ADVISORY OPINION NO. 2012-03

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Agency** asks if it may employ a relative of one of its supervisors without violating the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a public agency that provides emergency ambulance service to residents of the County in which it is located. Established pursuant to Chapter 7, Article 15 of the W. Va. Code, the Agency is a sub-unit of the County Commission.

The Agency is governed by a seven-member Board of Directors, and a program manager who oversees the day-to-day administration. The Agency employs individuals in a variety of disciplines (e.g. EMT-B(asic); Paramedics; etc) to assist in the mission of the Agency. The employees of the Agency abide by a hierarchal chain of command, with the Chief being the head supervisor of the employees. The chain of command includes a Deputy Chief/Supervisor, a Training Officer, and various ranking leaders (e.g. Captains and Lieutenants).

The Agency has a rolling application system whereby it accepts applications throughout the year. They do not post for job positions. Instead, at various times throughout the year, the Board of Directors reviews the applications submitted. The Requester has a Hiring Committee, consisting of several Board members, the Chief, and program manager. The Deputy Chief/Supervisor also typically is involved in the hiring process. The Hiring Committee initially reviews all the applications for qualifications. If qualified, the applicants are then tested and interviewed by the Hiring Committee. According to the Requester, the Deputy Chief and other leaders are typically involved in the interview process.

Following the interviews, the Hiring Committee makes a recommendation to the full Board of Directors to accept multiple applicants for possible hire. If approved, the applicants are placed in a pool of other previously accepted applicants from throughout the year. This accepted pool of applicants is referred to as the "to hire list".

When a need arises within the Agency for a particular position, the President of the Board of Directors, program manager, and Chief collectively make a determination as to who to hire from the list.

Recently, several individuals applied for employment with the Agency. One of the applicants for employment was the son of the Agency's "Deputy Chief/Supervisor". According to the Requester, the son was interviewed by the program manager, Chief, Training Officer, and several members of the Board of Directors. His father, the Deputy Chief, did not participate in the interview or in any hiring decisions. Following the interview process, the son was placed on the "to hire list" by the Board and continues to remain on the list. The Requester states that when a position comes open, the son is eligible to be hired.

The Requester asks if the Ethics Act permits the Agency to hire the Deputy Chief's son. The Requester states that the Deputy Chief has not been involved in his son's hiring. The Requester also states that the son is a qualified EMT. However, the Requester notes that the son still resides with his father, and, if hired, would be under the supervision and command of his father who is the Deputy Chief/Supervisor.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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.
>
> The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

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 6B 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.

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

> It is unlawful for any member of a county commission, ... or any member of any other county or district board or 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...

ADVISORY OPINION

In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W. Va. Code§ 6B-1-2(d). Favoritism in the hiring of a relative in public employment- typically referred to as nepotism- raises one such potential conflict.

The Requester's situation raises unique circumstances warranting the Commission's review. While the Commission has addressed the situation on multiple occasions, the Commission's last Advisory Opinion on this issue was in 1998. As such, and in effort to remind public servants who are considering employing relatives, the Commission takes this opportunity to summarize the ethics provisions and related laws governing the

employment of relatives.

I.

Overview of Pertinent Provisions

In numerous Advisory Opinions between 1990 and 1998, the Ethics Commission addressed various employment questions relating to relatives and immediate family members.[1] While some of the opinions presented unique circumstances, the general holding, as summarized in Advisory Opinion 98-05, was as follows:

> No provision of the Ethics Act makes a person ineligible for consideration for a job with a public agency simply because they are related to the person doing the hiring or to others employed in the agency. The Act, does however, contain a prohibition against public servants misusing their public positions for their own private gain or the private gain of others.

Indeed, the Ethics Act private gain prohibition is one of the primary provisions implicated in the hiring of relatives. W. Va. Code§ 6B-2-5(b). As a result, the Commission promulgated a legislative rule to guide public officials and employees in the hiring of relatives. W. Va. C.S.R. § 158-6-3. The Rule outlines steps whereby a public servant may avoid the appearance of favoritism in the hiring process. In particular, the Rule encourages public notice and transparency, and recommends that the public official or public employee stay out of the selection process altogether. See§ 158-6-3.3.

Additionally, there are other statutory provisions which must be taken into account with the employment of relatives. Specifically, W. Va. Code 6B-2-50)(1)(c) states that a public official may not vote on a "personnel matter involving the public official's spouse or relative". While not expressly defined in the Ethics Act, the Commission hereby finds that the phrase "personnel matter" includes the hiring, firing, discipline, promotion, salary adjustment, or other decision affecting the employment status of an employee.

Accordingly, if a personnel matter arises involving a relative, the public official must recuse him/herself from any and all discussion, deliberation and votes and must not have any involvement in the matter.[2]

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[1] "Relative" is defined in the Ethics Act as "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-1-3(I). "Immediate family", with respect to an individual, is defined as "a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents." W. Va. Code§ 6B-1-3(f).

[2] Under the Ethics Act, in order for "a public official's recusal to be effective, it is necessary to excuse him/herself from participating in the discussion and decision-making process by physically removing him/herself from the room during the period, fully disclosing his/her interests, and recusing him or herself from voting on the issue." W. Va. Code § 6B-2-50)(3). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the council member left the room during all consideration, discussion and vote on the item under consideration·

A separate criminal statute, W. Va. Code§ 61-10-15, imposes criminal penalties against **County officials** who are pecuniarily interested, either directly or indirectly, in the proceeds of a public contract over which those officials exercise "voice, influence, or control." An employment contract with a county agency constitutes a public contract. Therefore, if a relative resides with the county official or if the county official has a financial relationship with the relative (e.g. business together or co-sponsor of a loan), then the county official has a financial interest in the employment of the relative.

