

ADVISORY OPINION NO. 93-27

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 1, 1993

GOVERNMENTAL BODY SEEKING OPINION

Members of a County Commission

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code §61-10-15 for the members of a County Commission vote to approve the hiring of a Deputy Sheriff when the applicant is the emancipated son of a County Commissioner?

FACTS RELIED UPON BY THE COMMISSION

Vacancies exist for several Deputy Sheriff positions in a County. The Sheriff obtained applications for the position, had the required tests administered, and submitted the two qualifying applicants to the Deputy Sheriff Civil Service Commission for certification. The Civil Service Commission certified the two applicants and the Sheriff then submitted the names of those two individuals to the County Commission for its approval of their hiring.

One of the two applicants is the son of a County Commissioner. The Commissioner's son is a full-time student with eight hours to graduate. Last year his father paid his rent, utilities, tuition, books and personal expense money. He was listed as a dependent on the Commissioner's 1992 tax return and will probably be so listed on the 1993 return.

However, the son is emancipated and does not reside with his father. Currently the Commissioner gives his son twenty to thirty dollars per week. Also, the County Commission member's wife has co-signed for a car loan for his son.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-1-2(c) states in pertinent part 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... office or the prestige of his...office for his...own private gain or that of another person...

West Virginia Code §61-10-15 states in pertinent part that...it shall be unlawful for any member of a county commission...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control.

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 would per se prohibit the County Commission from hiring the emancipated son of a County Commissioner as a Deputy Sheriff.

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". The Commission considers a matter to be "personal" when the public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may influence 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 County Commission member is called upon to consider the employment of his emancipated son or other issues which would directly affect his son, the County Commissioner 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 if the County Commission member's son is hired as a deputy sheriff, the County Commissioner should not vote on any matter that may specifically and uniquely affect his son to a greater extent than other comparable county employees.

Private Gain

West Virginia Code §6B-2-5(b)(1) provides that a public official may not use his office for his own private gain or for the private gain of another. Consequently, the County Commissioner may not use his status or influence as a member of the County Commission to obtain, increase or promote the interests of his son. As previously noted, recusal from any participation in the decision making process would insulate the County Commissioner from appearing to violate the Ethics Act's prohibition against the use of public office for the private gain of another.

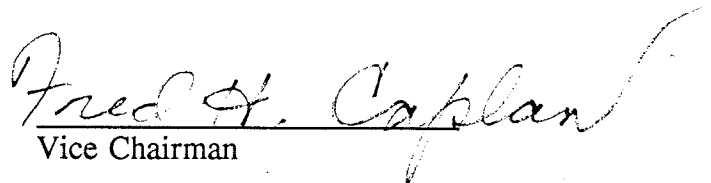
West Virginia Code §61-10-15

West Virginia Code §61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence or control over the letting of such contract. In this instance, the County Commissioners have voice, influence or control over employment decisions since the members are required to approve the applicants for the deputy sheriff position.

As previously noted, the County Commission members have been asked to approve the hiring of a Deputy Sheriff who is the emancipated son of a County Commissioner. The Ethics Commission has determined that the County Commissioner would have an indirect pecuniary interest in a contract involving the employment of his family member since the Commissioner will claim his son as a dependant on his 1993 tax return. The fact that the requestor's financially dependent son would be employed as a County Deputy Sheriff creates, for the County Commissioner, an indirect pecuniary interest in the employment contract which would trigger the sanctions of WV Code §61-10-15.

Therefore, it would be a violation of WV Code §61-10-15 for the County Commission members to vote to hire an applicant who has been certified by the Deputy Sheriff Civil Service Commission, since such applicant is financially dependent upon a County Commissioner.

The Commission notes that the Court, in Fisher v. Jackson, 107 W.Va. 138. 147 S.E. 541 (1929) held that the recusal of a public official from voting on a particular matter in which he has a direct or indirect pecuniary interest was not sufficient to immunize that official from the sanctions now contained in WV Code §61-10-15.


Vice Chairman