ADVISORY OPINION NO. 2013-01

Issued On February 7 10, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor** asks whether her adult daughter who does not reside with her and with whom she has no financial relationship may be employed by the City, and if so, what are the limitations, if any, regarding personnel matters related to her.

FACTS RELIED UPON BY THE COMMISSION

The Requester is the elected mayor of a small town. Her daughter is financially independent and does not reside with the Requester.

The Requester's daughter is employed as the Town's Municipal Clerk. The Town also employs a Police Chief and a Municipal Judge.

Although the Requester states that Town Council is her daughter's supervisor, upon information and belief, the Police Chief is her direct supervisor on a day to day basis.

According to the Requester, Town Council hired her daughter in January 2008 at $10/hour. Upon the Police Chief's request, Council has approved raises thereafter. The Requester's daughter now earns $300/month.

The Requester, as a member of the governing body, participates in setting the Town's budget, including salaries. By virtue of her position, she is also directly involved in the Town's personnel matters.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-1-3(1) reads:

> "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law or daughter-in-law.

W. Va. Code § 6B-2-5(b) reads 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.

Further, W. Va. Code§ 6B-2-5(d) states in relevant part:

> (1)... [N]o elected official may be a party to or have an interest in a contract which such official 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.

(3) If a public official or employee has an interest in the profits or benefits of a contract, then he or she may not make, participate in making, or in any way attempt to use his office or employment to influence a government decision affecting his or her financial or limited financial interest. Public officials shall also comply with the voting rules prescribed in subsection U) of this section.

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

(1) Public officials ... may not vote on a matter:

(C) A personnel matter involving the public official's spouse or relative;

(II) A public official may vote:

If the public official, his or her spouse, immediate family members or relatives or business with which they are associated are affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses. A class shall consist of not fewer than five similarly situated persons or businesses....

(3) For a public official's recusal to be effective, it is necessary to excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests, and recusing him or herself from voting on the issue.

Additionally, W. Va. C.S.R. § 158-6-3 (Nepotism) states in relevant part:

3.1. As used in this section, the term "nepotism" means favoritism shown or patronage granted by a public official or public employee to relatives or cohabitating sexual partners in employment matters without giving public notice and consideration to other applicants or qualifications required to perform the job.

3.2. "Relatives" are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse.

3.3. A public official or public employee may avoid the appearance of nepotism by following these steps in hiring a relative or cohabitating sexual partner for a public position:

a. The public should be given reasonable advance notice of the availability of the job.

    1. The notice should include a description of the job responsibilities, the qualifications required, the pay and the manner in which application for the job can be made.

    2. The method of giving notice will of course vary from job to job but there must be reasonable public awareness of the availability of the job. Newspaper want ads and notices on the bulletin boards in public areas of the building are the most obvious and effective methods.

    3. The notice must be made soon enough to give those members of the public who are interested in the job an opportunity to make application.

b. An objective, independent third party should be involved in the selection where a cohabitating sexual partner or family member is among those who have made application for the job.

    1. To the extent possible, the public official or public employee should stay out of the selection process altogether. If he or she is one of several people with the authority to hire, others with authority should make the selection. If appropriate, the matter should be handled by his or her supervisor, or in the case of an elected official by a qualified person in another office.

    2. A public official or public employee should at least have some independent person take part in the selection. He or she should avoid using a subordinate for the independent person.

    3. If a public official or public employee must share in the decision, he or she should exercise his or her best objective judgment in making the selection, and be prepared to justify his or her selection.

3.4. All hiring by public officials and public employees of relatives prior to the twenty-ninth day of February, 1992 is not subject to review under the ethics act, in Chapter 68 of the West Virginia Code.

3.5. A public official should not use his or her position for the private gain of a relative or cohabitating sexual partner by improperly giving bonuses, raises or other employment benefits to such person.

3.6.

ADVISORY OPINION

The Ethics Act does not *per se* prohibit the employment of relatives of the governing body. W. Va. Code§ 6B-2-5(d) and W. Va. C.S.R. § 158-6-3. (County officials, however, are also subject to the stricter provisions of W. Va. Code § 61-10-15 and should review and comply with the Ethics Commission's related Guideline.) Nonetheless, some employment situations are fraught with conflict so as to prohibit such employment. But even when an official's relative's employment is permissible, the official needs to exercise care throughout the individual's employment in order to comply with the Ethics Act. For example, in Advisory Opinion 90-51 the Commission held that since the assessor in that case did not publicly advertise or make known the availability of an employment position within his department, or interview other applicants, the employment of his son during the summer months gave the appearance of the public official intentionally using his office for the private gain of a relative. Similarly, in Advisory Opinion 90-94, although the hiring took place before the effective date of the Ethics Act, the Commission analyzed the situation presented in order to assist other public officials, and wrote:

