

TO: West Virginia Legislative Rule-Making Review Committee

FR: Rebecca Stepto, Executive Director (Rebecca.l.stepto@wv.gov) *Jmk*
Theresa M. Kirk, Staff Attorney (Theresa.m.kirk@wv.gov)

RE: Title 158, Series 6 – *Use of Office for Private Gain, Including Nepotism*
Brief overview of public comments received and proposed revisions to the Rule
in response thereto

DATE: August 23, 2016

Overview of comments received and response of West Virginia Ethics Commission

The Ethics Commission received six comments. The following individuals/entities submitted comments: (1) West Virginia Division of Personnel; (2) West Virginia Municipal League; and (3) Mark Gomez (four separate comments).

The following is an overview of the comments and the response of the Ethics Commission, including changes made to the proposed revised Rule in response thereto.

West Virginia Division of Personnel

Comment No. 1

Summary of Comment: The Division of Personnel (hereinafter “DOP”) notes that the proposed section numbering may be inconsistent with the Secretary of State’s Legislative Rule, Title 153, Series 6 which governs, in relevant part, the formatting of Legislative Rules.

Response: The Ethics Commission revised the Rule to ensure the section numbering is consistent with the Secretary of State’s Legislative Rule.

Comment No. 2

Summary of Comment: This comment relates to the new proposed subsection 3.4.c.1. This purpose of the revisions in this section is to more clearly define the rules governing the hiring of relatives and persons with whom a public official or employee resides.

The DOP states it agrees with the revision to 3.4.c.1, which requires the participation of an independent third party in hiring and personnel decisions involving relatives or a person with whom a public official resides.

The DOP recommends that the language previously found in subsection 3.3.b.2 restricting the use of subordinates as the independent third party

be reinserted. The prior language read: "A public official or public employee should at least have some independent third person take part in the selection. He or she should avoid using a subordinate for the independent person." The prior language then provided: "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." 3.3.b.3.

Response: The Ethics Commission accepted, in part, this recommendation. The Ethics Act and the Rule apply to public servants in both state and local government. At the local government level, if a relative, e.g., sister-in-law, works in a county office, the elected official may be unable to completely remove him or herself from decisions affecting the relative as it is the elected official who is statutorily responsible for the day-to-day operations of his or her office. Hence, he or she may not be able to lawfully delegate certain powers.

The proposed revision recognizes this fact. It reads: "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." 158 C.S.R. 6-3.4.a.

The Ethics Commission incorporated the change requested by the DOP by restricting the use of a subordinate as the independent third party. See 158 C.S.R. § 6-3.4.c.1. The proposed language now reads: 3.4.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... 158 C.S.R. 6-3.4.c.1..

Comment No. 3

Summary of Comment: This comment relates to section 4, which prohibits the use of subordinates for private gain, and section 5, which prohibits the use or removal of government property. The DOP recommends clarifying that public servants may not use subordinates or government property for the benefit of relatives.

Response: The Ethics Commission accepted this change. It amended the Rule to make it consistent with the language in the Ethics Act prohibiting the use of public office for the private gain of the public servant "or that of another person," which would include relatives. W.Va. Code § 6B-2-5(b).

West Virginia Municipal League

Comment 1, page 1: 158-6-3.1

Summary of Comment: In the proposed amended Legislative Rule, the Ethics Commission proposes substituting the phrase “cohabitating sexual partners” with the phrase “persons with whom the public official or public employee resides.”

The Municipal League proposes applying the anti-nepotism provisions only to “immediate family members” in lieu of extending the limitations to “persons with whom the public official or public employee resides.” The Ethics Act defines “immediate family member” as “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.” W.Va. Code § 6B-1-3.

Response: The Ethics Commission declined to make the requested change. The Ethics Commission submits that the use of the phrase “persons with whom the public official or public employee resides” captures the spirit and intent of the original Rule, while protecting the privacy interests of public servants.

The Ethics Commission further submits that this approach achieves the following objectives. First, this limitation does not unduly intrude upon the privacy rights of public servants as it does not require a determination of whether there is a sexual relationship. Second, a public servant normally has a financial relationship with a person with whom he or she resides.

Comment 2, page 2: 158-6-3.2

Summary of Comment: The Municipal League proposes incorporating the definition of “immediate family member” from the Ethics Act, W.Va. Code § 6B-1-3(f).

Response: The Ethics Commission declined to make the change. As the Ethics Commission is not incorporating the requested change in Comment 1, it is not necessary to incorporate the definition of “immediate family member” into the proposed Amended Rule.

Comment 3, page 2: 158-6-3.3

Summary of Comment: The Municipal League requests that language be incorporated to make it clear that public servants may make decisions affecting an employee who is a relative if the decision affects a class of five or more similarly situated employees.

Response: The Ethics Commission accepted this recommendation. The class exception is recognized in the Ethics Act. W.Va. Code § 6B-2-5(j)

and is already incorporated into the proposed amended Rule in subsection 3.4. The Ethics Commission agrees the revision will assist public officials in understanding the law and related exception. It incorporated additional language governing voting and recusal at 158 C.S.R. § 6-3.5.

Comment 4, page 3: 158-6-3.4(a)

Summary of Comment:

#4.a. Summary: The proposed Rule, as amended, requires public servants to remove themselves from employment decisions uniquely affecting relatives or persons with whom they reside. The Municipal League also requests that the Commission incorporate language found in another Legislative Rule governing public contracts, Title 158, Series 8. The authority for that Rule is the public contract provision in the Ethics Act, W.Va. Code § 6B-2-5(d). (In contrast, the proposed revised Rule under consideration relates to the use of public office for private gain provisions in the Ethics Act, W.Va. Code § 6B-2-5(b).)

The language the League requests that the Commission add to the Rule reads: "If a public official has a limited interest in a contract, he or she should recuse him or herself from voting. A public employee who has a limited interest should not be involved in any decision-making process relating to the award or review of the contract."

#4.a. Response: The Ethics Commission accepted this recommendation in part and declined it in part.

The Commission accepted the recommendation to add language relating to proper recusal from employment decisions. This language will serve to make the limitations in the Rule clearer to public servants.

The Commission declined to make the other requested change.

The public contract provisions, codified at W.Va. Code § 6B-2-5(d) and in Title 158, Series 8, are separate and distinct from the provisions in W.Va. Code § 6B-2-5(b) which is entitled "Use of office for private gain." To avoid confusion and unintended consequences, the language relating to public contracts and limited interests will not be incorporated into the restrictions on nepotism contained in this Rule.

#4.b. Summary: The proposed Amendment requires public servants to administer the employment and working conditions of relatives and "persons with whom they reside" in a "consistent and impartial manner." (*emphasis supplied*) The Municipal League proposes striking the term "consistent" as it is undefined or vague.

#4.b. Response: The Ethics Commission accepted this recommendation. The Commission finds the inclusion of the word "consistent" in this section

of the Rule is not necessary to achieve the objective of the Rule. The Ethics Commission deleted this word.

Comment 5, page 4: 158-6-3.4(b)

Summary of Comment: This proposed revision relates to Comment 1 regarding extending the limitations on employment and personnel decisions to “immediate family members” in lieu of extending it to persons with whom the public servant resides.

Response: The Ethics Commission declined to accept this recommendation for the reasons set forth in its response to Comment 1.

Comment 6, page 4: 158-6-3.4(c)

Summary of Comment: This comment relates to the following language in the proposed rule:

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:

1. An independent third party shall be involved in the process;
and,

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.

The Municipal League requests that the Ethics Commission delete the Commission’s proposed paragraph on the following grounds: (1) “An ‘independent third party’ has no standing or authority to vote upon municipal affairs;” (2) “If these matters are defined as employment ‘contracts’ in which the public official has an interest, this exemption is not appropriate or necessary;” and (3) “If the governing body may not act because of a recusal required by these rules, the agency or official must be able to apply to the Commission for an exemption.”

Response: The Ethics Commission declined to make the change. While an independent third party may not in all circumstances have authority to vote, he or she would have authority, if granted by the municipality, to participate in making recommendations relating to hiring and employment matters affecting a relative of a public official.

The Municipal League also expresses concern about the ability of a governing body to achieve a quorum. Normally, this situation would not

occur as it appears unlikely that a majority of a governing body will be related to an employee. If that were to occur, in Advisory Opinion 2000-37 the Commission ruled it would not violate the Ethics Act for a member of a governing body to remain in the room in this situation or to vote "where necessary to secure a majority decision..."

Comment 7, page 5: 158-6-3.5

Summary of Comment: The current Rule prohibits a public official or public employee from terminating the employment of a person without sufficient cause for the purpose of hiring a relative or political supporter. When the Legislature passed the Rule in 1992, presumably it was attempting to incorporate the common law rights of public servants under the First Amendment in "political firing cases." See *Adkins v. Miller*, 187 W. Va. 774, 776, 421 S.E.2d 682, 684 (1992) and *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909 (6th Cir.1991). Pursuant to the First Amendment, certain policy-making and confidential employees may be fired based upon political affiliation; other employees may not be terminated on this basis, e.g., employees protected by civil service.

In the proposed Amended Rule the Ethics Commission initially proposed revising the language to make it more consistent with the common law by amending it to read:

~~3.6. 3.5. It is improper for a~~ A public official or public employee to may not unlawfully terminate the employment of a person without sufficient cause for the purpose of hiring a relative, or person with whom the public official or employee resides, friend or political supporter. Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

The Municipal League proposes striking the language because it states: "The employer-employee relationship is governed by West Virginia and federal labor laws and precedent." In turn, the Municipal League submits it is not necessary or practicable to include this language in the Legislative Rule.

Response: The Ethics Commission accepted the recommendation to strike all of 3.5 (formally 3.6 in 1992 version). The laws governing which employees may be hired or fired based upon political affiliation are complex. The West Virginia Supreme Court, the United States District Courts in West Virginia, the Fourth Circuit Court of Appeals and the United States Supreme Court have issued numerous opinions regarding the test under the First Amendment in political firing cases. This test is controlling

in employment matters relating to “political firings.”¹ The Ethics Commission struck the language.

Comment 8, page 5: 158-6-5

Summary of Comment: This section prohibits public servants from removing government property from the workplace for their private benefit. The Municipal League proposes incorporating the “de minimis exception” from the Ethics Act.

Response: The Ethics Commission accepted this recommendation. It incorporated the de minimis exception.

Comment 9, page 6: 158-6-9

Summary of Comment: The Ethics Act recognizes that some public servants “bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits” and “it would be unfair to those individuals and against the best interests of the citizens of this state to deny those persons the right to hold public office or to be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them.” The Ethics Act provides that these persons may apply to the Ethics Act for an exemption.

Section 158-6-9 of the Legislative Rule sets forth the process for applying for an exemption. The Municipal League expresses the concern that there may be times that compliance with this provision may make it difficult for a governing body to achieve a quorum. W. Va. Code § 6B-2-5(b)

Response: The Ethics Commission declined to accept this recommendation. To obtain an exemption under this provision, it is the individual who applies; not the governing body or the employee's supervisor. Therefore, since a governing body does not request the exemption, it will not affect the ability of a governing body to obtain a quorum.

Mark Gomez

¹ The language which was struck read: 3-6. 3.5. It is improper for a A public official or public employee to may not unlawfully terminate the employment of a person without sufficient cause for the purpose of hiring a relative, or person with whom the public official or employee resides, friend or political supporter. Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

Comment #1

Summary of Comment: Mr. Gomez cites the dictionary definitions of “may” and “shall.” He states, “Under basic rules of legal writing, ‘shall’ is a stronger word that puts the covered public official on notice that he or she has little or no discretion in their actions.” He requests that the proposed rule use the term “shall.”

Response: The Ethics Commission declined to make the proposed change. The Ethics Commission has changed the phrase “may not” to the phrase “shall not” throughout the Rule. This is a grammatical change intended to improve the Rule, not to weaken it. Legal commentators may have different opinions regarding correct grammatical usage of the phrase “shall not” versus “may not.” The Ethics Commission will defer to the legal drafting preferences and expertise of the Legislature in regard to the preferred usages of these terms.

Comment #2

Summary of Comment: The subsection of the proposed Rule containing the anti-nepotism provision incorporates the definition of relative from the Ethics Act. 158 C.S.R. § 6-3.2.

Mr. Gomez states, in relevant part, “Today, our community recognizes close and intimate relationships between persons that may not be considered ‘traditional’ family members under the law.” He encourages the Legislative Rule Making Review Committee to consider expanding the definition of relative to include step-brothers, half-sisters and persons who are raised together.

Response: The Ethics Commission declined to make the proposed change. The Ethics Commission incorporated the definition of “relative” into the Rule directly from the Ethics Act. See W.Va. Code § 6B-1-3(I). As this term is defined in the Code, the Ethics Commission does not have authority to re-define this term in the proposed Legislative Rule.

Comment #3

Summary of Comment: The comment states the amendments, “[w]ill allow public officials to hire their relatives and roommates as long as they get someone else ‘involved’ with the decision.”

The comment states the Rule does not include a definition of independent third party.

The comment states the phrase “Notwithstanding the limitations in this subsection” should not be used.

Response: The Ethics Commission accepted the recommendation to further define what constitutes an independent third party by incorporating language which restricts a public official or public employee from using a subordinate “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.” The Ethics Commission declined to accept the remaining proposed changes as it believes the proposed changes did not capture the intent of the Ethics Commission in revising the Rule.

Comment #4

Summary of Comment: The comment reads, in relevant part, “It is unacceptable that an unlawfully hired relative/roommate of the public official would be allowed to remain in the government position. As a condition of employment, new hires should be required to list any and all relatives that are employed in government positions. Omissions and nondisclosure of this information should merit suspension during the investigation and termination, without benefits, if confirmed.”

Response: The Ethics Commission declined to accept the proposed change. The Commission does not have authority to incorporate language which exceeds the scope of the Ethics Act. Certain elected officials, including county and state officials, must file financial disclosure statements. One required disclosure is that they must list: “The name and business address of any child or step-child who is eighteen years or older and employed by state, county or municipal government.” W.Va. Code §6B-2-7(12). This existing statutory requirement, in part, addresses the concern raised in the comment.



June 10, 2016

Rebecca Stepto
Executive Director
West Virginia Ethics Commission
201 Brooks Street, Suite 300
Charleston, WV 25301

Received

JUN 13 2016

By: [Signature]

RE: Proposed Amended Rule: 158 WV CSR 6

Dear Ms. Stepto:

Please accept these written comments of the West Virginia Municipal League regarding the proposed amendments to the Private Gain Rule, 158 WV CSR 6. As always, the League values the Commission efforts to ensure fair and responsive local government for our citizens.

Please consider the following comments and suggestions:

158-6-3.1

Proposed rule: 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 ~~cohabitating sexual partners~~ persons with whom the public official or public employee resides, ~~in employment matters without giving public notice and consideration to other applicants or qualifications required to perform the job.~~

Comment: "Persons with whom the public official or public employee resides" is undefined and too broad to be included in the rule. The statute (WV Code 6B-1-3(f)) provides a useful definition of "immediate family" that should be included in this rule, effectively replacing "persons with whom [the official] resides" with "...a spouse with whom the individual is living as husband and wife..."

Suggested rule: 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 his or her immediate family or relatives, ~~or cohabitating sexual partners~~ ~~persons with whom the public official or public employee resides~~, ~~in employment matters without giving public notice and consideration to other applicants or qualifications required to perform the job.~~

158-6-3.2

Proposed rule: ~~"Relatives" are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse. "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.~~

Comment: Include the statutory definition of immediate family (WV Code 6B-1-3(f)).

Suggested rule:

3.2 (a) "Immediate family" 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.

3.2 (b) ~~"Relatives" are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse. "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.~~

158-6-3.3

Proposed rule: 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.

Comment: This rule is too broad because a public official may influence employment and/or working conditions of immediate family or relative, when that employee is a member of a class and enjoys the same treatment as other members of that class.

Suggested rule: A public official or employee may not influence or attempt to influence the employment or working conditions of his or her immediate family or relative or a person with whom he or she resides. This prohibition does not apply to matters affecting a class of five or more similarly situated employees.

158-6-3.4(a)

Proposed rule: 3.4. 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 a consistent and impartial manner.

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.

Comment: When requiring “others with authority” to make decisions, the rule is effectively instructing the official or employee to recuse himself/herself from voting upon or administering the employment matter. The Commission has rules for recusal in 158 WV CSR 8, “Interest in Public Contracts”. These rules should be symbiotic.

Comment: “Consistent” is an undefined adjective.

Suggested rule: 3.4. A public agency, including its officials and employees, must administer the employment and working conditions of immediate family or a relative of a public employee or a public official or a person with whom the public official or employee resides in a consistent and an impartial manner.

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. An official or employee of a public agency has an interest in the public contract of employment of immediate family or relative employed by the public agency and shall therefore comply with rules regarding interest in public contracts. This interest does not prohibit action by the official or employee affecting a class of five or more similarly situated employees.

158-6-3.4 (b)

Proposed rule: 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.

Comment: Change consistent with “immediate family” comment above.

Suggested rule: b. A public official or public employee may not directly supervise immediate family or 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.

158-6-3.4(c)

Proposed rule: 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:

1. An independent third party shall be involved in the process; and,
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.

Comment: “An independent third party” has no standing or authority to vote upon municipal affairs, including employment decisions.

Comment: If these matters are defined as employment “contracts” in which the public official has an interest, this exemption is not appropriate or necessary.

Comment: If the governing body may not act because of a recusal required by these rules, the agency or official must be able to apply to the Commission for an exemption.

Suggested rule: (delete all) ~~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:~~

- ~~1. An independent third party shall be involved in the process; and,~~
- ~~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.~~

158-6-3.5

Proposed rule: ~~It is improper for a~~ A public official or public employee ~~to~~ may not unlawfully terminate the employment of a person ~~without sufficient cause for the purpose of hiring a relative, or person with whom the public official or employee resides, friend or political supporter.~~ Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

Comment: This proposed rule unnecessarily constrains and complicates the employment decisions of a local agency. The employer-employee relationship is governed by West Virginia and federal labor laws and precedent.

Suggested rule: (delete all) ~~It is improper for a~~ A public official or public employee ~~to~~ may not unlawfully terminate the employment of a person ~~without sufficient cause for the purpose of hiring a relative, or person with whom the public official or employee resides, friend or political supporter.~~ Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

158-6-5

Proposed rule:

5.1. Removal - Public officials and public employees ~~shall~~ may not remove government property from the ~~work-place~~ workplace for their private benefit.

5.2. Improper Use - Public officials and public employees ~~shall~~ may not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property.

Comment: The two subsections should be consistent with the de minimis exception.

Suggested rule:

5.1. Removal - Public officials and public employees ~~shall~~ may not remove government property from the ~~work-place~~ workplace for their private benefit. This subsection does not apply to the de minimis use of government property.

5.2. Improper Use - Public officials and public employees ~~shall~~ may not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property.

158-6-9

Proposed rule: Certain public officials or public employees bring to their respective offices or employment their own personal prestige, their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. These public officials and employees may apply to the Ethics Commission for an exemption from the limitations in W.Va. Code § 6B-2-5(b). The Ethics Commission may grant an exemption if it finds:~~The requirements to obtain an exemption and avoid improperly using their office for private gain are set out below:~~

- a. ~~the~~ The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state;
- b. ~~the~~ The office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and
- c. ~~the~~ The person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

Comment: An exemption must be possible/offered where compliance with these rules would make impossible convening a quorum of the governing body to conduct public business.

Suggested rule:

9.1 Certain public officials or public employees bring to their respective offices or employment their own personal prestige, their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. These public officials and employees may apply to the Ethics Commission for an exemption from the limitations in W.Va. Code § 6B-2-5(b). The Ethics Commission may grant an exemption if it finds:~~The requirements to obtain an exemption and avoid improperly using their office for private gain are set out below:~~

- a. ~~the~~ The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state;
- b. ~~the~~ The office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige; and

c. ~~the~~ The person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment.

9.2 Where compliance with these rules make it impossible to convene a quorum of the governing body to conduct public business, the public agency and the recused official may jointly apply to the Ethics Commission for an exemption from the limitations in W.Va. Code 6B-2-5(b). The Ethics Commission may grant an exemption if it finds that the public agency may not conduct essential business without that exemption.

Thank you for your kind consideration of these comments. Of course, I am available to discuss these suggestions at your convenience.

Sincerely,

Lisa Dooley
Executive Director
WV Municipal League

West Virginia Division of Personnel

Sara P. Walker, Director

June 1, 2016

Rebecca L. Stepto, Executive Director
West Virginia Ethics Commission
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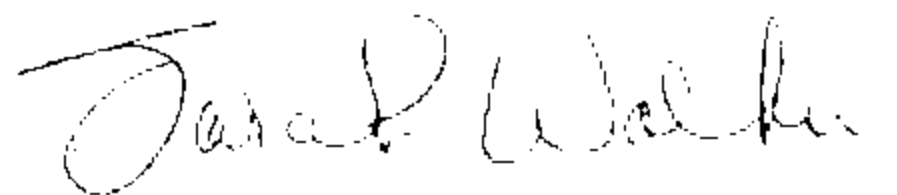
Dear Director Stepto:

I am in receipt of your attached letter of May 18, 2016, requesting the West Virginia Division of Personnel's (DOP) review of the West Virginia Ethics Commission's proposed Legislative Rule, Title 158, Series 6 – Use of Public Office for Private Gain, including Nepotism (W. Va. Code of State Rules §§ 158-6-1 through 9). Please find below a summary of DOP's proposed revisions for your consideration.

