ADVISORY OPINION NO. 2012-24

Issued On August 2, 2012 By The
WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Mayor,** whose father is a City employee and member of the City employee union, asks whether: (1) He may supervise his father; (2) He may participate in negotiating the collective bargaining agreement on behalf of the City; (3) He may vote on matters affecting City employees when his father may be affected; and (4) Additional limitations apply if they live together.

FACTS RELIED UPON BY THE COMMISSION

The Requester was recently elected Mayor. He assumed this position on July, 1, 2012. His father is employed by the City as a water meter reader. The father's direct supervisor is the City's maintenance supervisor.

The Requester's father is also a member and officer (secretary) of a local union comprised of City employees. To eliminate the potential for conflict, his father has agreed to resign from his officer position with the union in August of 2012.

The union has a collective bargaining agreement with the City. The City will begin the process of negotiating a new collective bargaining agreement in August. The main negotiations occur between the following two groups: (1) a union committee comprised of union officers, including the union's secretary, and union members at large; and (2) a City Committee comprised of the Mayor, one or more Council Members, and, an attorney retained by the City. Once negotiated, the collective bargaining agreement does not become final until and unless it is approved by the union members and City Council. As the Requester's father will be resigning his officer position, his father will have no direct involvement in the negotiation process.

The Requester's father, as part of his duties as the Union Secretary, also serves on the union's grievance committee. The make-up of this committee is the same as the collective bargaining agreement committee. The committee represents union employees in labor-relation matters, including grievances. The grievance committee first attempts to resolve disputes with the City's Maintenance Supervisor. If unsuccessful, then the Committee will attempt to reach a resolution by conferring with the Mayor who may, at his discretion, involve one or more Council Members.

The City has a Mayor-Council form of government. The Mayor is responsible for the day-to-day supervision of three employees: Police Chief; Maintenance Supervisor; and City Clerk/Treasurer.

Based upon his father's employment with the City, and union membership, the Mayor seeks guidance on complying with the Ethics Act. Also, while the Mayor and his father do not live together, he also seeks guidance in regard to the application of the Ethics Act if they decide to cohabit.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-1-3(f) reads:

> "Immediate family", with respect to an individual, means a spouse with whom the individual is living as husband and wife and any ... dependent parent or parents.

W.Va. Code § 68-1-3(1) reads:

> "Relative" means spouse, mother, father, sister...

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

> A public official ... may not knowingly and intentionally use his ... office or the prestige of his ... office for his ... own private gain or that of another person.

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.

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.
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> 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.

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

> *Limitations on Voting.*

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(C) A personnel matter involving the public official's spouse or relative;

(2) A public official may vote:

(A) 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; or

(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.

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The Ethics Act prohibits 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§ 68-2-5(d)(1). Nevertheless, the Ethics Act expressly states that the prohibition does not apply to "the employment of any person with any governmental body". Thus, there is nothing in the Ethics Act which prohibits the Requester from serving as the City's Mayor while his father is employed by the City, even if they live together. See A.O. 2012-11 where the Commission made this finding with the qualification that a stricter rule of law applies in regard to County officials governed by the more stringent provisions in W.Va. Code§ 61-10-15.

Limitations apply. The Mayor may **not** directly supervise his father. Based upon the facts presented, it appears this requirement has been satisfied as his father's direct supervisor is the City's Maintenance Supervisor. Also, the Mayor may not exercise supervisory control over him such as conducting his evaluations, setting his schedule, authorizing overtime or approving recommendations of the City Maintenance Supervisor which directly affect the terms and conditions of his father's employment. If his father

has a grievance, a Council Member or other City Official, e.g. Recorder, not the Mayor, must serve as the City's liaison in the grievance process.

Additionally, the Mayor may not be involved in any other personnel matters which uniquely affect his father as opposed to affecting him as a class of five (5) or more similarly situated employees. W.Va. Code§ 68-2-50). For example, if Council is contemplating a pay raise for the father/employee, the Requester may not be involved in this process. If matters relating uniquely to his father come before Council, then the Mayor must recuse himself.

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 or executive session during the period when the item is being discussed or decided, fully disclosing his/her interests, and recusing him or herself from voting on the issue. W. Va. Code§ 68-2-50)(3). Additionally, the minutes/record of the meeting must reflect the basis for the recusal and that the public official left the room during all discussion and vote on the item under consideration.

In regard to the father being a member of the employee union, the same rules of law outlined above apply. The Requester may serve on the City's collective bargaining agreement committee. If a matter arises which affects his father uniquely, as opposed to affecting his father as a class of five or more employees, then he may not be engaged in negotiating the terms of such provision. Nevertheless, in regard to discussing and approving the collective bargaining agreement when it comes before City Council for approval, he may participate. If there is a provision in the collective bargaining agreement which uniquely affects his father, and if the City Council challenges or discusses that particular provision, the Requester must recuse himself from the discussion and vote on that particular matter. Once it has been resolved, he may vote on the collective bargaining agreement in its entirety. *See* A.O. 2010-13 wherein the Commission discussed the rules governing voting on a budget when a public official's spouse is employed by the governing body where he or she serves.

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/Jonathan E. Turak,
Jonathan E. Turak, Acting Chairperson