

Advisory Opinion 2023-11

Issued on September 7, 2023, by

The West Virginia Ethics Commission

Opinion Sought

A **Prosecuting Attorney** asks whether she may employ spouses as assistant prosecuting attorneys.

Facts Relied Upon by the Commission

The Requester is a prosecuting attorney recently elected to office. Immediately prior to her becoming the elected prosecutor, she served as an assistant prosecutor for 15 years in the same county. She was assigned to handle the felony cases in the county. Now that she is the elected prosecutor, she needs to hire another assistant prosecuting attorney to handle some of the felony cases.

The Prosecutor's Office staffs five full-time assistant prosecutors, including a juvenile prosecutor who handles juvenile offenses and abuse and neglect cases exclusively. The Requester would like to hire the juvenile prosecutor's husband to handle felony cases exclusively. The juvenile prosecutor is not involved in felony or misdemeanor cases. The Requester asserts that she will select one of her assistant prosecutors to serve as the chief assistant prosecutor. Neither the juvenile prosecutor nor her husband would serve as the chief assistant prosecutor. Further, the chief assistant will not have supervisory duties nor will she or he be in charge of hiring or firing staff. The chief assistant will serve in an advisory role to the prosecutor and perhaps take over any of the Requester's duties if she is unavailable for any reason.

The Requester asserts that the juvenile prosecutor's husband has been a successful criminal defense attorney in the county for many years; therefore, he is very qualified for the position. She asserts that there has never been any crossover in the work of the juvenile prosecutor and her husband in the past and that no crossover would occur if they both work as assistant prosecutors.

Provisions Relied Upon by the Commission

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

- (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. Incidental use of equipment or resources available to a public official or public employee by

virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection.

. . . .

(4) A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides

W. Va. Code R. § 158-6-3 (2022) states:

3.1. As used in this section, the term “nepotism” means favoritism shown or patronage granted in employment or working conditions by a public official or public employee to a relative or person with whom the public official or public employee resides.

3.2. As used in this section, the term “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.

3.3. As used in this section, the term “supervise” or “supervision” means reviewing, auditing or evaluating work, or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline, or related matters.

3.4. Nepotism constitutes improper use of office for private gain.

3.5. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.6. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.6.1. A public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides unless required by law and an independent third party is involved in the process.

3.6.2. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition does not

extend to matters affecting a class of five or more similarly situated employees.

3.6.3. A public official or public employee may not use a subordinate as an independent third party required by subdivision 3.6.1 of this section. This prohibition does not apply to an elected public official who may not lawfully delegate powers of his or her office (for example, a sheriff, county assessor, or county clerk).

3.7. A public official may not vote on matters affecting the employment or working conditions of a relative or person with whom the public official resides unless such relative or person is a member of a class of five or more similarly situated persons affected. For a public official's recusal to be effective, he or she must excuse himself or herself from participating in the discussion and decision-making process by physically removing himself or herself from the room during the period in which the matter is under consideration, fully disclosing his or her interests, and recusing himself or herself from voting on the issue.

3.8. Certain county public officials and local board of education officials and employees are subject to the stricter limitations in W. Va. Code § 61-10-15. Other provisions in the Code or a public agency's own policies, rules, regulations, ordinances, or charters may further limit or prohibit the hiring of a relative or a person with whom a public official or employee resides.

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

In addition to the provisions of § 61-10-15 of this code, no 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

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

It is unlawful for any . . . county or district 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

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The Ethics Act and W. Va. Code § 61-10-15 limit or prohibit certain county public officials and employees from having a pecuniary interest in public contracts over which they exercise control.

The Ethics Act

The Ethics Act provides that "no elected or appointed public official . . . 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." W. Va. Code § 6B-2-5(d)(1). However, the prohibition expressly does not prohibit "the employment of any person with any governmental body." W. Va. Code § 6B-2-5(d)(1). Accordingly, the Ethics Act does not prohibit spouses from being employed by the same public agency. See [Advisory Opinion 2015-15](#) (citing [Advisory Opinion 2011-10](#) ("[t]here is nothing in the Ethics Act which prohibits a BOE superintendent's spouse from being employed by the same BOE.")).

The Ethics Act also contains a nepotism provision, at W. Va. Code § 6B-2-5(b)(4), and the Legislature adopted a Legislative Rule containing a nepotism provision, at W. Va. Code R. § 158-6-3 (2022). These provisions must be followed when spouses work together.

Therefore, the Ethics Act does not prohibit spouses from working in the prosecutor's office as assistant prosecutors as long as the Act's nepotism provision and the applicable Legislative Rule are followed.

However, the Commission must also address whether the more stringent and comprehensive provisions contained in W. Va. Code § 61-10-15 authorize the proposed employment of an assistant prosecutor's spouse.

W. Va. Code § 61-10-15

W. Va. Code § 61-10-15 imposes criminal penalties against certain county officials who become pecuniarily interested in the proceeds of a contract over which the official may exercise voice, influence, or control. The Ethics Commission has held that there is an inherent financial relationship between spouses who live together, as well as dependent children, grandchildren, and parents. See [Advisory Opinion 2014-04](#). Further, W. Va. Code § 61-10-15 has a strict anti-nepotism provision that prohibits county officials from employing their spouses unless an exception applies; none of the applicable exceptions apply here. [Advisory Opinion 2013-08](#). Unlike the Ethics Act, W. Va. Code § 61-10-15 does not contain an exception for governmental employment.