1. The numbering of the sections appears to be inconsistent with the requirements set forth in Section 5 of the Secretary of State's Legislative Rule, Title 153, Series 6 – Standard Size and Format for Rules and Procedures for Publication of the State Register or Parts of the State Register.
2. New subsection 3.4.c.1 – The DOP agrees with the revision to make participation of an independent third party mandatory. In addition, DOP recommends that the language previously found in subsection 3.3.b.2 regarding use of a subordinate as the independent third party be reinserted and be a prohibited practice rather than a suggested practice to avoid.
3. Subsections 4.1, 4.2, 5.1, and 5.2 – Though it may be the intent of the Ethics Commission to interpret the language in this manner, DOP believes language should be added to clarify that the prohibition found in these sections also apply to the public official's relatives or a person with whom he or she resides.

Should you have any further questions regarding this matter, please feel free to contact me at 304-558-3950, extension 57210.

Sincerely,



Sara P. Walker, Director
Division of Personnel

SPW/JT/dg

Attachment

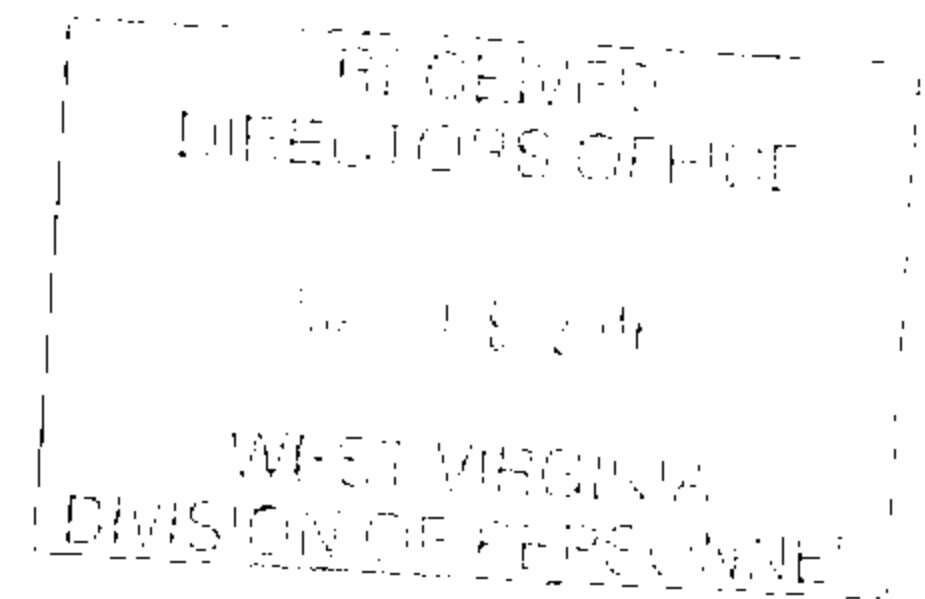
c: Joe Thomas, Assistant Director, Employee Relations Section

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May 18, 2016

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West Virginia Division of Personnel
Building 6, Room 420
1900 Kanawha Blvd E
Charleston, WV 25305-0139

**Re: Public Comment Period for Ethics Commission's
Proposed Legislative Rule for Private Gain & Nepotism**

Dear Director Walker:

I am enclosing for your review the West Virginia Ethics Commission's proposed Legislative Rule, Title 158, Series 6 – Use of Public Office for Private Gain, including Nepotism (W Va. Code of State Rules §§ 158-6-1 through 9.)

The Ethics Commission filed the Rule for public comment with the Office of the Secretary of State on May 17, 2016. The public comment period ends on June 16, 2016, at 5:00 p.m.

The proposed Rule and attachments may also be viewed on the Secretary of State's website at www.sos.wv.gov.

In late 2015, the Legislative Rule-Making Review Committee reviewed this Rule for purposes of determining whether it should be repealed or revised. The Rule became effective in 1992 and has not been amended since that time. The Ethics Commission determined that the Rule should not be repealed, but that amendments were necessary to more concisely define the limitations on nepotism, to expressly incorporate the existing rule of law that public agencies may impose stricter standards than the standards imposed by the Ethics Act and to make technical changes.

Please mail all public comments to: Rebecca L. Stepto, Executive Director, West Virginia Ethics Commission, 210 Brooks Street, Suite 300, Charleston, WV 25301.

Sincerely yours,

Rebecca L. Stepto
Executive Director

RLS/tmk

Enclosure: Proposed Rule and attachments

TITLE 158
LEGISLATIVE RULE
WEST VIRGINIA ETHICS COMMISSION

SERIES 6
USE OF OFFICE FOR PRIVATE GAIN, INCLUDING NEPOTISM

§ 158-6-1. General Provisions.

1.1 Scope -- ~~These legislative rules establish the guidelines concerning private gain for persons covered by the WV Governmental Ethics Act.~~ This legislative rule establishes guidelines relating to the private gain provisions in the Ethics Act.

1.2 Authority -- W. Va. Code § 6B-2-5(b) and W. Va. Code § 6B-2-2(a).

1.3 Filing Date. -- ~~April 28, 1992.~~

1.4 Effective Date -- ~~June 1, 1992.~~

1.5 Sunset provision -- This rule remains in effect for five years after the effective date.

§ 158-6-2. Exceptions to Using Office for Private Gain.

2.1 The performance of certain acts does not constitute a public official's or public employee's improper use of office for private gain if ~~they perform~~ he or she performs:

- a. usual and customary duties associated with the office or position; ~~or~~
- b. services relating to the advancement of public policy goals; or
- c. constituent services without compensation.

2.2 A public official acting in his or her capacity as a public official may make an inquiry for information on behalf of a constituent provided that no fee, reward, or other thing of value is directly or indirectly accepted by the public official. The provisions of this subsection shall do not apply to a public official acting in his or her private capacity.

~~2.3 When public officials and public employees whose job responsibilities anticipate travel outside the State to attend seminars or inspect certain facilities or products on behalf of their governmental agency this is considered performing usual and customary duties associated with the person's office. When the job responsibilities of a public official or public employee include out-of-state travel to attend seminars or to inspect certain facilities or products on behalf of his or her public agency, these activities constitute the usual and customary duties associated with the public official or public employee's office or position if there is a legitimate government reason for the travel.~~

§ 158-6-3. Nepotism

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

~~cohabitating sexual partners persons with whom the public official or public employee resides in employment matters without giving public notice and consideration to other applicants or qualifications required to perform the job.~~

~~3.2 "Relatives" are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse. "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.~~

~~3.3 A public official or public employee may avoid the appearance of nepotism by following these steps in hiring a relative or cohabitating sexual partner for a public position:~~

~~a. The public should be given reasonable advance notice of the availability of the job:~~

~~1. The 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 soon enough 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 where a cohabitating sexual partner 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 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.~~

3.3. 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

3.4. 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 a consistent and impartial manner.

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.

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.

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:

1. An independent third party shall be involved in the process, and,

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.

~~3.4. All hiring by public officials and public employees of relatives prior to the twenty-ninth day of February, 1992 is not subject to review under the ethics act in Chapter 6B of the West Virginia Code.~~

~~3.5. A public official should not use his or her position for the private gain of a relative or cohabitating sexual partner by improperly giving bonuses, raises or other employment benefits to such person.~~

~~3.6. 3.5. It is improper for a~~ A public official or public employee to may not unlawfully terminate the employment of a person without sufficient cause for the purpose of hiring a relative, or person with whom the public official or employee resides, friend or political supporter. Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

3.6. Certain county public officials and local board of education officials and employees are subject to the stricter limitations in W.Va. Code § 61-10-15. Other provisions in the Code or a public agency's own policies, rules, regulations, ordinances or charters may further limit or prohibit the hiring of a relative or a person with whom a public official or employee resides.

§ 158-6-4. Use of "Subordinate" for Private Gain

4.1. After work hours - Public officials and public employees shall may not use subordinate employees for their private gain as an implied or express condition to their continued employment. An example of prohibited conduct would be a public official requiring a subordinate employee to perform personal errands for the official in order to maintain his or her public employment.

4.2. During work hours - Public officials and public employees shall may not use subordinate employees during work hours to perform private work or provide personal services for their benefit. An example of this prohibited conduct would be a public employee supervisor requiring state employees to repair a garage or pave a driveway for the supervisor during work hours. This

subsection does not apply to de minimis work or services

§ 158-6-5. Use or Removal of Government "Property."

5.1 Removal - Public officials and public employees ~~shall~~ may not remove government property from the ~~work place~~ workplace for their private benefit

5.2 Improper Use - Public officials and public employees ~~shall~~ may not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property

§ 158-6-6. Kickbacks.

It is unlawful for a public official or public employee to accept ~~any~~ a thing of value from any person for providing business or other benefits to that person through the public official's or public employee's governmental agency or as a result of his or her influence and control

§ 158-6-7. Bribes.

It is unlawful for a public official or employee to receive money or ~~any~~ a thing of value from any person for the purpose of influencing or persuading the official to perform his duties in a manner to benefit ~~such~~ the person

§ 158-6-8. Private Work During Public Work Hours

Full-time appointed public officials and part-time and full-time public employees may not receive private compensation for performing private work during public work hours. This section ~~shall~~ does not apply to de minimis private work

§ 158-6-9. Exemption Categories.

Certain public officials or public employees bring to their respective offices or employment their own personal prestige, their intelligence, education, experience, skills and abilities, or other personal gifts or traits. In many cases, these persons bring a personal prestige to their office or employment which inures to the benefit of the state and its citizens. These public officials and employees may apply to the Ethics Commission for an exemption from the limitations in W.Va. Code § 6B-2-5(b). The Ethics Commission may grant an exemption if it finds: ~~The requirements to obtain an exemption and avoid improperly using their office for private gain are set out below.~~

a. ~~the~~ The public office held or the public employment engaged in is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state,

b. ~~the~~ The office held or the employment engaged in is such that it normally or specifically requires a person who possesses personal prestige, and

c. ~~the~~ The person's employment contract or letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office or employment

§ 158-6-10. Other limitations

The Ethics Act sets a minimum standard of conduct. When the Legislature or a public agency impose stricter standards, then public officials and public employees must comply with the stricter standards.



WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION

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5/17/2016 9:28:24 AM

FORM 1 -- NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 1)

AGENCY West Virginia Ethics Commission

RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE SERIES 158-6

RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6B-2-2(a) and § 6B-2-5(b)

COMMENTS LIMITED TO
Written

DATE OF PUBLIC HEARING

LOCATION OF PUBLIC HEARING

DATE WRITTEN COMMENT PERIOD ENDS
Thursday, June 16, 2016 5:00 PM

WRITTEN COMMENTS MAY BE MAILED TO
Rebecca Stepto
Executive Director
West Virginia Ethics Commission
210 Brooks Street, Suite 300
Charleston, WV 25301

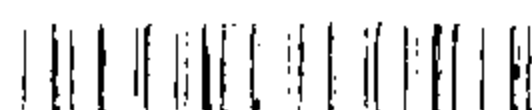
BY CHOOSING YES I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT

Yes

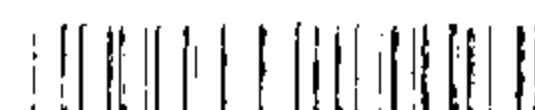
Theresa M Kirk -- By my signature, I certify that I am the person authorized to file legislative rules in accordance with West Virginia Code §29A-3-11 and §39A-3-2



Title Series: 158-06



Rule ID: 10114



Document: 37556



WEST VIRGINIA
SECRETARY OF STATE
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ADMINISTRATIVE LAW DIVISION

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5/17/2016 9:28:24 AM

FORM 1 - NOTICE OF A PUBLIC HEARING OR COMMENT PERIOD ON A PROPOSED RULE
(Page 2)

AGENCY West Virginia Ethics Commission

RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE-SERIES 158-6

RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6B-2-2(a) and § 6B-2-5(b)

PROVIDE A BRIEF SUMMARY OF YOUR PROPOSAL

The purpose of the rule is to amend the Ethics Commission's Legislative Rule relating to the private gain provision in the Ethics Act, including restrictions on nepotism. W.Va. Code § 6B-2-5(b)

The proposed amendments rewrite the existing language governing nepotism, i.e., favoritism in the hiring of relatives and cohabitating sexual partners. The current Rule contains vague restrictions on the hiring and supervision of relatives and cohabitating sexual partners. The proposed amendments establish more concise rules for public officials and employees to follow in employing or supervising relatives or persons with whom the public official or public employee resides.

The proposed Rule substitutes the phrase "persons with whom the public official or public employee resides" for the phrase "cohabitating sexual partners." It places limitations on unlawfully favoring campaign contributors and paid campaign staff in personnel matters, including the hiring process.

The proposed Rule also incorporates the existing rule of law that public agencies may impose stricter limitations than the Ethics Act.

BY CHOOSING YES, I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT

Yes

Theresa M. Kirk - By my signature, I certify that I am the person authorized to file legislative rules in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

FILED IN THE OFFICE OF THE SECRETARY OF STATE

Title Series 158-6

FILED IN THE OFFICE OF THE SECRETARY OF STATE

Rule ID 10114

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Document 17936



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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 1)

AGENCY West Virginia Ethics Commission

RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE SERIES 158 6

RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6B-2-2(a) and § 6B-2-5(b)

SUMMARIZE IN A CLEAR AND CONCISE MANNER WHAT IMPACT THIS MEASURE WILL HAVE ON COSTS AND REVENUES OF STATE GOVERNMENT

The Ethics Commission does not anticipate that this Rule will impact the costs or revenues of state government.

Theresa M Kirk By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series 158-06



Rule Id 16114



Document 17536



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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 3)

AGENCY West Virginia Ethics Commission

RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE-SERIES 158-6

RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6b-2-2(a) and § 6B-2-5(b)

3 EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT) PLEASE INCLUDE ANY INCREASE OR DECREASE IN FEES IN YOUR ESTIMATED TOTAL REVENUES

As addressed below, the estimated costs and revenues are valued at zero as the staff resources needed to educate public servants about the Rule should be de minimis.

Theresa M Kirk -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series: 158-6E



Rule-Id: 10114



Document: 27536



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FORM 11 -- FISCAL NOTE FOR PROPOSED RULES (Page 4)

AGENCY West Virginia Ethics Commission

RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE-SERIES 158.6

RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6B-2-2(a) and § 6B-2-5(b)

PLEASE IDENTIFY ANY AREAS OF VAGUENESS, TECHNICAL DEFECTS, REASONS THE PROPOSED RULE WOULD NOT HAVE A FISCAL IMPACT AND OR ANY SPECIAL ISSUES NOT CAPTURED ELSEWHERE ON THIS FORM.

The proposed Rule will have a de minimis fiscal impact. The Ethics Commission will educate public servants about changes to the Rule. This task should only require a limited amount of staff time and agency resources.

BY CHOOSING YES (ATTEND) THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT

Theresa M Kirk By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

FILED

Title No. 158-06

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File No. 10114

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Document: 27536



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ADMINISTRATIVE LAW DIVISION

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FORM 12 -- BRIEF SUMMARY AND STATEMENT OF CIRCUMSTANCES (Page 1)

AGENCY West Virginia Ethics Commission
RULE TYPE Legislative AMENDMENT TO EXISTING RULE Yes TITLE SERIES 158-6
RULE NAME Private Gain

CITE AUTHORITY W.Va. Code § 6B-2-2(a) and § 6B-2-5(b)

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN RULE AND
STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE

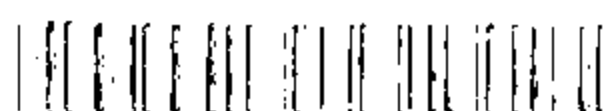
In 2015 the Legislative Rule Making Review Committee reviewed this Rule for purposes of determining whether it should be repealed or revised. The Rule became effective in 1992 and has not been amended since that time.

The Ethics Commission determined that the Rule should not be repealed. The Commission found that amendments were necessary to more concisely define the limitations on nepotism, to expressly incorporate the existing rule of law that public agencies may impose stricter standards than the standards imposed by the Ethics Act and to make technical changes.

BY CHOOSING YES I ATTEST THAT THE PREVIOUS STATEMENTS ARE TRUE AND CORRECT

Yes

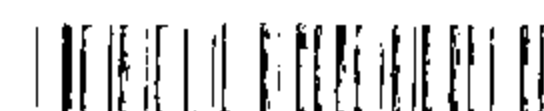
Theresa M Kirk By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.



Title-Series 158-06



Rule Id: 10114



Document: 27536

Mark Gomez
3500 Staunton Avenue, S.E.
Suite 7
Charleston, WV 25304

“In just about every area of society, there’s nothing more important than ethics.”

Henry Paulsen, 74th Secretary of the Treasury

WV Registered Lobbyist #151048

(304) 410-1982

June 15, 2016

Via Internet Distribution (ellen.m.briggs@wv.gov)

Re: Public Comment for Title 158 Legislative Rules
West Virginia Ethics Commission
Use of Office for Private Gain, Including Nepotism
Failure to Prosecute Nepotism

Dear Members of the Legislative Rule Making Review Committee:

I filed two (2) ethic complaints on April 13, 2015 against members of the State Athletic Commission. These Complaints were assigned Case Numbers VCRB 2015-051 and VCRB 2015-052 by the Ethics Commission. One of the Commissioners resigned after five (5) months of service. The second Commissioner was not confirmed by the 2016 Senate. Despite these Commissioners being long gone, I have not received any information on the status of these Complaints and do not know if they are still open and under investigation or closed.

On March 31, 2016, in Smith v. Allred, Civil Action File Number 2:15-CV-06026, the Federal District Court, Judge Copenhaver, *presiding*, ordered former members of the State Athletic Commission to stand trial for more than 40 counts of racketeering. Public officials appointed their relatives to work as fight officials. The relatives appointed as fight officials charged fight promoters three and four times the legal amount for fight officials. If the promoters did not pay the extortionate amount, they could expect “bad” officiating and “no shows.”

Before the Plaintiff filed his lawsuit, he filed an Ethics Complaint providing the same evidence and testimony. It is shameful that the federal court proceeded faster than the Ethics Commission in issuing findings of fact based on the same information. It is public knowledge that the Ethics Commission forwarded their findings to the Kanawha County Prosecutor many months ago but I have seen no public reprimands or fines levied against these offending public officers.

The much reported case against Drema Bias Evans, Raleigh County Assessor, is illustrative of Ethics Commission’s sloth’s pace in handling complaints. A concerned citizen filed his ethics complaint on February 23, 2012 and the case was settled on December 17, 2014. In settlement, Assessor Evans agreed to a Public Reprimand and a \$7500 fine. During the 21 months that the case languished with the Ethics Commission, Assessor Evans, her son, and her grandson each collected salaries as usual from Raleigh County. Of further concern is that this nepotism began in July, 2007 when Assessor Evans hired her grandson as Assessor. Her son joined the office as a Mapper/Supervisor on May 3, 2010. Inexplicitly, the Director did not pursue charges against the son or grandson for their ethics violations as public employees.

Public comments posted on the WVMetroNews website following the report were as follows:

www.metronews.com/2015/05/07/public-reprimand-for-raleigh-county-assessor/

Traffic Google Translate MSN (2) MSN Entertainment MSN Money MSN SlideShow file:///C:/Users/Marg... MSN MSNBC

Public Comments

David Delk ·
Member Since: 12/20/2014 10:00 AM
WV Ethic Commission deserves a vote of no confidence. A relatively simple complaint filed in 2012 gets settled and resolved three years later. That is not holding public officials accountable.
Like Reply 10/10/2015 10:00 AM

Dianne Sisler ·
Member Since: 12/20/2014 10:00 AM
She's just following the fine example we have at the highest level. The political family tree in Charleston has no branches....
Like Reply 10/10/2015 10:00 AM

Jim Daniel Dean ·
Member Since: 12/20/2014 10:00 AM
If the people do not like what she is doing they will elect someone else
Like Reply 10/10/2015 10:00 AM

Patrick Parry ·
Member Since: 12/20/2014 10:00 AM
She should be relieved of her duties immediately.
Like Reply 10/10/2015 10:00 AM

Raymond Cardwell ·
Member Since: 12/20/2014 10:00 AM
Not likely.
Like Reply 10/10/2015 10:00 AM

Dan Lyons ·
Member Since: 12/20/2014 10:00 AM
"The case should send an important reminder...."? A reminder that she'll get a stem, gentle slap on the wrist! What a total joke this committee makes of political ethics in WV. You might as well have nothing.
Like Reply 10/10/2015 10:00 AM

Not one positive comment for a public reprimand and a \$7500 fine. This was not a win for ethics.

In each of the above-cited cases, there was no question as to the relationship of the public official to the employee. The cited cases included the improper hiring of sons, grandsons, daughters and spouses. Editing the language of the Nepotism Rules will do nothing to improve the processing time of this office.

It is unacceptable that an unlawfully hired relative/roommate of the public official would be allowed to remain in the government position. As a condition of employment, new hires should be required to list any and all relatives that are employed in government positions. Omissions and non-disclosure of this information should merit suspension during the investigation and termination, without benefits, if confirmed. Upon Complaint, the public official should have 20 days to respond to the Ethics Commission as to whether the accused employee is a prohibited relation or roommate Yes or No. If yes, the public official should be responsible for the wages and salary paid to the unlawfully hired family member/roommate and pay a \$500 fine for a first offense and \$1000 thereafter. If no, the Ethics Commission must conduct an investigation regarding the facts and circumstances the case and upon finding of false statements and misrepresentation the offending public official should be removed from office for violations of oath of office by and through Order of the Ethics Commission.

This Executive Director does not have the drive of a prosecutor that her position requires. The current nepotism rules are adequate to protect the public from unlawful private gain and graft. The Director has the tools to pursue violators but does not. The Director has the ear of the Legislature to promote more aggressive laws to promote ethics and get rid of the State's D- grade ethics grade. But she does not.

The Governor is also to blame for failing to appoint a full Commission of members as required by statute. This is a universal complaint amongst the various West Virginia commissioners against Governor Tomblin's administration.

Nepotism, and the racketeering and extortion it breeds, is a matter of the public trust and safety and should be given grave and somber consideration.

Thank you for your consideration.

Mark Gomez
Private Citizen

Mark Gomez
3500 Staunton Avenue, S.E.
Suite 7
Charleston, WV 25304

“The reader should not be required, because of the writer’s laziness, to struggle with the meaning of written text.”

The Decline and Fall of Gobbledygook, Canadian Bar Association

WV Registered Lobbyist #151048

(304) 410-1982

June 15, 2016

Via Internet Distribution (ellen.m.briggs@wv.gov)

Re: Public Comment for Title 158 Legislative Rules
West Virginia Ethics Commission
Use of Office for Private Gain, Including Nepotism
“Notwithstanding” and other matters

Dear Members of the Legislative Rule Making Review Committee:

The Executive Director of the Ethics Commission has proposed amendments to the existing Nepotism rules that drastically weaken the Legislature’s intent. The Director’s amendments will **allow public officials to hire their relatives and roommates as long as they get someone else “involved” with the decision.**

The Executive Director has proposed omitting the existing Rule 3.3, 3.4, and 3.5 pertaining to “cohabitating sexual partners.” The Director proposes to replace them with the following:

3.3. 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.

3.4. 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 a consistent and impartial manner.

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.

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.

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:

1. An **independent third party** shall be involved in the process; and,
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.

The archaic legal term “notwithstanding” is translated as “despite” in non-lawyer language. Placing the phrase “notwithstanding the limitations in this subsection” at the end of the proposed amendment renders void all other prohibitions and provisions found in proposed Rule 3.4.

The phrase “Notwithstanding the limitations in this subsection” specifically voids the private gain prohibitions found in proposed Rule 3.4(a) pertaining to participation in employment matters and Rule 3.4(b) pertaining to no direct supervision of relatives/roommates.

Further, the proposed amendment does not include the important definitions of “independent third party” or “some independent person.” The existing Rule 3.3(b) gives guidance as follows:

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 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.~~

The existing Rule 3.3 establishes a nominal procedure for handling nepotism: ~~“A public official or public employee may avoid the appearance of nepotism by following these steps in hiring a relative or cohabitating sexual partner for a public position.”~~

Although the existing rule needs improvement and clearer language in order to give adequate guidance to public officials, the deletion of this these subsections, without replacement, obliterates the statutory prohibition on hiring relatives/roommates.

The Director’s proposed Rule 3.4(c) contradicts her proposed Rule 3.3 which is a prohibition against a public official having an influence on employment matters concerning his or her relative/ roommate.

The language of 4.3(c) 2 is extraneous and unnecessary as every public official is oath bound and bonded “to exercise his or her best judgment” and every public official must “be prepared to justify his or her decisions” upon the filing of an ethics complaint. Perhaps a separate section should be added to the series specifically informing non-lawyer public officials of their general duties, standards and responsibility pursuant to WV Code

“To the extent possible” language of Rule 3.4(a), both existing and proposed, weakens the intent of the Legislature. This language adds an unneeded qualifier to the Rule and allows a subjective rather than objective standard of conduct.

Thank you for your consideration of these matters.

Mark Gomez
Private Citizen

Mark Gomez
3500 Staunton Avenue, S.E.
Suite 7
Charleston, WV 25304

“There is no such thing as a “broken family. Family is family, and is not determined by marriage certificates, divorce papers, and adoption documents. “ C. Joybell C.

WV Registered Lobbyist #151048

(304) 410-1982

June 14, 2015

Via Internet Distribution (ellen.m.briggs@wv.gov)

Re: Public Comment for Title 158 Legislative Rules
West Virginia Ethics Commission
Use of Office for Private Gain, Including Nepotism
Definition of “Relative”

Dear Members of the Legislative Rule Making Review Committee:

It is not often that certain series of legislative rules are open for public comment.. When these opportunities present themselves through statutory amendments by the Legislature, the goal should be to update the law and recognize social changes in our community.

The Ethics Commission proposes the following changes to 158CSR6:

3.2. ~~“Relatives” are defined as individuals who are related to the public official or public employee as father, mother, son, daughter, brother, sister, or spouse.~~ “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.

The Commission proposes the inclusion of “in-laws” as “relatives.” The legislative rules should further define and refine the terms mother, father, brother and sister. Today, our community recognizes close and intimate relationships between persons that may not be considered “traditional” family members under the law. Men and women routinely have children without the benefit of traditional marriage. Children of these unions, raised in these non-traditional families, may be step-brothers, half sisters, and may have no blood relation but are still raised together and considered family members.

Mark Gomez
Private Citizen

Mark Gomez
3500 Staunton Avenue, S.E.
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Charleston, WV 25304

"The only foes that threaten America are the enemies at home, and these are ignorance, superstition and incompetence."

WV Registered Lobbyist #151048

(304) 410-1982

June 13, 2015

Via Hand-Delivery and Internet Distribution

Re: Public Comment for Title 158 Legislative Rules
West Virginia Ethics Commission
Use of Office for Private Gain, Including Nepotism

JUN 13 2015

WV Ethics Commission

Dear Members of the Legislative Committee:

I was encouraged to see that Ethics Commission was reconsidering the legislative rules defining "nepotism" as this practice is rampant throughout West Virginia state government. Unfortunately, my enthusiasm for this project waned upon reading the weak, conditional and ambiguous language that the Director has proposed for amendment.

The focus of this public comment is Director Rebecca L. Stepo's proposal to change the word "shall" to "may" throughout the rules regarding nepotism.

