

ADVISORY OPINION NO. #92-20

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 2, 1992

GOVERNMENTAL BODY SEEKING OPINION

The Mayor and a City Council

OPINION SOUGHT

Is it a violation of the Ethics Act for a City to employ the Mayor's spouse as a laborer without giving public notice of the position and by transferring the Mayor's salary to the spouse?

FACTS RELIED UPON BY THE COMMISSION

A City has received a \$5,000 grant for the purpose of purchasing materials to remodel City Hall. However, there are no funds available for the labor required to complete these renovations.

Because of a shortage of funds, some of the renovation work would be completed by the Mayor, however, because of injuries received in an accident, the Mayor is unable to perform these duties. Consequently, the Mayor would like to hire his spouse as a part-time employee of the City to assist in the renovations and other unspecified tasks. This employment position would be created specifically for the Mayor's spouse and would not be available to other qualified individuals who might wish to apply and be considered. Since the Mayor is currently drawing a disability income, he has proposed in a Council Meeting that his salary of \$420 per month be suspended. This money would instead be paid to his spouse, as a City employee.

The Mayor has stated that he would present his spouse to the City Council for consideration for employment since all employment matters must be approved by City Council. The Mayor would then abstain from the consideration and voting process.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code §6B-2-5(b)(1) states in pertinent part that...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...

ADVISORY OPINION

Pursuant to WV Code 6B-2-5(b)(1) a public official may not use his office for his own private gain or for the private gain of another. Nepotism would fall within the purview of this section and is a violation of the Ethics Act. A Legislative Rule on private gain and nepotism was recently approved by the Legislature.

According to the legislative rules, the term "nepotism" means favoritism shown or patronage granted by a public official or public employee to relatives or cohabiting sexual partners in employment matters without giving public notice and consideration to other applicants or the qualifications required to perform the job. A spouse is within the rule's definition of "relatives".

A public official or public employee may avoid the appearance of nepotism by following these steps when hiring for a public position:

A. The public should be given reasonable advance notice of the availability of the job.

1. Notice should include a description of the job responsibilities, the qualifications required, the pay and the manner in which application for the job can be made.
2. The method of giving notice will of course vary from job to job but there must be reasonable public awareness of the availability of the job. Newspaper want ads and notices on the bulletin boards in public areas of the building are the most obvious and effective methods.
3. The notice must be made early enough in the hiring process to give those members of the public who are interested in the job an opportunity to make application.

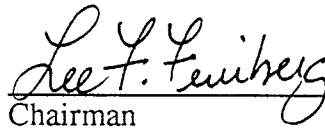
B. An objective, independent third party should be involved in the selection when a close friend or family member is among those who have made application for the job.

1. To the extent possible, the public official or public employee should stay out of the selection process altogether. If he or she is one of several people with the authority to hire, others with authority should make the selection. If appropriate, the matter should be handled by his or her supervisor, or in the case of an elected public official by a qualified person in another office.
2. A public official or public employee should at least have some independent person take part in the selection. He or she should avoid using a subordinate for the independent person.

3. If a public official or public employee must share in the decision, he or she should exercise his or her best objective judgment in making the selection, and be prepared to justify his or her selection.

It would not be a presumptive violation of the WV Code 6B-2-5(b)(1) for the City employ the Mayor's spouse provided the City follows the guidelines established above.

However, in this instance, there is no previously existing public employment position available and it appears from the facts presented that the position is being created specifically for the public official's spouse. The position for which the City might hire the Mayor's spouse is a general labor position. For this reason, the Commission believes that the position should be advertised so that the general public is afforded an opportunity to apply and be considered for the position. Failure to do so would be a misuse of public office for private gain and would constitute a direct violation of WV Code 6B-2-5(b)(1). The fact that the Mayor has requested that his salary be suspended and paid to his spouse as a City employee does not change this result.


Chairman