

ADVISORY OPINION NO. 94-21

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 7, 1994

GOVERNMENTAL BODY SEEKING OPINION

Director of a Housing Authority

OPINION SOUGHT

Is it a violation of the Ethics Act for the Housing Authority Chairman's son to be employed as the Public Housing Manager for the Authority?

FACTS RELIED UPON BY THE COMMISSION

The requestor was hired as the Executive Director of the Housing Authority in February 1990 after having served as the acting Director for three months. In July 1991, she placed a public advertisement seeking an individual to serve as the Public Housing Manager. The hiring procedure was handled entirely by the Executive Director with no input from or action by the Housing Authority Board. The individual selected by the Executive Director was chosen because he was the most qualified for the position and had the most appropriate experience. This individual is the adult son of the Housing Authority Chairman.

STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part that...local governments have many part-time public officials...serving in elected and appointed capacities; and that certain conflicts of interest are inherent in part-time service and do not, in every instance, disqualify a public official...from the responsibility of voting or deciding a matter; however, when such conflict becomes personal to a particular public official or public employee, such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...a public official...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.

West Virginia Code §6B-2-5(d)(1) states in pertinent part that...no appointed public official...or member of his or her immediate family...may be a party to or have an interest in the profits or benefits of a contract which such official...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...

West Virginia Code §6B-1-3(d) states that "immediate family", with respect to an individual, means a spouse residing in the individual's household and any dependent child or children and dependent parent or parents.

ADVISORY OPINION

In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of the Ethics Act which per se prohibits the adult son of the Housing Authority Chairman from being employed as the Public Housing Manager for the Authority.

Public Contracts

WV Code §6B-2-5(d)(1) prohibits a public official's immediate family members from having more than a limited interest in the profits or benefits of a public contract over which the public official may have direct authority or control. Although an employment agreement between the Housing Authority and an individual may be considered a public contract, this section further provides that nothing contained within it would prohibit the employment of any person with any governmental body.

Also, WV Code §6B-1-3(d) defines "immediate family" as a spouse residing in the individual's household and any **dependent** child or children and dependent parent or parents. In this instance, the Housing Authority Chairman's son is an adult who does not reside with his parents and is financially independent.

Therefore, it would not be a violation of WV Code §6B-2-5(d)(1) for the son of the Housing Authority Chairman to be employed as the Public Housing Manager.

Voting

Pursuant to WV Code §6B-1-2(c), a public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal" to him. The Commission previously defined "personal" as situations where the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may affect his vote, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

If the Housing Authority Chairman is called upon to consider employment matters or other issues which would directly affect her son, the Chairman should refrain from voting or taking other action regarding these matters since failure to do so would give the appearance of impropriety.

However, in Advisory Opinion #92-11 the Commission determined that the voting prohibition contained in WV Code §6B-1-2(c) does not apply to actions which involve the creation of laws, rules, regulations or policies which affect the public official's or family member's financial interests as a **member of a class**. There is no conflict of interest if the public official or his family member is not pecuniarily affected to a greater extent than any other member of the profession, occupation, group or class.

Therefore, the Commission finds that the Authority Chairman should not vote on any matter that may specifically and uniquely affect her son to a greater extent than other comparable employees.

Private Gain

West Virginia Code §6B-2-5(b)(1) provides that a public official may not use his office or the resulting prestige for his own private gain or for the private gain of another. Consequently, the Authority Chairman may not use her status or influence as a member of the Housing Authority to obtain, increase or promote the interests of her son as an employee of the Authority. As previously noted, recusal from any participation in the decision making process would insulate the Authority member from appearing to violate the Ethics Act's prohibition against the use of her public office for the private gain of another. The Commission notes that the Housing Authority Board members did not participate in the selection and hiring of the Public Housing Manager.


Chairman