ADVISORY OPINION NO. 2013-48

Issued On October 3, 2013 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether its death investigators may also provide contract services as County Medical Examiners for the State Agency.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Agency which is responsible for investigating certain deaths, i.e., suspicious deaths and deaths in an unusual or unnatural manner. Pursuant to its enabling legislation, the Requester is authorized to appoint County Medical Examiners and assistants and pay them for their services. The Requester states that the relevant high ranking State Agency has delegated to its death investigators the authority to select which of the particular appointed County Medical Examiners to retain in each death case. The State Agency pays the County Medical Examiners $127.00 per case. The Requestor asks whether the death investigators employed by the State Agency may also serve as the County Medical Examiners who are awarded contracts by the State Agency, and more particularly by other death investigators in their office (co-workers). There are five death investigators, including one supervisor. Some of them have been appointed by the State Agency to serve as County Medical Examiners and their assistants. The investigators rotate shifts, and at least one investigator must be available to perform his or her duties at all times. This raises the potential for the on duty investigator to award contracts to his or her co-workers when they are *off* duty with the State Agency.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> A public official or 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 to another ....

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

> [N]o elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee 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.... (Emphasis added)

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(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-2-5(h) reads in relevant part:

(1) No full-time ... public employee may... be employed by... any person who:

* * *

(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 including, but not limited to:

(i) Drafting bid specifications or requests for proposals;
(ii) Recommending selection of the vendor;

* * *

(2) Within the meaning of this section, the term "employment" includes professional services and other services rendered by the public official or public employee, whether rendered as employee or as an independent contractor

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(3) A full-time public official or employee who would be adversely affected by the provisions of this subsection may apply to the Ethics Commission for an exemption from the prohibitions.

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ADVISORY OPINION

The Ethics Act generally prohibits public employees from using their public office (including public resources), for their own private financial gain. W. Va. Code§ 6B-2-5(b). Based upon this principle, the Ethics Act imposes limitations on secondary employment of public servants with vendors over whom they exercise authority or control over the selection of the vendor. W. Va. Code§ 6B-2-5(h)(1).

In this case, the State employees who work as death investigators are in a position to select their co-workers as vendors. As a result, the investigators are able to award contracts to one another.

Further, W. Va. Code§ 68-2-5(b) prohibits an employee of a state agency from knowingly and intentionally using his or her office or the prestige of his or her office for his or her own private gain or to another. Also, W. Va. Code§ 68-2-5(d) prohibits an employee from having a direct pecuniary interest in a contract over which he or she may have direct authority to enter into, or over which he or she may have control.

Here, the State Agency has delegated to its own investigators the authority to select County Medical Examiners to receive the contract work from the State. In short, the State investigators are in the position of awarding contracts to their coworkers (and, conceivably, themselves). This situation is fraught with conflicts of interest. Therefore, pursuant to W. Va. Code§ 68-2-5(h)(1) and§ 68-2-5(d), the Requester's employees who have been delegated authority to select County Medical Examiners may not serve as County Medical Examiners under these circumstances.

The Ethics Commission commends the Requester for seeking this opinion. If the Requester is unable to find qualified candidates to serve as County Medical Examiners, after a meaningful search, then it may return to the Commission to seek a Contract Exemption to retain the services of its death investigators. To do so requires the State Agency to prove that hiring anyone else would result in undue hardship, excessive cost, or substantial interference with government operations. Advisory Opinion 2012-04.

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