

Advisory Opinion 2024-08

Issued on September 5, 2024, by

The West Virginia Ethics Commission

Opinion Sought

A **municipal judge candidate** asks whether she may be employed as the municipal judge in a city where her father is employed as the city attorney.

Facts Relied Upon by the Commission

The mayor appoints the City's municipal judge and city attorney. Both positions are part-time. The Requester's father is serving as the appointed city attorney. The municipal judge and the city attorney are employees of the City and not independent contractors. The City also has a part-time assistant city attorney who prosecutes all of the City's municipal cases, which are mostly traffic violations. The Requester's father has never appeared in municipal court as a prosecutor and does not anticipate that he will in the future. The municipal judge has no supervisory duties or control over the city attorney, the assistant city attorney, or the operations of the city attorney's office. Similarly, the city attorney has no supervisory duties or control over the municipal judge.

The Requester and her father are practicing attorneys in a law firm together. They do not have a formal partnership agreement or share income, but they do share office expenses. The Requester states that if she is appointed to serve as the municipal judge, she will disqualify herself from all cases and matters in municipal court in which her father participated or will participate as the city attorney or otherwise. The Requester and her father do not reside together.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3 states, in relevant part:

(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.

(m) "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.

W. Va. Code § 6B-2-5(b)(1) states, 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.

W. Va. Code § 6B-2-5(b)(4) states, in relevant part:

A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: Provided, That as used in this subdivision, "employment or working conditions" shall only apply to government employment: Provided, however, That government employment includes only those governmental entities specified in subsection (a) of this section.

W. Va. Code § 6B-2-5(d) states in pertinent part:

Interests in public contracts. - (1) In addition to the provisions of §61-10-15 of this code, no 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 R. § 158-6-3 (2022). (Nepotism) states, in relevant part:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary

benefit to such action is to the public official or employee or another person rather than to the public.

3.3. "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.

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

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3.6. A public official may not vote on matters affecting the employment or working conditions of a relative unless the relative is a member of a class of persons affected. A class shall consist of not fewer than five similarly situated persons. For a public official's recusal to be effective, he or she must excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests and recusing him or herself from voting on the issue. . . .

Advisory Opinion

The Ethics Act generally prohibits a public official or employee or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). The Act also prohibits public employees from using their public office for private gain to themselves or another person, including family members and relatives. W. Va. Code § 6B-2-5(b)(1) and (4).

Under W. Va. Code § 6B-2-5(d)(1), the prospective municipal judge would not have a prohibited financial interest in the employment contract between the City and her father, the city attorney. Even though she and her father share office expenses in their law firm, the public contract restrictions do not apply to prevent “the employment of any person with any governmental body.” W. Va. Code § 6B-2-5(d)(1). Further, the municipal judge does not have authority or control over the employment of the city attorney, supervise the city attorney, or make or participate in decisions affecting the city attorney’s working conditions. Similarly, the city attorney does not have authority or control over the employment of the municipal judge, supervise the municipal judge, or make or participate in decisions affecting the municipal judge’s working conditions. Thus, the public contract restrictions, W. Va. Code § 6B-2-5(d), the nepotism restrictions, W. Va. Code § 6B-2-5(b)(4), W. Va. Code R. § 158-6-3 (2022), and other provisions in the Ethics Act do not prohibit the Requester’s employment as a municipal judge in a city where her father is the city attorney.

This conclusion is consistent with the Ethics Commission’s prior advisory opinions. In [Advisory Opinion 2022-03](#), the Commission, for the same reasons herein, explained that the Ethics Act allows a city to employ a city council member’s son as a municipal judge. In [Advisory Opinion 2012-24](#), the Ethics Commission held that a mayor’s father may be employed by the same city, and in [Advisory Opinion 2013-01](#), the Commission held that a mayor’s daughter may be employed by the same town. These opinions held, as required by the nepotism restrictions in the Ethics Act, that mayors (and other public officials and public employees) may not participate in or vote on matters affecting the employment or working conditions of their relatives unless the relative is affected as a member of and to no greater extent than a class of five or more similarly situated persons.¹ W. Va. Code § 6B-2-5(j)(2)(A) and W. Va. Code R. § 158-6-3.6. Further, public officials and public employees may not directly supervise their relatives. W. Va. Code R. § 158-6-3.5.b. Those provisions would not be violated in this case since the municipal judge does not hire, supervise, control, or vote on employment issues affecting the city attorney or his/her office, and vice versa.

¹ The Ethics Commission held in [Advisory Opinion 2007-07](#) that a mayor may not appoint her son as the city attorney. The facts presented in the instant case are distinguishable from those in Advisory Opinion 2007-07. For example, in Advisory Opinion 2007-07, the mayor would have been the one appointing her son and supervising him. In this case, the mayor is not related to the person that he is appointing to be the municipal judge. Hence, the holding in Advisory Opinion 2007-07 does not change the analysis or holding herein.

In conclusion, the Ethics Commission holds that the Ethics Act does not prohibit a person from employment as the municipal judge in a city where her father is employed as the city attorney.

The Ethics Act would prohibit the Requester from using her position as municipal judge for the unlawful private gain to another person, including her father and his clients. The Act does not, however, per se disqualify a municipal judge from cases involving her father. Other laws may apply, such as the West Virginia Rules of Professional Conduct, that govern attorneys.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission