ADVISORY OPINION NO. 2011-10

Issued On June 2, 2011 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Board of Education** (BOE) asks whether the spouse of a candidate for superintendent may continue to be employed by the BOE as a School Psychologist, and continue to serve as the Director of Student Services, if her spouse is selected as the new superintendent.

FACTS RELIED UPON BY THE COMMISSION

The BOE is in the process of hiring a new Superintendent, and has identified two candidates. The spouse of one candidate is currently employed by the BOE as a School Psychologist and holds a supplemental contract for $4,500 per year as Director of Student Services. Her office is currently located in the central office, due to her position as Director of Student Services.

The job description for the Director of Student Services provides, in relevant part, that the incumbent "serves as coordinator of staff development programs for professional and service employees", "assumes other necessary and desirable responsibilities for the efficient operation of the school system", "supervises school psychologist interns" and "coordinates/leads design development and implementation of a countywide Strategic Plan". The Director of Student Services also represents the County BOE on various committees.

According to the Requester, the School Psychologist position "is defined to assist, support, participate and report." The Requester further states that the job description "does not exhibit responsibilities of an administrator or directorship, and provides no description of supervisory roles over our professional staff".

The Legislative Rule for performance evaluations of professional school personnel contains the following definitions:

> 4.10. Professional Support Personnel: For the purposes of this policy, professional support person is defined as the professional educator whose title includes but is not limited to the following: athletic trainer, counselor, education audiologist, school nurse, **school psychologist**, social service and attendance, and speech language pathologist.
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> 4.11. Administrator: For the purposes of this policy, administrator is defined as the professional educator whose title includes but is not limited to the following: central office administrator, supervisor, **director**, coordinator, program specialist, principal, and/or vice principal.

126 C.S.R. § 142. (emphasis supplied)

CODE PROVISIONS RELIED UPON BY THE COMMISSION

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

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

W. Va. Code § 6B-2-5(d)(1) reads, in pertinent part:

> In addition to the provisions of section fifteen, article ten, chapter sixty-one of this code, no elected ... official ... or member of ... her immediate family ...may be a party to or have an interest in the profits or benefits of a contract which the official ... may have direct authority to enter into, or over which ... 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(a) states, in pertinent part:

> It is unlawful for ... any ... superintendent ... of public schools ... to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service ... if, as a ... superintendent, ... 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 ... superintendent ... as a principal or teacher or auxiliary or service employee in the public schools of any county....

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If the BOE's employee's husband is selected to serve as School Superintendent, he will be subject to the provisions established in the Ethics Act and to the prohibitions contained in W. Va. Code § 61-10-15.

Public Contracts

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". W. Va. Code § 6B-2-5(d)(1). Thus, there is nothing in the Ethics Act which prohibits a BOE superintendent's spouse from being employed by the same BOE. Notwithstanding this conclusion, our inquiry does not end here.

West Virginia Code § 61-10-15

We must next analyze whether W. Va. Code § 61-10-15, which is more comprehensive, authorizes the continued employment of the spouse of the potential superintendent.

This statute prohibits a covered person, such as a BOE superintendent, from having a personal financial interest, directly or indirectly, in public contracts over which her public position gives her 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. Instead, it is stricter than the Ethics Act and also contains strict anti-nepotism provisions which prohibit, with limited exceptions, the employment of immediate family members by county officials, including county school board officials. As for school board superintendents, their spouses may be employed in the following positions: principals or teachers, or auxiliary or service employees in the public schools of any county.

In Advisory Opinion 92-11, the Commission noted that the protection of this proviso is not afforded to various employment positions such as central office administrator. Central office administrator is defined in W. Va. Code § 18A-1-1(4) as "the superintendent, associate superintendent, assistant superintendent, and other professional educators, whether by these or other appropriate titles, who are charged with the administering and supervising of the whole or some assigned part of the total program of the county-wide school system." The Commission concluded that the position of Special Education Director met the definition of central office administrator, and therefore the BOE candidate could not serve on the BOE while his spouse was employed in that position by the same BOE. *See also* Advisory Opinion 94-18 (Special Education Director/Elementary Education Director/Staff Development Coordinator/Education Diagnostician fit the definition of Central Office Administrator).

By contrast, in Advisory Opinion 94-04, the Commission held that the position of Instrumental Music Coordinator, a part-time non-administrative position, did not meet the definition of Central Office Administrator, and therefore the BOE member could serve on the BOE while her spouse was employed in that position by the same BOE.

Thus, the Ethics Commission must examine the two positions to determine if either or both are positions that the statute permits a spouse to hold. Specifically, is the Director of Student Services a professional educator and/or one of those "other appropriate titles" charged with administering and supervising some part of the total program of the county-wide school system? Or, is the Director of Student Services the equivalent of a teacher, and therefore exempt? Similarly, is the School Psychologist a professional educator and/or one of those "other appropriate titles" charged with administering and supervising some part of the total program of the county-wide school system? Or, is the School Psychologist the equivalent of a teacher, and therefore exempt?

The nature of the position of Director of Student Services, as set forth in the job description, clearly establishes that the incumbent administers the whole or some assigned part of the total program of the countywide school system and supervises other professional personnel. *See* W. Va. Code § 18A-1-1(c)(4). As a result, the Commission finds that it is a prohibited position.

By contrast, the position of School Psychologist is a position where the incumbent works directly with students, parents and staff associated with an assigned school(s). The incumbent has no duties or responsibilities related to the countywide school system. W. Va. Code § 18A-1-1(c)(1) defines a "classroom teacher" as "the professional educator who has direct instructional or counseling relationship with pupils,

spending the majority of his or her time in this capacity." As a result, the Commission finds that it is a permissible position.

Finally, the Requester states that if the spouse is permitted to continue her employment as School Psychologist, it will remove her from the central office and into a school. Apparently, this decision is due, at least in part, to the proviso in W. Va. Code § 61-10-15(a) which authorizes the employment of the spouse of a superintendent as a teacher "in the public schools of any county". In Advisory Opinion 2010-03, however, the Commission found that the final modifying phrase "in the public schools" was not intended to require otherwise permitted positions to be physically located in a public school. Other references throughout Chapters 18 and 18A of the West Virginia Code support the Commission's conclusion that, for purposes of applying the provisions of W. Va. Code § 61-10-15, the phrase "in the public schools" refers to the county-wide school system, and not a physical location.

Therefore, should the BOE select the employee's spouse to be its next Superintendent, the employee may retain her position as School Psychologist, and may continue to be physically located at the BOE's central office. The BOE should not, however, renew her supplemental contract as Director of Student Services.

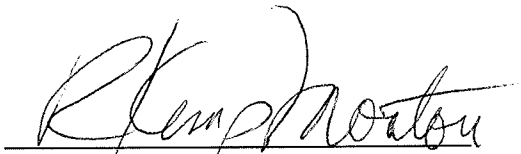
Private Gain

Pursuant to W. Va. Code § 6B-2-5(b), public officials may not use their office or its resulting prestige for personal private gain or for the private gain of another. Therefore if the BOE selects its employee's husband as superintendent, he may not use his position as superintendent of the BOE to obtain, increase or promote the interests of his spouse as a BOE employee.

CONCLUSION

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.

Pursuant to W. Va. Code § 6B-2-3, any person acting in good faith reliance on an advisory opinion issued by the Ethics Commission is immune from the sanctions of section fifteen, article ten, chapter sixty-one of the code, and shall have an absolute defense to any criminal prosecution for actions taken in good faith reliance upon such opinion.



R. Kemp Morton, Chairperson