

ADVISORY OPINION NO. 96-22

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JUNE 6, 1996

GOVERNMENTAL OFFICIAL SEEKING OPINION

A member of the Board of Directors for a County Health Department

OPINION SOUGHT

Is it a violation of the Ethics Act or WV Code 61-10-15 for the spouse of a member of the Board of Directors of a County Health Department to be employed by that Health Department?

FACTS RELIED UPON BY THE COMMISSION

The requester is a member of the Board of Directors of a County Health Department. The Board has the authority over the personnel matters of that Health Department, including hiring and firing of employees. The requester's spouse would like to apply for the vacant position of secretary for the Health Department.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-1-2(c) provides in pertinent part that...local governments have many part-time public officials...serving in...appointed capacities; and that certain conflicts of interest are inherent in part-time service...; however, when such conflict becomes personal to a particular public official...such person should seek to be excused from voting, recused from deciding, or otherwise relieved from the obligation of acting as a public representative charged with deciding or acting on a matter.

West Virginia Code 6B-2-5(b)(1) provides 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...

West Virginia Code Section 61-10-15 states in pertinent part that...It shall be unlawful for any member of a county board...to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in furnishing any supplies in the contract for, or the awarding or letting of, which as such member he may have any voice, influence or control...

ADVISORY OPINION

The Ethics Act

In considering this request, the Ethics Commission has analyzed the facts presented in light of the statutory violations contained in the Ethics Act. The Commission has determined that there is no provision of **the Ethics Act** which would prohibit the requester's spouse from being employed by the County Health Department while the requester is a member of the Board of Directors of that Health Department. However, pursuant to WV Code §6B-2-5(b)(1), public officials may not use their office or its resulting prestige for personal private gain or for the private gain of another. Therefore, the requester may not use his position as a member of the County Health Department's Board of Directors to obtain, increase or promote the interests of his spouse as an employee of the Health Department.

Further, WV Code §6B-1-2(c) provides that a public official should seek to be excused from voting, deciding or otherwise acting on a matter that has become "personal" to him. The Commission previously defined "personal" as situations where a public official has any direct or indirect pecuniary interest in the matter, is affected in a manner which may affect his vote, or when voting would give the appearance of impropriety. The Commission has determined that in order for a public official's recusal to be effective he must physically remove himself from the room during the discussion and decision making process.

If the requester, as a member of the County Health Department's Board of Directors, is called upon to consider employment matters or other issues which would directly affect his spouse, he should refrain from voting or taking other action regarding these matters since failure to do so would create the appearance of impropriety.

However, in Advisory Opinion #92-11 the Commission determined that the voting prohibition contained in WV Code §6B-1-2(c) does not apply to actions which involve the creation of laws, rules, regulations or policies which affect the public official's or family member's financial interest as a member of a class. There is no conflict of interest if the public official or his family member is not pecuniarily affected to a greater extent than any other member of the profession, occupation, group or class.

Therefore, the Commission finds that the requester should not vote on any matter that may specifically and uniquely affect his spouse to a greater extent than other comparable employees.

However, the Commission's ruling under the Ethics Act is academic in light of the prohibition against any pecuniary interest in public contracts established in WV Code 61-10-15 and discussed below.

West Virginia Code 61-10-15

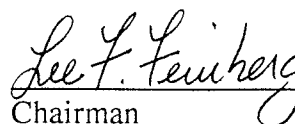
West Virginia Code 61-10-15 provides that it is a criminal violation for any county officer to be pecuniarily interested, directly or indirectly, in the proceeds of any contract or service when he may have voice, influence, or control over the letting of such contract. The Supreme Court of Appeals of West Virginia, in *Cimino v. Bd. of Ed. of Marion Co.*, 210 S.E. 2d 485 (1974), applied this provision to employment contracts. Specifically, the Court held that it would be a violation of WV Code 61-10-15 for a cook to remain employed by the County School Board after her spouse was elected to serve on that County Board of Education.

Similarly, as a member of the Board of Directors of the County Health Department, the requester would have voice, influence or control over any employment contracts the Department may have with its employees. Further, the Court, in *Fisher v. Jackson*, 107 W.Va. 138. 147 S.E. 541 (1929) held that recusal of a public official from voting on a particular matter in which he has a direct or indirect interest was not sufficient to immunize that official from the sanctions now contained in WV Code 61-10-15.

Therefore, it would be a violation of WV Code 61-10-15 for the requester to serve as a member of the Board of Directors of a County Health Department while his spouse is an employee of that Department.

This decision is consistent with several prior advisory opinions issued by the Ethics Commission. For example, in A.O. #92-10 the Commission ruled that the hiring of the Prosecuting Attorney's spouse as an assistant prosecutor would violate WV Code 61-10-15. Similarly, A.O. #95-22 ruled that a member of a County Solid Waste Authority Board could not continue to serve in that position if her spouse was simultaneously employed by the Authority.

The Commission notes that it is without authority to grant exemptions to the prohibitions contained in WV Code 61-10-15.


Chairman