The Commission has held that prosecuting attorneys and assistant prosecuting attorneys are county officials for purposes of W. Va. Code § 61-10-15. See [Advisory Opinion 2010-24](#) (finding that an assistant prosecutor is a county official for reasons that an oath of office is required and the position is specifically created by statute).

Having established that spouses have a pecuniary interest in each other's employment and that an assistant prosecutor is a public official subject to § 61-10-15, the Commission must now decide whether an assistant prosecuting attorney "may have any voice, influence or control" over the employment contracts of other assistant prosecutors.

The Requester has asserted that the juvenile prosecutor in her county would not be involved in filling the vacant assistant prosecutor position for which her husband is being considered. Further, neither spouse would serve as the chief assistant prosecutor or supervise the other spouse. Still, even under this hierarchy in the prosecutor's office, the Ethics Commission must determine whether an assistant prosecutor "may" have any voice, influence, or control over the employment contracts of other assistant prosecutors by virtue of an assistant prosecutor's statutory duties. If so, spouses would be prohibited from working in the same office as assistant prosecutors under W. Va. Code § 61-10-15.

The Commission, in [Advisory Opinion 2019-12](#), held that an assistant prosecutor was prohibited from privately contracting with the board of education in the same county to provide legal services because - even though the assistant prosecutor had not ever been assigned to represent the board of education - he had a duty to represent the board if called upon to do so. The Commission found this duty to the school board based on two statutes, [W. Va. Code § 7-4-1\(a\)](#) and [W. Va. Code § 7-7-8](#). The statutes provide, in relevant parts as follows:

[W. Va. Code § 7-4-1\(a\)](#):

The prosecuting attorney shall also attend to civil suits in the county in which the state or any department, commission, or board thereof, is interested, and 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 § 7-7-8](#):

The prosecuting attorney of each county may, in accordance with and limited by the provisions of section seven of this article, appoint practicing attorneys to assist him in the discharge of his official duties during his 's term of office. Any attorney so appointed shall be classified as an assistant prosecuting attorney and shall take the same oath and may perform the same duties as his principal. Each assistant shall serve at the will and pleasure of his principal and may be removed from office by the circuit court of the county in which he is appointed for any cause for which his principal might be removed.

The Commission acknowledged, in [Advisory Opinion 2019-12](#) that "a county official does not have to actually exercise any influence to trigger the statute, but may have voice, influence or control simply by virtue of the position held. Syl. pt. 2, *State v. Neary*,

365 S.E.2d 395, 179 W. Va. 115 (1987).” The Commission further noted in Advisory Opinion 2019-12 that its decision was in line with the Supreme Court's decision in *Carr v. Lambert*, 179 W. Va. 277, 367 S.E.2d 225 (1988), *holding modified by State v. Macri*, 199 W. Va. 696, 487 S.E.2d 891 (1996), in which the Court held that an assistant prosecutor held a public office making him ineligible to serve on a county board of education. Therefore, the Commission found that an assistant “may” have some voice, influence, or control over the contracts of the board of education. For the same reasons, in [Advisory Opinion 2016-08](#) the Commission held that an assistant prosecuting attorney may not buy or sell property to the county commission because under the above statutes, he had a duty to provide legal representation to the county commission and to exercise the same statutory duties as the prosecuting attorney.

In the above Opinions, the Commission established that an assistant prosecuting attorney may have voice, influence, or control over contracts of the board of education and the county commission because the assistant prosecuting attorney has a duty to exercise the same statutory duties as the prosecuting attorney which include “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 § 7-7-8](#).

However, the Ethics Commission finds that an assistant prosecuting attorney does not automatically have a statutory duty to exercise voice, influence, or control over the employment contracts in the prosecutor’s office of other assistant prosecutors. Under the above Code provisions, the board of education and county commission may call upon the prosecutor’s office to represent them. The prosecuting attorney and the assistant prosecutors have a statutory duty to represent them. But this statutory duty is owed to the county commission, boards of education, and other county entities outside of the prosecutors’ office. A prosecuting attorney has the authority and duty to determine who in his or her office is involved in employment matters in the office. The prosecutor in this case has decided that she and the chief prosecutor are the only persons who may have voice, influence, or control over the employment contracts in the prosecutor’s office.

This ruling is consistent with the Ethics Commission’s prior holding in [Advisory Opinion 2013-15](#) where it found that a sheriff’s department chief tax deputy may not enter into a contract to perform additional duties for the county 911. The Ethics Commission qualified its holding, however, noting that “[t]his conclusion should not be construed as a finding that a law enforcement deputy or chief law enforcement deputy has voice, influence or control over every contract to which the sheriff is a party. Instead, the finding herein as to the MOU (Memorandum of Understanding) and subsequent agreement is fact specific.” In the facts of this case, the spouses serving as assistant prosecuting attorneys would not serve as the chief prosecutor, who is the only assistant which may be assigned responsibility over employment decisions and supervision.

The Ethics Commission holds that assistant prosecuting attorneys do not per se have any voice, influence, or control over the employment contracts of the other assistant prosecutors in the prosecutor’s office. Therefore, W. Va. Code § 61-10-15

does not prohibit the Requester from employing spouses to work as assistant prosecutors in the prosecutor's office as long as the applicable Legislative Rule on nepotism is followed.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics 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 §§ 6B-1-1 through 6B-3-11, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Terry L. Walker



Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission