ADVISORY OPINION NO. 2012-28

Issued On August 2, 2012 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Candidate** for Prosecuting Attorney asks, if elected, whether his spouse may continue her employment with the Prosecuting Attorney's Office.

FACTS RELIED UPON BY THE COMMISSION

The Requester, an Assistant Prosecuting Attorney, is running for Prosecuting Attorney, and expects to be elected since he has no opposition in the general election. His wife has been employed by the Prosecuting Attorney's Office for 19 years. They worked together for approximately 13 years before marrying, and have worked together in the Prosecuting Attorney's Office ever since.

The Requester states that, if elected, the county commission will set his wife's salary, and that he will not supervise his wife.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

> [N]o electe_d .. 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....
(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.

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, although there is nothing in the Ethics Act that prohibits a Prosecuting Attorney's spouse from being employed by the Prosecuting Attorney's Office, 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 Prosecuting Attorney, 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 Requester seeks to avail himself of the most recent amendment to W. Va. Code§ 61-10-15, subdivision (l). This provision permits the continued employment of a spouse of a newly elected county official in that official's office when the elected official does not directly supervise his spouse or set her salary. The statute further provides, however, that this exception **only** applies to spouse employees who were neither married to nor engaged to the elected county official at the time of their initial hiring.

In Advisory Opinion 2012-26, the Commission found 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. 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 were already married **before** the spouse of the county employee runs for county office. In reaching this conclusion, the Commission relied 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). In arriving at this result, the Commission wrote:

> 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.[1]

As a result of the foregoing analysis, if the Requester becomes the elected Prosecuting Attorney, his spouse may **not** continue her employment with the Prosecuting Attorney's office.[2] Unlike the result in Advisory Opinion 2012-26, however, the Prosecuting Attorney's wife **may** be employed by another county office or agency[3] so long as she is chosen for such a position based on her experience and qualifications, not based on favoritism to the Requester.

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[1] By 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."

[2] Further, although the Ethics Commission is authorized to grant hardship exemptions to non-employment contracts pursuant to W. Va. Code§ 61-10-15(h), that authority does **not** extend to employment contracts, as the Commission ruled in Advisory Opinion 2007-03.

[3] The nepotism/employment limitation only applies to spouse employees over whom the elected official exercises voice, influence or control. The Ethics Commission's advisory opinions have consistently held that county commissioners exercise voice, influence or control over **all** county offices. *See, e.g.* Advisory Opinions 95-24 (sheriff's office), By contrast, in Advisory Opinion 96-56 the Commission found that a Sheriff's spouse could work for a Magistrate. Still, any county official whose spouse is considering employment by the county, or is currently employed by the county should seek advice from the Ethics Commission to ensure that such employment complies with W. Va. Code§ 61-10-15.

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