> In this instance the vacancy within the Sheriff's Department was made known only to the public by word of mouth and was also not publicly advertised. Although the applicant's employment was approved by the County Commission, the Sheriff screened and interviewed the applicants and recommended the one he wanted for the job to the County Commission. This applicant was a family member of the Sheriff and it is the opinion of the Ethics Commission that this situation does give the appearance of nepotism which is hereafter defined by the Commission as: **"favoritism shown or patronage granted by persons in high office to relatives or close friends without consideration of other applicants or qualifications required to perform the job;"** and would be a violation of 6B-2-5(b)(1) of the Ethics Act.

(emphasis in original)

Thus, the employment of a relative of a municipal official is permissible when the governing body and public official follow the Commission's Nepotism Guidelines and its advisory opinions. In Advisory Opinion 2012-04, the Ethics Commission examined the proposed hiring of a Municipal Water Board's Chairperson as its Supervisor. The Commission expressed concern about the close relationship between the members of the Board and concluded that the Board's Chairperson could not also be employed as the Board's Supervisor, and required, under the circumstances, that the Board publicly advertise for the position. The opinion reads, in pertinent part:

> This opinion should not be interpreted to require all municipal and county governing bodies to publicly advertise every employment opportunity,

> especially if it is a short-term, temporary position or an emergency situation. Instead, when the public body knows in advance that one of its preferred candidates is a relative, close friend, or fellow member of the public body, in order to avoid violating W. Va. Code§ 6B-2-5(b) (1), then the public body must follow the Commission's nepotism guidelines more fully set forth at W.V.C.S.R. § 158-6-3.

The Commission finds that the rationale is equally appropriate to apply to the employment of relatives. Thus, if an elected member of a governing body knows in advance that a relative is interested in being considered for employment, the governing body shall advertise the position. This step ensures transparency in the public employment process.

Other limitations apply. The parent/public official shall not have **any** role in the decision to select the employee to fill a vacancy for which the relative has applied. S/he shall be recused from: deciding whether a position needs to be filled; writing the job description or establishing job requirements; reviewing applications/resumes; interviewing applicants; ranking applicants; and participating in the decision-making process.

Once a relative is employed, the public official must completely be recused from all personnel matters related to that relative, including without limitation, salary, raises, promotion, discipline, termination or lay-offs, unless that relative is a member of a class of five or more. For recusal to be proper, the official shall disclose her/his conflict of interest and leave the room during the discussion, deliberation and vote thereon. The minutes of the meeting shall reflect the official's recusal.

In addition to formal recusal, public officials may not informally attempt to influence official action on behalf of a relative. An official may not "lobby" fellow members of a governing body to take favorable action on the relative's behalf; an official may not attempt to influence the relative's supervisor to take favorable action either.

Further, the public official shall not supervise any relative, nor shall the official supervise the relative's supervisor; instead, the relative shall be supervised by someone who is not a subordinate of the public official. This condition is consistent with the Commission's ruling in Advisory Opinion 2012-03 wherein a Deputy Chief/Supervisor of a County Agency providing emergency ambulance service was permitted to supervise his subordinate son in emergency situations. The opinion reads:

> The Commission further finds the father may not otherwise supervise his son, or be involved in any matters related to his son. Those situations should be handled by either the Chief or some other similarly situated individual who is a not a subordinate of the Deputy Chief. This removes any appearance that the father's actions or decisions will affect his son's ... financial interest.

Without more information, is it is impossible for the Commission to address the Requester's situation specifically. Instead, the Commission directs the Requester to closely examine the conditions imposed herein to determine whether she can comply

with them. For example, is it possible for someone who is not the Requester's subordinate employee to supeNise her daughter? If the Requester concludes that the limitations imposed by this opinion make it impossible for her daughter to continue to be employed by the Town without running afoul of the Ethics Act, then the daughter must resign. If the Requester believes that her daughter's continued employment complies with the foregoing requirements, then she must inform the governing body of her conclusion and provide a copy of this advisory opinion. The governing body shall review the opinion and independently determine whether the daughter's continued employment is permissible under the conditions imposed in this opinion. The governing body must comply with the requirements of the Open Governmental Proceedings Act when considering this employment situation. The Requester and/or the governing body shall report back to the Ethics Commission by February 28, 2013.

The Commission notes that advisory opinions are prospective only.

This advisory opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester should contact the Commission for further advice as it may alter the analysis and render this opinion invalid.

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 public agencies unless and until it is amended or revoked, or the law is changed.

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