ADVISORY OPINION NO. 2012-40

Issued On October 4, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Assistant Superintendent** asks whether it is permissible for her spouse to be a subcontractor for a company that has a contract with the County Board of Education to provide services to several schools within the County.

FACTS RELIED UPON BY THE COMMISSION

The Requester is one of several Assistant Superintendents for a county Board of Education (BOE). For the past several years, the BOE has contracted with an educational consulting company (hereinafter "Consulting Company") to work with school administrators to improve dropout rates in its schools. During that time, the Requester's spouse was a school administrator who worked with the Consulting Company as part of his official duties.

In 2011, the Requester's spouse resigned his position in the County school system and began contracting with the Consulting Company to provide educational consulting services around the State and country. The spouse is an independent contractor and subcontracts with the Consulting Company to provide services. He is not an employee and does not hold an ownership interest.

Earlier this year, the BOE's Director of Secondary Schools expressed her desire to expand the work of the Consulting Company to provide services to three underperforming schools within the county. Upon learning of the desired expansion, the Requester notified the Superintendent of her spouse's subcontracting work, and recused herself from any involvement in consideration of an expanded contract.

According to the Requester, the Director of Secondary Schools handled the negotiation of a new contract with the Consulting Company and developed a consulting plan. The Requester further states that the Superintendent handled the actual contract and submitted it for approval. A $140,000 contract was ultimately approved in August 2012, and the Consulting Company began providing services to the three schools last month.

At the time the contract was approved, the Consulting Company had not sought to use the Requester's spouse as a consultant, but intended to use another consultant from Virginia to work with the three underperforming schools. Since then, however, the Consulting Company has indicated a desire to subcontract with the Requester's husband to provide services to the three schools.

The Requester asks whether her spouse may subcontract with the Consulting Company to provide educational consulting services to the three underperforming schools in the county. The Requester states that another Assistant Superintendent oversees the contract and that she has had no involvement with the expanded contract.[1]

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits the use of public office for private gain.

W. Va. Code§ 6B-2-5(d)(1) provides that no appointed public official or business with which she is associated 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 she may have control. It does not make unlawful the employment of any person with any governmental body.

W.Va. Code§ 6B-2-5(d)(3) states:

> 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.

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

> It is unlawful for any member of a county commission, district school officer, secretary of a board of education, supervisor or superintendent, principal or teacher of public schools ... or any other 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 prohibits public servants, including Assistant Superintendents, from having more than a limited interest in the profits or benefits of a public contract over which they have direct authority or control, unless their governing body seeks, and receives, an exemption to contract with the public official. W. Va. Code§ 6B-2-5(d)(1).

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[1] Prior to the approval of the expanded contract, the new BOE Superintendent asked the Requester to follow-up on the contract. The Requester states that she told the new Superintendent about her spouse's subcontract work for the Consulting Company, and the Superintendent handled the contract thereafter.

In addition to the Ethics Act, certain County officials must abide by the stricter prohibitions contained in W.Va. Code§ 61-10-15. W. Va. Code§ 61-10-15, a separate criminal statute, imposes criminal penalties against County officials who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which they exercise "voice, influence, or control." Any person who violates this provision is guilty of a misdemeanor and may be removed from public office.

W.Va. Code§ 61-10-15

While the Ethics Commission previously has addressed the applicability of W. Va. Code § 61-10-15 to a Superintendent of a County BOE, the Commission has not specifically addressed its applicability to an **Assistant** Superintendent.2 W.Va. Code§ 61-10-15 states, in relevant part:

> It is unlawful for any member of a county commission, **district school officer,** secretary of a board of education, **supervisor or superintendent,** principal or teacher of public schools ... or any other county **or district officer.**..

(emphasis added)

The statute expressly references a Superintendent and additionally references district school officer, principals and teachers. While the statute does not list each County position subject to its prohibitions, it clearly reflects an intent to include high ranking administrative school officials. Indeed, the Commission has previously held the statute applicable to Assistant Principals. See A.O. 2009-11 (prohibiting an Assistant Principal from contracting with the BOE underW.Va. Code§ 61-10-15 because he had voice, influence and control over the contract).

Accordingly, the Commission hereby finds that Assistant Superintendents (including Associate and Deputy Superintendents, and any others who have such duties) are subject to the prohibitions of W.Va. Code§ 61-10-15.

Having established that the Requester is subject to W.Va. Code§ 61-10-15, the Commission must next address whether the spouse's subcontract is prohibited. Specifically, the Commission must determine whether the Requester has a pecuniary interest in the contract and if she has voice, influence, or control over the contract.

