

Advisory Opinion 2022-08

Issued on March 3, 2022, by

The West Virginia Ethics Commission

Opinion Sought

A **County Council** asks whether a deputy sheriff's father may serve on the deputy civil service commission and, if so, what voting restrictions apply.

Facts Relied Upon by the Commission

Counties must have a civil service commission for deputy sheriffs. W. Va. Code § 7-14-3. The Legislature has established the appointment process and eligibility requirements for deputy civil service commissioners. The relevant Code provision states, in relevant part:

There shall be a civil service commission in each county in the state. Each such civil service commission shall consist of three commissioners, one of whom shall be appointed by the bar association of such county, one of whom shall be appointed by the deputy sheriff's association of such county, and one of whom shall be appointed by the county commission of such county. In the event the bar association or deputy sheriff's association fails to make an appointment within the time prescribed in this section therefor, then such appointment shall be made by the county commission. The persons appointed commissioners shall be qualified voters of the county for which they are appointed, and at least two of the commissioners shall be persons in full sympathy with the purposes of this article. Not more than two of the commissioners, at any one time, shall be members of the same political party.

....

No commissioner may hold any other office (other than the office of notary public) under the United States, this state or any municipality, county or other political subdivision thereof; nor may any commissioner serve on any political party committee or take any active part in the management of any political campaign.

W. Va. Code § 7-14-3.

The duties of deputy civil service commissions include prescribing and enforcing rules and regulations relating to the civil service system, certifying eligibility lists for deputy

sheriff candidates, and conducting investigations. W. Va. Code §§ 7-14-6 and 7-14-9. If a sheriff discharges, suspends, or reduces the rank or pay of a deputy, then the deputy has the right to demand a hearing before the deputy civil service commission. W. Va. Code § 7-14-17. Following the hearing, the deputy civil service commission enters an order either upholding or overturning the sheriff's decision. *Id.* If the deputy prevails, he or she is entitled to reinstatement or other relief as provided for under the civil service system. *Id.* Either party may appeal the ruling. *Id.*

The county's deputy sheriff association has appointed the father of a deputy sheriff to serve on the deputy civil service commission. The Requester states that it is concerned that the appointment of a deputy sheriff's father may violate the Ethics Act or create an appearance of impropriety. Thus, the Requester asks whether a deputy sheriff's father may serve on the deputy civil service commission and, if so, what voting restrictions apply.

Provisions Relied Upon by the Commission

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

(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) states, in relevant part:

(1) 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.

.....

(4) 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 R. § 158-6-3 (2017) states:

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.

3.5.c. Notwithstanding the limitations in this subsection, if a public official or public employee must participate in decisions affecting the employment, working conditions or supervision of the public official or public employee's relative or a person with whom the public official or public employee resides, then:

3.5.c.1. An independent third party shall be involved in the process. A public official or public employee may not use a subordinate for the independent third party unless it is an elected public official who

may not lawfully delegate the powers of his or her office, e.g., county assessor or county clerk; and,

3.5.c.2. The public official or employee shall exercise his or her best objective judgment in making the decision and be prepared to justify his or her decision.

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.

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

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

.....

(C) The employment or working conditions of the public official's relative or person with whom the public official resides.

(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;

.....

Advisory Opinion

Eligibility to serve

In [Advisory Opinion 2017-22](#), the Ethics Commission held that a part-time appointed board member may serve on a board or subcommittee even though his spouse represented clients before the board and subcommittee. The Commission reasoned that “[t]he Ethics Act does not prescribe who is eligible to serve on a public body or subcommittee.” *Id*; see also [Advisory Opinion 2019-03](#) (finding that a county airport

authority member could also serve on the board of a chamber of commerce and be employed by a hotel which used the airport).

The Legislature has established the eligibility requirements for deputy civil service commissioners. W. Va. Code § 7-14-3. In accordance with the statute, the county's deputy sheriff association has appointed the father of a deputy sheriff to serve on the deputy civil service commission. A son falls under the definition of relative for purposes of the Act and Legislative Rule. Therefore, the Ethics Commission will first address the relevant anti-nepotism provisions in the Ethics Act and related Legislative Rule, which prohibit public officials and employees from giving an unfair advantage to relatives and persons with whom they reside. W. Va. Code § 6B-2-5(b)(4) and W. Va. Code R. § 158-6-3 (2017).

