# ADVISORY OPINION NO. 2013-08

**Issued On March 7, 2013 By The**

**WEST VIRGINIA ETHICS COMMISSION**

## OPINION SOUGHT

An **Elected County Prosecutor** asks whether his spouse may be employed as a School Nurse in the county school system.

## FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected Prosecutor. His wife is employed by the Board of Education in the county where he serves. Her job title is School Nurse. She is a registered nurse. Her office is in the central BOE office; however, she spends most of her time in the four schools located in the county.

She exercises some supervisory responsibility over service personnel such as aides and licensed professional nurses. She also provides education to classroom aides and teachers concerning the health needs of students. She carries a school-issued cellular phone and answers calls on a daily basis from parents and teachers regarding student health issues. On a daily basis she also provides nursing care to students. She attends monthly administrator meetings. Her role at these meetings is to advise and inform school administrators of current health issues that affect each school.

## CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official ... may not knowingly and intentionally use ... her office or the prestige of ... her office for ... her own private gain or that of another person.

W. Va. Code§ 6B-2-5(d)(1) reads, in pertinent part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... official ... or member of ... 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 ... 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....

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

> (a) It is unlawful for any ... county ... 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 a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control: Provided, That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer... as a principal or teacher or auxiliary or service employee in the public schools of any county or prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

W. Va. Code. § 1SA-1-1(d), governing school personnel, defines "Other professional employee" as:

> [A] person from another profession who is properly licensed and who is employed to serve the public schools. This definition includes a **registered professional nurse** (emphasis supplied), licensed by the West Virginia Board of Examiners for Registered Professional Nurses, who is employed by a county board and has completed either a two-year (sixty-four semester hours) or a three-year (ninety-six semester hours) nursing program;

W. Va. Code R. § 126-142-4, the State Board of Education's Legislative Rule governing performance evaluations of school personnel, contains the following definitions:

> 4.10. Professional Support Personnel: For the purposes of this policy, professional support person is defined as the professional educator whose title includes but is not limited to the following: athletic trainer, counselor, education audiologist, school nurse, school psychologist, social service and attendance, and speech language pathologist.
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> 4.11. Administrator: For the purposes of this policy, administrator is defined as the professional educator whose title includes but is not limited to the following: central office administrator, supervisor, director, coordinator, program specialist, principal, and/or vice principal.

## ADVISORY OPINION

Both the Ethics Act 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 control. The relevant provision in the Ethics Act further states, however, that the prohibition is not intended to apply to "the employment of any person with any governmental body". W. Va. Code§ 6B-2-5(d)(1). Thus, there is nothing in the Ethics Act which prohibits a Prosecutor's spouse from being employed by the BOE in the county where he or she serves as an elected prosecutor. Notwithstanding this conclusion, our inquiry does not end here.

We must next analyze whetherW. Va. Code§ 61-10-15, which is more comprehensive, authorizes the continued employment of the spouse of the County Prosecutor in the county school system. This statute prohibits a county official from having a personal financial interest, directly or indirectly, in public contracts over which his public position gives him voice, influence or control.

Unlike the Ethics Act, W.Va. Code§ 61-10-15 does not specifically make an exception for the employment of any person by any governmental body. Instead, it is stricter than the Ethics Act and also contains strict anti-nepotism provisions which prohibit, with limited exceptions, the employment of immediate family members in county agencies over which elected county officials, such as a Prosecutor, exercise voice, influence or control.

By statute, a County Prosecutor renders legal advice to the county school system. "It shall also be the duty of the prosecuting attorney... to advise, attend to, bring, prosecute or defend, as the case may be, all matters, actions, suits and proceedings in which such county or any county board of education is interested" W. Va. Code§ 7-4-1. The Commission finds that the duty to render legal advice constitutes the exercise of voice, influence or control over county school system contracts. The Commission reached a similar conclusion in A.O. 2010-24 wherein the Commission ruled that an Assistant Prosecutor exercises voice, influence and control over board of education contracts.

Since the Prosecutor exercises voice, influence or control over county school board contracts, § 61-10-15 only authorizes her employment if she is employed in one of the following "covered" positions: (1) principal; (2) teacher; or (3) auxiliary or service employee. Hence, the Commission must determine whether her position falls within one of these permitted employment positions.

Clearly, the Requester's spouse is not a principal. Additionally, the Commission finds that she is not an auxiliary or service employee as these job classifications generally apply only to persons who are listed in W.Va. Code§ 18A-4-8, e.g. accountant I, braille or sign language specialist, clerk I, etc.[1] In reviewing this code section and other applicable code sections governing service personnel, the positions of registered nurse and school nurse are not referenced or defined in these provisions.

