

Advisory Opinion 2022-03

Issued on January 6, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A potential candidate for **City Council** asks whether she may be a council member if her son is a municipal judge for the same city.

Facts Relied Upon by the Commission

The Requester plans on running for city council in the next election cycle. A municipal judge position may become vacant in the same city for which she is running for council, and her son may apply to fill that position. It is uncertain whether the vacancy for the municipal judge position will be filled before or after the newly elected council members take office.

The prospective council member and her son do not reside together and are not financially dependent upon each other. The Requester states that if she is elected, she will not participate in or vote on matters affecting her son's potential selection or service as municipal judge or other conditions of his employment.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-1-3 states, in relevant part:

(f) "Immediate family", with respect to an individual, means 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.

(m) "Relative" means 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-2-5(b)(1) states, 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his

or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection.

W. Va. Code § 6B-2-5(b)(4) states, in relevant part:

A public official or public employee may not show favoritism or grant patronage in the employment or working conditions of his or her relative or a person with whom he or she resides: Provided, That as used in this subdivision, "employment or working conditions" shall only apply to government employment: Provided, however, That government employment includes only those governmental entities specified in subsection (a) of this section.

W. Va. Code § 6B-2-5(d) states in pertinent part:

Interests in public contracts. - (1) In addition to the provisions of §61-10-15 of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee 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 § 6B-2-5(j) states, in relevant part:

Limitations on Voting. - (1) Public officials ... may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

.....

(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;

....

W. Va. Code 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 in employment or working conditions by a public official or public employee to relatives or persons with whom the public official or public employee resides.

3.2. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

3.3. "Relative" means 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.

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses,

benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

.....

3.6. A public official may not vote on matters affecting the employment or working conditions of a relative unless the relative is a member of a class of persons affected. A class shall consist of not fewer than five similarly situated persons. For a public official's recusal to be effective, he or she must 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.

.....

Advisory Opinion

The Ethics Act prohibits a public official or business with which he or she is associated from having more than a limited interest in the profits or benefits of a public contract over which he or she has direct authority or control. W. Va. Code § 6B-2-5(d)(1). The Act also contains specific exceptions to the public contract restrictions, including an exception for the employment of any person. *Id.* This exception states: "nothing herein shall be construed to prevent or make unlawful the employment of any person with any governmental body." *Id.*

In the instant situation, the prospective city council member does not have a prohibited financial interest in the possible employment contract between the City and her son pursuant to W. Va. Code § 6B-2-5(d) for two reasons. First, the son does not meet the definition of immediate family in W. Va. Code § 6B-1-3(f) because her son is not a dependent. Second, even if there was a financial relationship between the mother and son, the public contract restrictions do not apply to prevent "the employment of any person with any governmental body." W. Va. Code § 6B-2-5(d).

The Ethics Act does not, therefore, prohibit the son of a city council member from serving as a municipal judge for the same city. This conclusion is also consistent with prior Advisory Opinions. In Advisory Opinion 2012-24, the Ethics Commission held that a mayor's father may be employed by the same city, and in Advisory Opinion 2013-01, the Ethics Commission held that a mayor's daughter may be employed by the same town. These Opinions hold, as required by the nepotism restrictions in the Ethics Act, that mayors (and other public officials and public employees) may not participate in or vote on matters affecting the employment or working conditions of their relatives unless the relative is affected as a member of and to no greater extent than a class of five or more similarly situated persons.¹ W. Va. Code § 6B-2-5(j)(2)(A) and W. Va. Code R. §

¹ The Ethics Commission held in Advisory Opinion 2007-07 that a mayor may not appoint her son as the city attorney. The facts presented in the instant case are distinguishable from those in Advisory Opinion

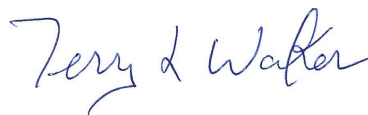
158-6-3.6. Further, public officials and public employees may not directly supervise their relatives. W. Va. Code R. § 158-6-3.5.b.

In conclusion, the Ethics Commission holds that the Ethics Act allows a city to employ a city council member's son as a municipal judge. In accordance with the nepotism restrictions in the Ethics Act and related Legislative Rule, however, the city council member/mother may not participate in or vote on matters affecting the employment or working conditions of her son or directly supervise him.² Further, the city council member must comply with the other nepotism restrictions in the Ethics Commission's Legislative Rule.³

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, 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 public servants and other persons unless and until it is amended or revoked or the law is changed.

/s/ Terry L. Walker



Terry L. Walker, Acting Chairperson
West Virginia Ethics Commission

2007-07. For example, in Advisory Opinion 2007-07, the Mayor would have been the one appointing her son and supervising him. Hence, the holding in Advisory Opinion 2007-07 does not change the analysis or holding herein.

² See W. Va. Code R. § 158-6-3 (containing restrictions on public officials and public employees participating in matters affecting the employment or working conditions of relatives).

³ *Id.*