The nepotism restrictions do not bar a public official's relative from being employed with a public agency so long as the nepotism rules are followed. Applying the anti-nepotism restrictions, the Commission held in [Advisory Opinion 2021-20](#) that a sheriff's son may be employed as the director of courthouse security if the sheriff delegated responsibility for the hiring and supervision to his chief deputy. In [Advisory Opinion 2022-03](#), the Ethics Commission held that a city council member's son may serve as the city's municipal judge, but that the council member may not participate in or vote on matters affecting his son's employment or working conditions unless the matter affects the son as a member of a class of five or more similarly situated individuals.¹

The Ethics Commission finds that the Ethics Act, including its nepotism provisions, do not prescribe who is eligible to serve on a deputy civil service commission. The eligibility requirements for deputy civil service commission members are governed, instead, by W. Va. Code § 7-14-3. Therefore, the Ethics Commission holds that pursuant to the Ethics Act the father of a deputy sheriff may serve on the deputy civil service commission.

Based upon the holding in this Opinion and the holding in [Advisory Opinion 2017-22](#), the Commission overrules its holding in [Advisory Opinion 2013-37](#), in which the Ethics Commission held that the Ethics Act prohibited a sheriff's department employee from serving on a deputy civil service board.²

¹ The Commission also held that the council member may not directly supervise her son per W. Va. Code R. § 158-6-3.5.b. Deputy civil service commissioners do not directly supervise deputies because they do not assign them work or discipline them. The commissioners duties are mainly quasi-judicial.

² [Advisory Opinion 2013-37](#) was also implicitly overruled by the Ethics Commission's holding in [Advisory Opinion 2013-47](#) in which it held that town council members who were employed by a board of education (BOE) could vote on matters affecting their BOE employer. The Ethics Commission also notes that the West Virginia Supreme Court held that a municipal police officer "holds an office within the contemplation of West Virginia Code § 8-14-7, thereby rendering the individual ineligible to serve as a commissioner of any police civil service commission." *City of Bridgeport v. Matheny*, 223 W. Va. 445, 450, 675 S.E.2d 921, 926 (2009).

Voting

If a matter comes before the deputy civil service commission uniquely affecting the deputy civil service commissioner's son, such as a disciplinary matter, then the deputy civil service commissioner must recuse himself as the nepotism and voting restrictions in the Ethics Act and related Legislative Rule ban public officials and public employees from voting on or participating in matters affecting the employment and working conditions of a relative. W. Va. Code § 6B-2-5(j)(1)(C) and W. Va. Code R. § 158-6-3.5.a. In accordance with the Ethics Act voting provisions, at W. Va. Code § 6B-2-5(j) and W. Va. Code R. § 158-6-3.6, the deputy civil service commission member may, however, participate in matters which affect his son as a member of a class. "A class shall consist of not fewer than five similarly situated persons." *Id.* The Ethics Act establishes the process for proper recusal.³

In conclusion, the father of a deputy sheriff may serve on the deputy civil service commission. He must recuse himself if a matter uniquely affects the employment or working conditions of his son, but he may vote if his son is affected in the same manner as five or more similarly situated deputies.

The Requester states that it is concerned about the appearance of impropriety. The Commission recently reasoned in [Advisory Opinion 2021-08](#) that: "It is the duty of the Commission to apply the provisions of the Act and Rule. Neither the Act nor the Rule prohibits voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision (W. Va. Code § 6B-2-5(e), or a potential violation of the private gain provision (W. Va. Code § 6B-2-5(b)(1). . . ." The Commission further held that "[v]iolations of the Act's confidentiality and private gain provisions both require an actual breach rather than mere potential violations." *Id.*

The Ethics Act does not, therefore, bar a relative of a deputy sheriff from serving on a deputy civil service commission based upon the potential for impropriety or the appearance thereof.

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 W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.

³ W. Va. Code § 6B-2-5(j)(3) states that: "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. The recusal shall also be reflected in the meeting minutes."

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/ Robert J. Wolfe
Robert J. Wolfe, Chairperson
West Virginia Ethics Commission