

ADVISORY OPINION NO. 2003-17

Issued On January 8, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

COPY

OPINION SOUGHT

A **County Board of Education** asks if the spouse of a Board Member may be hired to fill an extra-curricular teaching position.

FACTS RELIED UPON BY THE COMMISSION

The Board of Education plans to post an extra-curricular position for an appropriately certified teacher to provide remedial instruction to selected students in Language Arts and Mathematics. The spouse of a current Board Member is qualified to fill this position.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV Code § 6B-2-5(d)(1) *Interests in public contracts*, provides in part that ... no elected or appointed official or 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 ... a contract which such 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.

WV Legislative Rules 158-9-2

2.1 A public official or public employee may not vote on or decide a matter that has become "personal" to that individual.

2.2 For the purpose of this section a matter will be considered "personal" to a public official or public employee when he or she has any pecuniary interest either directly or indirectly in the matter or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety. An interest is not "personal" if the interest of the public official or public employee in the matter is affected as a member of, and to no greater extent than any other member of, a profession, occupation or class.

2.3 For a public official's or public employee's recusal to be effective, it is necessary for the official or employee to excuse himself from participating in the discussion and decision-making process by physically removing himself from the room during that period, fully disclose his interest, and recuse himself from voting on the issue.

WV Code § 61-10-15 states in part that ... It shall be unlawful for any member ... of any ... county or district board ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract ... [over] which as such member 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

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Both the Ethics Act and WV 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, purchase or sale over which their public position gives them control.

The Ethics Act's prohibition against private interests in public contracts, WV Code § 6B-2-5(d), applies to public servants, their spouses and businesses with which they or their spouses have an ownership interest of more than 10%. This prohibition contains a proviso which says that it is not intended to apply to "the employment of any person with any governmental body".

It would not be a violation of the Ethics Act's prohibition against private interests in public contracts for a Board Member's spouse to be employed by the Board to fill an extra-curricular teaching position.

WV Code § 61-10-15 provides that it is a criminal violation for certain county personnel, including a Board of Education Member, to have a direct or indirect personal financial interest in a public contract over which their public position gives them "voice, influence or control".

Although this prohibition does include employment contracts, the statute specifically provides that it will not apply to the spouse of a member who is employed by the Board as a "principal, or teacher, auxiliary or service employee."

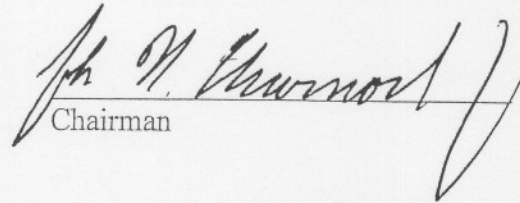
Nothing in WV Code § 61-10-15 defines "teacher." However, provisions of the WV Code dealing with School Personnel define "Classroom teacher" as "[t]he professional educator who has direct instructional or counseling relationship with pupils, spending the majority of his or her time in this capacity." WV Code § 18A-1-1.

Accordingly, the Commission finds that "teacher," as that term is used in the proviso, includes an extra-curricular teaching position as described here, and it would not be a violation of WV Code § 61-10-15 for the Board to employ a Board Member's spouse to fill the position.

The Ethics Commission's Legislative rules on voting say that public servants may not vote on matters which have become personal to them. These rules say that matters become personal to a public servant "... when he or she has any pecuniary interest either directly or indirectly in the matter

or is affected in a manner which may influence his or her vote or would clearly give the appearance of impropriety.”

A Board Member has a personal financial interest in the employment of his or her spouse. Therefore, that Board Member should be recused from any discussion or vote by the Board on these matters.


Chairman