Next, the Commission must determine whether the Prosecutor's spouse is considered a "teacher" for purposes of§ 61-10-15 and applicable school law. The term teacher for

[1] "Service person" or "service personnel", whether singular or plural, means a nonteaching school employee who is not included in the meaning of "teacher" as defined in section one, article one, chapter eighteen of this code and who serves the school or schools as a whole, in a nonprofessional capacity, including such areas as secretarial, custodial, maintenance, transportation, school lunch and aides. Any reference to "service employee" or "service employees" in this chapter or chapter eighteen of this code means service person or service personnel as defined in this section. W. Va. Code Ann.§ 18A-1-1(e). Additionally, W.Va. Code§ 18A-4-8(53) defines the term licensed practical nurse but the title school nurse is not included.

purposes of school law has, in relevant part, the same meaning as the term "professional educator". W.Va. Code§ 18A-1-1. So, if a school nurse is a "professional educator", then he or she may be considered a "teacher" for purposes of§ 61-10-15.

The State Board of Education's Legislative Rules state that a **school nurse** is a **professional educator.** W. Va. Code R.§ 126-142-4. As such, as a professional educator, she may be employed by the county school system unless her responsibilities rise to a level so as to place her in the category of "central office administrator" which means:

> [A] superintendent, associate superintendent, assistant superintendent and other professional educators who are charged with administering and supervising the whole or some assigned part of the total program of the countywide school system. This category includes other appropriate titles or positions with duties that fit within this definition.

W. Va. Code§ 18A-1-1.2.

In analyzing whether she is a "central office administrator", the key component is whether she administers a countywide program in the county school system. Boards of education are required to have school nurses. W. Va. Code§ 18-5-22. This code section further provides that in certain circumstances, a school nurse may delegate certain health care procedures to trained school employees. W. Va. Code§ 18-5-22(d).

The Commission finds that merely because she is the only school nurse in the county, does not means she "administers" a program in the county school system. Instead, she is tending to the health care needs of the children in the school system in her capacity as a registered nurse.

Additionally, while she has some supervisory responsibility over service personnel such as aides and licensed professional nurses, the Ethics Commission finds that these responsibilities do not make her a "program administrator" or a "central office administrator". Instead, as a licensed health care provider, she is authorized to seek assistance from trained personnel in performing her duties.[3]

As such, the Commission finds the Requester's spouse may be employed by the county school system since she is **not** a central office administrator but a "professional educator"/teacher who serves the school system by providing general health care

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[2] Other opinions referenced herein and the Supreme Court in W. Virginia Educ. Ass'n v. Preston County Bd. of Educ., 171 W. Va. 38, 41,297 S.E.2d 444,447 (1982) recognize that there are differences between individuals working in a specific school directly with students (principals and teachers), and those in a central office administering a school system and supervising other professional personnel.

[3] The fact that her office is located in the central board office does not change the analysis. The Commission has previously ruled that the location of one's office is not outcome determinative in analyzing whether a person is a "central office administrator." A.O.s 2010-03 and 2011-10.

services to children in the county school system. Hence, her position falls within the exceptions created by§ 61-10-15 and she may continue her employment.

This conclusion is consistent with the Commission's ruling in A.O. 2011-10 wherein the Commission ruled that the spouse of a superintendent may be employed as a School Psychologist. Additionally, the conclusion reached herein is consistent with the ruling of the Commission in A.O. 95-01 wherein the Commission previously ruled that the spouse of an elected County Board of Education Member may be employed as a County School Nurse. Despite this prior ruling wherein this Commission reached the same conclusion, the Commission has re-examined this issue as the laws governing the classification of school personnel have changed since the adoption of A.O. 95-01.[4] Nevertheless, despite the changes in the law, for purposes of analyzing school personnel classifications for purposes of interpreting§ 61-10-15, the answer remains the same.

While his spouse may continue her employment with the county school system, the Requester may not advise the Board of Education on matters affecting her directly as opposed to affecting her as a member of a class of five or more similarly situated school personnel. *See generallyW.Va.* Code§ 6B-2-5U) discussing the class rule.

## CONCLUSION

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, et seq. and W. Va. Code§ 61-10-15, 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 other public agencies unless and until it is amended or revoked, or the law is changed.

Pursuant to W. Va. Code§ 6B-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of section fifteen, article ten, chapter sixty-one of the code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion..

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

[4] When the Advisory Opinion was issued in 1995, school nurses were classified as service personnel.