While one or more of the foregoing provisions may be implicated in a given situation, the overriding rule in any employment situation involving a relative is for the public servant to be removed entirely from the hiring process so as to avoid an appearance of favoritism. This maintains the integrity of the government hiring process and limits complaints of bias or special treatment in favor of the relative. Further, if the relative is hired, the public servant should continue to remove him/herself from any and all personnel matters involving the relative, including the supervision of the relative, to avoid any appearance of impropriety.

II.
Requester's Situation

A. Interest in Public Contract

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. W. Va. Code§ 6B-2-5(d)(1) expressly states, however, that the prohibition does not apply to "the employment of any person with any governmental body". As a result, the Ethics Act does not prohibit the Requester from hiring the son of its Deputy Chief/Supervisor. Notwithstanding this conclusion, our inquiry does not end here.

Since the Requester's Agency is a county entity, the Commission must analyze W. Va. Code§ 61-10-15. This criminal provision strictly prohibits the employment of a relative if the county official has a direct or indirect financial interest. In this situation, the Requester desires to hire the son of the Deputy Chief. The son resides with his father (Deputy Chief). As such, the father has a financial interest in the employment of his son, and therefore a financial interest in any employment contract. In light of such, if the strict prohibitions of§ 61-10-15 which apply to certain County officials apply here, then the son's employment with the Agency would be prohibited.

The Commission hereby finds that the father, as Deputy Chief/Supervisor, is not a county official subject to the restrictions of§ 61-10-15. In making this finding the Commission notes that the father, as the Deputy Chief/Supervisor, is an employee of the Agency, and is not a county officer for purposes of§ 61-10-15. *See* AO 97-34 (County Health Administrator not one of statutorily enumerated positions; Administrator is an employee, not an officer, for purposes of§ 61-10-15).

Accordingly, the Commission finds that W. Va. Code§ 61-10-15 does not prohibit the employment of the Deputy Chief's son. However, consideration must still be given to the other relevant provisions of the Ethics Act.

B. Private Gain

Having found the employment contract permissible under W. Va. Code§ 61-10-15, the Commission must look at the private gain provision of the Ethics Act, and determine whether there has been favoritism in the hiring process by virtue of the familial relationship. *See* W. Va. Code§ 6B-2-5(b) and W. Va. C.S.R. § 158-6-3.

According to the Requester, the Agency has a rolling application process, and fills positions from an approved pool of applicants. Since positions are filled on an as needed or emergency basis, there was no posting for a particular job. Rather, according to the Requester, applications are accepted on a continuous basis.

With respect to the son's application, the Requester states that the Chief Deputy removed himself from any and all consideration of his son's application. In particular, the Deputy Chief did not participate in the interview of his son, or in the approval of his son to the hire list. In addition, should a position come open which is appropriate for his son's qualifications, the Deputy Chief will not be involved in the decision-making process as to whom to select from the "to hire list".

In view of the Requester's representations, the Commission is satisfied that the Agency has taken appropriate steps to comply with the Commission's nepotism process. However, the Commission recommends that the Deputy Chief refrain from any further involvement in the hiring process while his son remains on the "to hire list" so as to avoid an appearance of impropriety or use of office for private gain to benefit his son in being selected for employment.

Accordingly, based on the Requester's representations, the Commission hereby finds that the employment of the Deputy's Chief's son is not prohibited under the Ethics Act. Should the responsibilities or job position of the father substantially change (e.g. he is promoted to chief or made a member of the Board of Directors), the foregoing analysis may be affected. If such a circumstance arises, the father should immediately contact the Ethics Commission.

III.
Employment Issues

Although neither the Ethics Act nor W. Va. Code§ 61-10-15 prohibit the employment of the Deputy's Chief's son, other issues remain. This is especially true where, as here, the father and son have a financial relationship as a result of the fact that they live together.[3] W. Va. Code§ 6B-2-5(d)(3) reads, in pertinent part:

[3] Although, W. Va. Code § 6B-2-5(d)(1) expressly excepts employment from the prohibition against

> 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. ...

For example, in most employment situations, the Commission advises a public servant not to supervise his/her relative. Instead, the Commission typically requires the public servant's supervisor to supervise the relative.

Here, however, the job functions make removal impractical in an emergency situation. Therefore, given this unique circumstance, the Commission finds that the father (Deputy Chief/Supervisor) may continue to supervise his son during emergency calls and/or while "in the field". 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, and indirectly his own, financial interest.

Finally, the Commission recommends that the Agency consider implementing a by-law or policy governing the employment of relatives. The Requester is free to impose stricter standards than those found in the Ethics Act or W. Va. Code§ 61-10-15, including an outright ban on hiring relatives. At the very least, the Requester should review its policies concerning employment of a relative or immediate family member.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et. seq.,* 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.

/s/ R. Kemp Morton, Chairman

Kemp Morton, Chairman

***This opinion was administratively corrected on March 1, 2012.

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having an interest in a public contract over which one has authority or exercises control, the Commission notes that governing bodies need to exercise caution when considering financial transactions with any entity with which one of its members may have a financial relationship.