ADVISORY OPINION NO. 2013-02

Issued On February 7, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Board of Education** asks whether a High School Principal may be employed by a business owned by a coach at his high school, and if so, what the limitations are, if any, regarding the Principal's obligation to conduct annual performance evaluations on the coach.

FACTS RELIED UPON BY THE COMMISSION

A High School Principal has a second job in the private sector. His private employment is with a business which is owned, in whole or in part, by a coach who is employed at his high school.

A West Virginia Department of Education policy requires coaches to be evaluated on an annual basis. Pursuant to the policy, either the Principal or Assistant Principal may conduct the evaluation.

If the coach receives an unsatisfactory evaluation, then he is subject to a recommendation of termination by the Superintendent to the Board. If the evaluations are satisfactory, he remains employed from year-to-year under the extracurricular contract.

The power to hire or fire employees lies solely with the Board of Education. Only the Superintendent is authorized to make employment recommendations to the Board of Education. Nonetheless, the Principal supervises all employees at his school, including coaches and Assistant Principals.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> (b) Use of public office for private gain. -- (1) 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

W.Va. Code § 6B-2-5(h) reads in relevant part:

(h) Employment by regulated persons and vendors. -- (1) No full-time official or full-time public employee may seek employment with, be employed by, or seek to purchase, sell or lease real or personal property to or from any person who:
(A) Had a matter on which he or she took, or a subordinate is known to have taken, regulatory action within the preceding twelve months; or
(8) Has a matter before the agency on which he or she is working or a subordinate is known by him or her to be working.
(C) Is a vendor to the agency where the official serves or public employee is employed and the official or public employee, or a subordinate of the official or public employee, exercises authority or control over a public contract with such vendor, including, but not limited to:

W. Va. Code§ 68-2-5(0) reads in relevant part:

(o) Except as provided in this section, a person who is a public official or public employee may not solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control. A person who is a public official or public employee may solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control when:
(A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or
(8) The solicitation is limited to the posting of a notice in a communal work area; or
(C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling; or
(D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative.

ADVISORY OPINION

The Requester asks whether the Ethics Act prohibits a supervisor from being employed by a subordinate. Upon reviewing the plain language in the Ethics Act, the Commission finds there is no such prohibition. While the Ethics Act, W.Va. Code§ 68-2-5(h), limits the employment of public employees by vendors and regulated entities, a subordinate employee does not fall within either of these categories. Additionally, the Ethics Act, W. Va. Code§ 68-2-5(0), prohibits the direct solicitation of **business** (emphasis supplied), from a subordinate; however, the Ethics Commission finds that this prohibition does not apply to the situation in question. Instead, the term "business" as used in this subsection relates to commercial transactions such as the sale of goods or services, not employment.

While the Commission finds that the Ethics Act does not ban a supervisor from employing a subordinate, this employer/employee relationship would run afoul of the Ethics Act if the supervisor pressured the subordinate to hire him. This conduct would violate the private gain provision in the Ethics Act which expressly prohibits public servants from using their public office for private gain. W.Va. Code§ 6B-2-5(b).

In considering the question before it, the Ethics Commission takes this opportunity to note that the Ethics Act is not a general code of conduct which prohibits public servants and public officials from engaging in any and all conduct which could be viewed as unethical. Instead, it establishes certain standards of conduct for public servants and public officials to follow to avoid a specific conflict of interest between their personal interests and the public good. The Ethics Act does not govern every situation which may give rise to a conflict.

If a public employer believes that a financial interest such as an employment relationship between a supervisor and a subordinate creates a conflict of interest, then it is free to impose stricter standards on its employees than those contained in the Ethics Act. As such, the Requester may independently determine whether principals should be permitted to be employed by their subordinates. If the Requester, or any public agency, determines that this type of employment relationship creates, from a personnel standpoint, an inescapable conflict of interest, then it may consider adopting a personnel policy which prohibits supervisors from being employed by their subordinates. Of course any public agency considering the adoption of such a policy would need to consult with its attorney to determine whether it is legally authorized, in accordance with applicable laws governing public employment, to impose restrictions on outside employment activities.

While the Ethics Act does not prohibit the employment in question, the analysis does not end here. Instead, the Requester asks whether the Principal may evaluate the coach, who is also his private boss. The Ethics Commission finds that the prohibition in the Ethics Act against use of office for private gain prohibits the Principal from evaluating a subordinate who is his boss in the private sector. Evaluations must be conducted in an objective and even-handed manner. If a supervisor is evaluating a person who is his private boss, there may be a problem, real or perceived, that the supervisor, despite his best intentions, is biased by his financial relationship with the subordinate.

The Commission finds that it is permissible for an Assistant Principal to conduct the evaluation so long as the evaluation is reviewed by the Superintendent or his or her designee. If the Superintendent designates someone to review the evaluation, this person may not be a subordinate of the Principal; instead, it must be someone from Central Office or another school in the County School system.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code

§ 68-1-1, *et* seq., and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other similarly situated public servants unless and until it is amended or revoked, or the law is changed.

s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman