ADVISORY OPINION NO. 2012-26

Issued On June 28, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A potential **Candidate** for County Commission asks, if elected, whether his spouse may continue her employment with the County Clerk's Office.

FACTS RELIED UPON BY THE COMMISSION

The Requester is considering running for County Commission as a write-in candidate. His wife has been employed by the County Clerk's Office for twenty-one years. They were married years after her employment began, but before the Requester chose to run for County Commission.

The Requester asks, if elected, whether his wife may continue her employment with the County Clerk's Office.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> no elected ... official ... or member of his or her immediate family ... 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. Code§ 61-10-15 provides in part that:

> (a) 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 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: *Provided,* That nothing in this section prevents or makes unlawful the employment of the spouse of a member, officer, secretary, supervisor, superintendent, principal or teacher as a principal or teacher or auxiliary or service employee in the public schools of any county or

prevents or makes unlawful the employment by any joint county and circuit clerk of his or her spouse.

(k) The provisions of subsection (a) of this section do not prevent or make unlawful the employment of the spouse of any member of a county commission as a licensed health care provider at government-owned hospitals or other government agencies who provide health care services...
(I) The provisions of subsection (a) of this section do not make unlawful the employment of a spouse of any elected county official by that county official: *Provided,* That the elected county official may not:
(1) Directly supervise the spouse employee; or
(2) Set the salary of the spouse employee: *Provided,* That the provisions of this subsection shall only apply to spouse employees who were neither married to nor engaged to the elected county official at the time of their initial hiring.

ADVISORY OPINION

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. The relevant provision in the Ethics Act further states, however, that the prohibition is not intended to apply to "the employment of any person with any governmental body". Thus, there is nothing in the Ethics Act which prohibits a County Commissioner's spouse from being employed by the County Clerk. Notwithstanding this conclusion, our inquiry does not end here.

The Commission must next analyze the application of W.Va. Code§ 61-10-15, which is more comprehensive. It prohibits covered persons, including a county commissioner, from having a personal financial interest, directly or indirectly, in public contracts over which his public position gives him voice, influence or control. Unlike the Ethics Act, it does not specifically make an exception for the employment of any person by any governmental body. It is a strict anti-nepotism provision which is more restrictive than the Ethics Act and only permits the employment of spouses or immediate family members in limited specific circumstances: the spouse of an elected school board member may be employed as principals or teachers, auxiliary or service employees in the public schools; the spouse of a joint county and circuit clerk may be employed in that office; and, the spouse of a county commissioner may be employed as a licensed health care provider at government-owned hospitals or other government agencies who provide health care services.

Previous opinions of the Commission expressly hold that, in accordance with the limitations in W.Va. Code§ 61-10-15, a County Commissioner's spouse may **not** be employed in county government. *See* A.O. 95-24 wherein the Commission held that a County Commission's spouse may **not** be employed by the Sheriff's Office and, A.O.

96-23 wherein the Commission held that if a County Commission candidate were elected, her spouse could not continue his employment with the County Public Service District. Similarly, the West Virginia Supreme Court held that it would violate W. Va. Code§ 61-10-15 for a cook to remain employed by the County Board of Education after her spouse was elected to serve on the same Board. Cimino v. Bd. of Ed. of Marion Co., 210 S.E. 2d 485 (1974).

In A.O. 2007-03, a County Assessor asked whether he could marry his fiancee who also worked in his office. There was no indication that their relationship pre-dated her hire. Instead, while he was the elected Assessor, they fell in love "on the job". Pursuant to past Commission opinions, Office of the Attorney General opinions, and decisions of the West Virginia Supreme Court, the Commission ruled that it would violate W.Va. § 61-10-15 for the Assessor's fiancee to continue her employment with the Assessor's Office once they were married. (Another alternative would have been for him to resign as Assessor once they were married.)[1]

Thereafter, in Senate Bill 339 (2009 Regular Session), the Legislature amended § 61-10-15 by adding a new sub-section that would permit the continued employment of the Assessor's fiancee after they wed. It reads:

> (l) The provisions of subsection (a) of this section do not make unlawful the employment of a spouse of any elected county official by that county official: *Provided,* That the elected county official may not:
> (1) Directly supervise the spouse employee; or
> (2) Set the salary of the spouse employee: *Provided,* That the provisions of this subsection shall only apply to spouse employees who were neither married to nor engaged to the elected county official at the time of their initial hiring.

Thus, the Commission must determine whether this exception extends to the Requester and permits what§ 61-10-15 otherwise has historically prohibited, i.e. the continued county employment of a spouse of a newly elected County Commissioner. (The same analysis governs the continued employment by a County Board of Education of a spouse of a newly elected Member of a County Board of Education.)

While subsection (l) is challenging to interpret, the Commission finds that the exception created by this language does not extend to persons elected to office whose spouses are **already** employed by the County government or the County school system.[2]

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1 Further, although the Ethics Commission is authorized to grant hardship exemptions to non-employment contracts pursuant to§ 61-10-15(h), that authority does not extend to employment contracts, as the Commission ruled in A.O. 2007-03.

2 The nepotism/employment limitation only applies to spouse employees over whom the elected official exercises voice, influence or control. In this regard, the county commission exercises voice, influence or control over all county offices. In contrast, in A.O. 96-56 the Commission found that a Sheriff's spouse could be employed by a Magistrate. Still, any county official whose spouse is considering employment by

Instead, this limited exception only applies to an elected official and her or his employee who, during the course of the employer/employment relationship, make the decision to get married, not to couples who are already married before the spouse of the county employee runs for county office. In reaching this conclusion, the Commission relies upon the Bill title which reads that one purpose of the Bill is to create "an exemption for certain spouses who were employed by the county prior to their engagement or marriage to a county official to county hiring prohibition." When there is ambiguity in a statute, it is appropriate to look at the title of the bill. West Virginia Health Care Cost Review Authority v. Boone Memorial Hospital, 472 S.E.2d 411 (W.Va. 1996).

The Commission can only conclude that the Legislature reasoned that when a person is employed by county government, and the spouse considers running for county office, then the household jointly decides whether this decision is in the best interest of the household; particularly when the resulting consequence is that, if the candidate is successful, then the spouse will have to resign. In contrast, when two people fall in love on the job, the consequences may be viewed as more harsh if the law requires them to choose between marriage and one or the other vacating their current position or employment.[3]

In conclusion, if the Requester becomes an elected county commissioner, his spouse may not continue her employment with the County Clerk's office nor may she be employed by another county office or agency.

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

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the county, or is currently employed by the County should seek advice from the Ethics Commission to ensure the employment does not run afoul of § 61-10-15.

[3] In contrast, W.Va. Code§ 6-10-1 states "The employment of his wife at public expense by any official or employee of the state is expressly prohibited."