ADVISORY OPINION 2016-12

Issued on September 1, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Prosecutor** asks whether it is permissible for the County Commission to purchase a building from the Requester's mother-in-law to be used as office space for the Office of the Prosecuting Attorney.

FACTS RELIED UPON BY THE COMMISSION

The County Commission is leasing office space in a building from an S-corporation that is solely owned by the Requester's mother-in-law. The Commission is responsible for providing office space for the Prosecutor's Office. As there is inadequate space in the county courthouse, the Commission is leasing this office space which is close to the county courthouse for the Prosecutor's Office. The building is now for sale, and the County Commission would like to purchase the building and continue using it for the Prosecutor's Office.

The Requester states that he and/or his wife do not have a financial interest, direct or indirect, in his mother-in-law's corporation or the building's sales agreement. He and/or his wife do not have a financial relationship with his mother-in-law. They do not have any ownership interest in, or control over, the corporation. Further, they do not own property or other businesses with his mother-in-law and do not live in the same household as his mother-in-law. The Requester and/or his wife are not financially dependent on or in debt to his mother-in-law, and his mother-in-law is not financially dependent on or in debt to the Requester. The Requester states that his mother-in-law has made gifts to his wife and two adult children in the past.

The Requester states after he learned the building was for sale, he notified the County Commission of the proposed sale and the asking price. He did not have further discussions with the Commissioners nor offer legal advice to or attempt to influence the Commissioners in their decision of whether to purchase the building. The Requester indicated that he was willing to relocate the Prosecutor's Office to another suitable location. The Commissioners have kept the Requester apprised of the negotiations and their search for alternative space because this would directly affect the Requester.

The Requester advised the Commission that it would need to hire separate legal counsel to handle the purchase and that it should seek approval from the Ethics Commission before finalizing the purchase of the building.

PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 68-2-5(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. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W.Va. Code§ 68-2-5(d)(1) states, in relevant part:

> [N]o elected ... 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 the official ... may have direct authority to enter into, or over which he or she may have control....

W.Va. Code§ 68-1-3(f) states, in relevant part:

> "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.

W.Va. Code§ 61-10-15(a) states, in pertinent part:

> It is unlawful for ... any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as ... [an] officer ... , he or she may have any voice, influence or control....

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Both the Ethics Act, at W.Va. Code§§ 68-2-5(b) and (d), 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 varying degrees of control.

The Ethics Act prohibits contracts between an immediate family member of a public official over which he or she may have direct authority to enter into or over which he or she may have control. The Ethics Act specifically defines "immediate family member" and this definition does not include parents-in-law.

The Ethics Commission has held in prior Advisory Opinions that a public official does not have a direct or indirect financial interest in a business owned by his parent-in-law based upon this familial relationship alone. For example, in Advisory Opinion 2014-17, a sheriff did not have a prohibited pecuniary interest in a contract under W.Va. Code§ 6B-2-5(d) or W.Va. Code§ 61-10-15 where there was no financial relationship between the sheriff or his wife and his father-in-law.

Therefore, public contracts with a public official's mother-in-law are not strictly prohibited.

A public official's family members and relatives who are not included in the definition of "immediate family member" may contract with the public official's agency unless there is an actual financial relationship between the public official and the family member. For example, if a relative resides with the public official or if relatives own a business together or are co-sponsors of a loan, then the public official has a financial interest in the contracts of the relative. See Advisory Opinion 2012-03. By way of further example, unrelated, unmarried adults who live together have a financial interest in the employment of one another. See Advisory Opinion 2012-11

In the instant situation, the Requester and/or his wife do not have a financial relationship with the Requester's mother-in-law. Gifts from the Requester's mother-in-law to the Requester's wife do not create prohibited financial interests under the Ethics Act or under W.Va. Code§ 61-10-15.

Therefore, the Requester does not have a prohibited financial or pecuniary interest in the building's sales agreement and the purchase of the building by the County Commission is permissible under W.Va. Code§ 6B-2-S(d) and W.Va. Code§ 61-10-15.

Finally, the Ethics Commission will consider the private gain provision of the Ethics Act at W.Va. Code§ 6B-2-5(b). In Advisory Opinion 2014-17, the Commission stated that, "The private gain provision of the Ethics Act prohibits favoritism in the selection process by virtue of the familial relationship." The Commission went on to state that it had not been made aware of any facts to suggest that the proposal is based on favoritism, but recommended that the Requester follow the requirements of the county bid process when selecting the business to award the contract.

Moreover, in Advisory Opinion 2013-52, the Ethics Commission stated that to ensure an arm's length transaction in an Ambulance Authority's purchase of land from an Authority member's brother, the Requester in that situation "shall carefully evaluate and document the reasons why this particular land is most suitable to the Authority. Further, the

purchase price shall be based upon a reliable appraisal, and shall not exceed the fair market value of the property." The Ethics Commission notes that these specific measures are not required in all instances. However, the Requester here states that he intends to advise the County Commission to follow this procedure to ensure an arm's length transaction with his mother-in-law.

In the instant situation, the facts asserted by the Requester do not suggest that he used his office to influence the County Commission's decision to purchase the building or its sales price. The Requester indicated that he was willing to relocate the Prosecutor's Office to another suitable location and that he had advised the County Commission that it would need to hire separate legal counsel to handle the purchase.

Therefore, the Ethics Commission has not been made aware of any facts to suggest that the building's sales contract is based on favoritism by virtue of the familial relationship or that the Requester has used his position in violation of W.Va. Code § 6B-2-S(b).

In conclusion, it is permissible under the Ethics Act, at W.Va. Code §§ 6B-2-5 (b) and (d), and under W.Va. Code§ 61-10-15 for the County Commission to purchase the building from the Requester's mother-in-law to be used as office space for the Office of the Prosecuting Attorney.

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 ***W*** *Va. Code§ 61-10-15 and the Ethics Act, at W.Va. Code§ 6B-1-1 through W Va. Code§ 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, Chairperson
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