According to the Requester, the county has contracted with the Consulting Company to provide educational services to three schools under her County BOE's control. The Consulting Company desires to subcontract with the Requester's spouse to perform these consulting services at the three schools. The Requester's spouse will be paid by

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[2] In Advisory Opinion 2001-12, the Commission addressed a question from an Assistant Superintendent who was becoming the Superintendent and desired to know if a pre-existing fuel contract with her company could continue once she became the Superintendent. The opinion did not address whether an Assistant Superintendent is subject to § 61-10-15.

the Consulting Company to perform these services under the terms of the contract. Hence, the Requester's spouse will receive a financial benefit and/or proceeds from the contract. In Advisory Opinion 2012-37, the Commission noted that by virtue of her marriage, the Requester has a financial interest in her husband's business dealings. *See* Haislip v. White, *et al.,* 124 W. Va. 633, 642, 22 S.E.2d 361, 365-66 (1942) (Mutual liabilities between spouses "creates, on the part of each, an interest in the contracts of the other, out of which compensation arises, and the proceeds of which are used directly or indirectly within the family circle.")

Based upon the foregoing, the Commission finds that the Requester has a financial interest in the contract with the Consulting Company.

Next, the Commission must determine if the Requester has voice, influence, or control over the contract. Although the Requester has recused herself from the contract, the Commission has previously held that it "must consider not only the letting of the contract, but also the administration." A.O. 2009-11. In regard to administration of contracts, the Commission finds that Superintendents and their Assistant Superintendents are responsible for overseeing the implementation of contracts throughout the county. Thus, while the BOE lets the contract, the Superintendent and the Assistant Superintendents are responsible for the maintenance and oversight of the contract.

In this situation, the Requester is an Assistant Superintendent with significant responsibilities relating to the administration of the school system. While the Requester states she is not involved in the oversight of the contract, her position is still such that she has voice, influence, or control over the administration of the contract. Indeed, the Commission addressed a similar situation in A.O. 2009-11. In A.O. 2009-11, the Commission held W.Va. Code§ 61-10-15 prohibited an assistant principal from contracting with a school to provide an extracurricular activity. The Commission stated:

> While the Requester has stated that it will ensure that the Assistant Principal will have no administrative responsibilities in his official capacity in regard to the after-hours driver's education program, the Ethics Commission finds that this action does not alleviate the fact that the assistant principal has voice, influence or control in regard to ensuring that students at his school receive the quality of education to which they are entitled. The Assistant Principal has this responsibility regardless of: whether an educational program is provided by BOE employees or a third party hired by the school system; or whether a course is offered for credit.
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> The Commission recognizes that sometimes in the chain of command there may be instances where a public employee lower in the chain may be relieved of job responsibilities to ensure that he has no voice, influence or control over a contract. However, applying the strict prohibitions in

> § 61-10-15, particularly as they historically relate to protecting the appearance of self-dealing in county school systems, the Commission finds that an assistant principal has voice, influence and control over the administration of a public contract with a third party provider in whose courses the students at his school may enroll.

The Commission finds these comments equally applicable in this situation. Finally, the Commission notes the Supreme Court's comments in Summers County Citizens League, Inc. v. Tassos, 367 S.E.2d 209, 210 (W. Va. 1988) regarding application of W.Va. Code§ 61-10-15:

> The purpose of the statute is to protect public funds, and give official recognition to the fact that a person cannot properly represent the public in transacting business with himself.

While the Requester has appropriately taken steps to remove herself from involvement or oversight over the contract, the Commission is also mindful of the Legislature's intent to steer public servants away from inherently questionable situations. [3] These prohibitions are intended to prevent not only actual impropriety, but also situations which give the appearance of impropriety.

Accordingly, based upon the foregoing, the Commission holds that the Requester has voice, influence, and/or control over the contract with the Consulting Company.

CONCLUSION

Having established that the Requester is a county official who has voice, influence, or control over a contract in which she has a financial interest, the Requester's husband is prohibited under W.Va. Code§ 61-10-15 from subcontracting with the Consulting Company to provide services to schools or personnel within the Requester's County. *See* A.O. 94-22 wherein the Commission held that the prohibitions against having an interest in public contracts extend to subcontractors. Since the contract is prohibited underW.Va. Code§ 61-10-15, the Commission need not analyze whether the Requester additionally has a prohibited interest under the Ethics Act. W.Va. Code§ 6B-2-5(d).

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[3] Since this opinion prohibits the Requester's spouse from subcontracting with a company that has a contract with the County Board of Education to provide services to several schools within the County, the Commission does not need to address the issue of recusal. *See* Fisher v. Jackson, 107 W. Va. 138, 147 S.E. 541 (1929) wherein the Court held that the recusal of a public official from voting on a matter in which he had a pecuniary interest was insufficient to comply with§ 61-10-15.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *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§ 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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson