ADVISORY OPINION NO. 2012-11

Issued On March 1, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Commissioner** asks if he may cohabit with a county employee without violating the Ethics Act orW. Va. Code§ 61-10-15.

FACTS RELIED UPON BY THE COMMISSION

The Requester plans to live in the same house as an employee of the County Commission. To remove her from the County Commission's direct supervision, the employee could be relocated to be supervised by another County elected official.

The County Commission approves the budget for all County elected officials, although each is an independent office. These county officials may appoint and employ subordinate staff by and with the advice and consent of the county commission.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits a public official 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 that of another person.

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.

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.
>
> 3.5. 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 ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service... if, as a member ... 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. The Requester's situation is unique and raises delicate concerns.

In Advisory Opinion 2012-03, the Commission reviewed its nepotism opinions. Significantly, the Commission has never formally addressed an employment situation involving cohabitation. Recognizing the privacy rights of the parties involved, the Ethics Commission's analysis is extremely cautious, deliberative and unobtrusive.

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". Thus, there is nothing in the Ethics Act to prohibit the Requester's future roommate from continuing her employment with the County after they move in together. Notwithstanding this conclusion, our inquiry does not end here.

W. Va. Code§ 61-10-15, a criminal provision, prohibits covered persons, such as county commissioners, from having a personal financial interest, **directly or indirectly,** in public contracts over which their public positions gives them voice, influence or control. *See generally* Advisory Opinion 2012-01. Although the Requester states that the county commission employee could be moved to the office of another elected county official rather than continue under the county commission's direct supervision, the county commission still has "voice, influence or control" over her employment contract. The County Commission must approve the budget for all County officials. These county officials may appoint and employ subordinate staff "by and with the advice and consent of the county commission". W. Va. Code§ 7-7-7. *See e.g.* Advisory Opinion 95-24 (County Commissioner had a financial interest in his spouse's employment contract with the Sheriffs department.), and Advisory Opinion 2007-03 (Assessor has the ultimate authority to hire individuals to work in the Assessor's office.) *See also* Advisory Opinion 96-23 (If a County Commission candidate were elected, his spouse's employment by the County Public Service District would violate§ 61-10-15.)

The foregoing advisory opinions concern the employment of a spouse of a county official. These opinions followed West Virginia Supreme Court precedent that considered whether the employment of the spouse of a county officer is a contract in

which the officer is 'directly or indirectly pecuniary interested' for purposes of§ 61-10-15. Specifically, in Haislip v. White, *et al.,* 124 W. Va. 633, 642 (1942), the Court wrote:

> We prefer to rest our decision on the broad principle that there is still a relation existing between husband and wife, and mutual liabilities growing out of the family relation, which 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 cited analysis, the Court held there was a prohibited financial interest.

Here, however, the parties are not married; instead they intend to reside together. The question, then, is whether cohabiting creates the same personal financial interest that marriage does. The Requester intends to share a home with a subordinate employee. Although the nepotism provisions specifically reference cohabitating sexual partners, the Commission's analysis will focus on the **financial** relationship between the individuals created by their decision to live together, and not on the nature of their personal relationship.

Specifically, does W. Va. Code§ 61-10-15, a criminal provision, cover non-married, unrelated adults who live together? As the West Virginia Supreme Court has opined, penal statutes must be strictly construed against the State. State v. Neary, 179 W. Va. 115, 119365 S.E.2d 395, 399 (1987). Nonetheless, in Neary the Court went on to state:

> It also answered the argument that without requiring a showing of some specific pecuniary gain this "would be a violation of the time-honored canon that penal statutes are to be narrowly construed," by stating: "But even penal statutes must be 'given their fair meaning in accord with the evident intent of Congress.' ... In view of the statute's evident purpose and its comprehensive language, we are convinced that Congress intended to establish a **rigid rule** of conduct...." 364 U.S. at 550-51, 81 S.Ct. at 309-10, 5 L.Ed.2d at 289.

179 W. Va. 115, 120, 365 S.E.2d 395, 400 (1987) (emphasis added)

The Court further ruled:

> There is little, if any, leeway present to construe the statute since, as stated in Alexander v. Ritchie, 132 W.Va. 865, 871, 53 S.E.2d 735, 739 (1949), "Code, 61-10-15, implements the public policy of this State, and its provisions are clear and unambiguous. Although harsh, its objects and purposes are salutary."

179 W. Va. 115,118,365 S.E.2d 395, 398 (1987)

In Advisory Opinion 2012-03, a county agency asked whether it could employ the adult son of one of its supervisors. Analyzing W. Va. Code§ 61-10-15, the Commission

noted that an employment contract with a county entity constitutes a public contract, and that 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.

The opinion reads, in relevant part, "The son resides with his father. As such, the father has a financial interest in the employment of his son, and therefore a financial interest in any employment contract." The Commission noted that if the prohibitions of§ 61-10-15 applied in that situation, then the son's employment with the Agency would be prohibited. Ultimately, the Ethics Commission concluded that the supervisor was a county employee rather than a county official and therefore was not subject to the prohibitions of§ 61-10-15. *See also* Advisory Opinion 97-34 (County Health Administrator not one of statutorily enumerated positions; Administrator is an employee, not an officer, for purposes of§ 61-10-15).

The Commission has considered the fair meaning of the statute's inclusion of the term **"indirect** pecuniary interest" (emphasis supplied) in accord with the evident intent of the Legislature. As a result, the Commission hereby finds that there is a rebuttable presumption that where two adults share a home or otherwise live together, regardless of whether it is a romantic or platonic relationship, they have at least an indirect financial interest in the employment contract of the other. This conclusion adopts a common sense approach to the definition of financial interest. Where two or more adults share living quarters, their expenses are bound to overlap. Therefore, each has an interest in the employment of the other(s) to ensure that all are able to meet their respective financial obligations. Adult emancipated children who live with their parents, cohabiting sexual partners, adult siblings, or unrelated roommates who share expenses all fit in this category.

As a result of the foregoing finding, the Commission further finds that notwithstanding the fact that the Requester's potential roommate entered into her employment contract before their relationship began, her continued employment in **any** County Office after they move in together violates W. Va. Code§ 61-10-15. *See generally* Advisory Opinion 92-11 (although employment contract between the requester's spouse and the County Board of Education was entered into four years earlier, the requestor may have voice, influence or control over the renewal, modification or enforcement of the employment contract, giving rise to a potential violation of W. Va. Code§ 61-10-15.) *See also* Advisory Opinions 2004-10A and 2004-1OB (continuation of contract generates potential violation because of the requester's voice, influence or control over the renewal, modification or enforcement of employment contract).

The County Commission's willingness to transfer the employee to another County Office to prevent any conflict of interest, though laudable, fails to change the outcome. As earlier noted, the County Commission has voice, influence and control over all county office's employment contracts.

Finally, although the Legislature amended W. Va. Code§ 61-10-15 to allow the

Commission to grant an exemption when the prohibitions thereof would result in undue hardship, this provision does not apply to employment contracts. Thus, the Commission finds that it lacks the authority to exempt any employment contract not already expressly authorized by the statute. See Advisory Opinion 2007-03 (It does not appear from the recent amendment to the statute that the Legislature intended to exempt employment contracts other than those expressly listed in W. Va. Code§ 61-10-15.)

As the West Virginia Supreme Court, in Serge v. Matney, 273 S.E. 2d 818, 820 (1981) wrote:

> If the legislature wishes to establish exemptions or provide that personnel who have tenure with the county as employees of one of the numerous county agencies can retain their jobs even though their husbands have been elected to ... county [office], then the legislature should do so.

Indeed, following the issuance of Advisory Opinion 2007-03, the Legislature amended the statute and expressly created additional employment exemptions. See W. Va. Code §§ 61-10-15(k) and (1).

The Ethics Commission recognizes that this opinion could impose a hardship on individuals affected by its ruling. As a result, the Commission hereby instates a transition period of one year to allow affected individuals to bring their conduct into compliance herewith. Or, in the alternative, the transition period will allow the Legislature to amend W. Va. Code§ 61-10-15 to expressly exempt adults who reside together from the prohibitions thereof.

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. Pursuant to W. Va. Code§ 6B-2-3, any person acting in good faith reliance on an advisory opinion is immune from the sanctions of W. Va. Code§ 61-10-15, and shall have an absolute defense to any criminal prosecution to actions taken in good faith reliance upon such opinion. Further, 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.

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