Dictionary.com defines "may" as: a choice to act or not, or a promise of a possibility, as distinguished from "shall," which makes it imperative. Non-lawyers tend to see the word "may" and think they have a choice or are excused from complying with some statutory provision or regulation.

Dictionary.com defines "shall" as (in laws, directives, etc.) must; is or are obliged to.
Example: The meetings of the council shall be public.

Under basic rules of legal writing, "shall" is a stronger word that puts the covered public official on notice that he or she has little or no discretion in their actions. "May" gives the impression that the public official has discretion, leeway and option to act in a certain way. There is nothing ambiguous in the statute about prohibited familial relations in these employment matters. A son is a son and so on. It is absolutely wrong for an official to hire a listed and described family member for government employment, in any event.

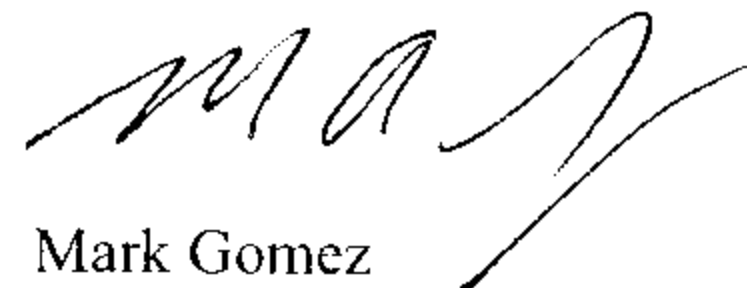
On November 9, 2015, the Charleston Gazette Mail reported the following headline, "WV drops to D- level rating in government openness, transparency." Staff writer, Phil Kabler reported that an investigation conducted by the Center for Public Integrity's State Integrity gave the Ethics Commission a D grade for "open and transparent government." "A summary of the investigation notes:

'In state after state, open records laws are laced with exemptions, and part-time legislators and agency officials engage in glaring conflicts of interests and cozy relationships with lobbyists. *Meanwhile, feckless, understaffed watchdogs struggle to enforce laws as porous as honeycombs.*'"

Rebecca L. Stepto is the Director of the West Virginia Ethics Commission. Since beginning her tenure, West Virginia dropped from a D+ to a D grade in this nationwide evaluation. On July 30, 2015, Director Stepto confirmed to me via email that her Commission was "understaffed" and unwilling to file an amicus brief in the Kanawha Circuit Court in a case involving the State's Open Governmental Meetings Act when she wrote;

"Thank you for your email and for your kind words about the Ethics Commission. Our agency's biggest problem is lack of funding and staff. We have only three attorneys, and it is very difficult to fulfill even our statutory duties so I am reluctant to take on any extra duties or work!"

These proposed language changes only weaken the current nepotism rules. Being "understaffed" is a legislative budgetary problem and hard correct. Being "feckless" is a leadership problem and "may" be readily corrected. I public comment that the proposed language changes are not in the best interests of the citizens of the State of West Virginia. Thank you for your consideration.



Mark Gomez
Private Citizen



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August 4, 2016

Sara P. Walker, Director
West Virginia Division of Personnel
Building 6, Room 420
1900 Kanawha Boulevard East
Charleston, WV 25305

Dear Director Walker:

Thank you for reviewing the proposed amendments to Title 158, Series 6 and for your comments. The Ethics Commission responds to your comments as follows:

Comment No. 1

Summary of Comment: The Division of Personnel (hereinafter "DOP") notes that the proposed section numbering may be inconsistent with the Secretary of State's Legislative Rule, Title 153, Series 6 which governs, in relevant part, the formatting of Legislative Rules.

Response: The Ethics Commission will revise the Rule to ensure the section numbering is consistent with the Secretary of State's Legislative Rule.

Comment No. 2

Summary of Comment: This comment relates to the new proposed subsection 3.4.c.1. The purpose of the revisions in this section is to more clearly define the rules governing the hiring of relatives and persons with whom a public official or employee resides.

The DOP agrees with the revision to 3.4.c.1, which requires the participation of an independent third party in hiring and personnel

decisions involving relatives or a person with whom a public official resides.

The DOP recommends that the language previously found in subsection 3.3.b.2 be reinserted. The prior language read: "A public official or public employee should at least have some independent third person take part in the selection. He or she should avoid using a subordinate for the independent person." The prior language then provided: "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." 3.3.b.3.

Response: The Ethics Commission accepts, in part, this recommendation. The Ethics Act and the Rule apply to public servants in both state and local government. At the local government level, if a relative, e.g., sister-in-law, works in a county office, the elected official may be unable to completely remove him or herself from decisions affecting relatives as it is the elected official who is statutorily responsible for the day-to-day operations of his or her office. He or she may not be able to lawfully delegate certain powers.

The proposed revision recognizes this fact. It reads: "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."

However, the Ethics Commission will revise the language to restrict the use of a subordinate as the independent third party.

Comment No. 3

Summary of Comment: This comment relates to section 4, which prohibits the use of subordinates for private gain, and section 5, which prohibits the use or removal of government property. The DOP recommends clarifying that public servants may not use subordinates or government property for the benefit of relatives.

Director Walker
Page Three
August 4, 2016

Response: The Ethics Commission generally agrees with the recommendation. It will amend the Rule to make it consistent with the language in the Ethics Act prohibiting the use of public office for the private gain of the public servant "or that of another person." W.Va. Code § 6B-2-5(b).

Thank you for your comments.

Very truly yours,



Robert J. Wolfe, Chairperson
WV Ethics Commission

RJW/tmk



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August 4, 2016

Lisa Dooley
Executive Director
WV Municipal League
2020 Kanawha Boulevard East
Charleston, WV 25311

Dear Director Dooley:

Thank you for submitting a public comment in response to the Ethics Commission's proposed amendment to Title 158, Series 6. In response to your comment, the Ethics Commission responds as follows:

Comment 1, page 1: 158-6-3.1

Summary of Comment: In the proposed amended Legislative Rule, the Ethics Commission proposes substituting the phrase "cohabitating sexual partners" with the phrase "persons with whom the public official or public employee resides."

The Municipal League proposes applying the anti-nepotism provisions only to "immediate family members" in lieu of extending the limitations to "persons with whom the public official or public employee resides." The Ethics Act defines "immediate family member" as "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." W.Va. Code § 6B-1-3.

Response: The Ethics Commission declines to make the requested change. The Ethics Commission submits that the use of the phrase "persons with whom the public official or public employee resides"

captures the spirit and intent of the original Rule, while protecting the privacy interests of public servants.

The Ethics Commission submits that this approach achieves the following objectives. First, this limitation does not unduly intrude upon the privacy rights of public servants as it does not require a determination of whether there is a sexual relationship. Second, a public servant normally has a financial relationship with a person with whom he or she resides.

Comment 2, page 2: 158-6-3.2

Summary of Comment: The Municipal League proposes incorporating the definition of “immediate family member” from the Ethics Act, W.Va. Code § 6B-1-3(f).

Response: The Ethics Commission declines to make the change. As the Ethics Commission is not incorporating the requested change in Comment 1, it is not necessary to incorporate the definition of “immediate family member” into the proposed Amended Rule.

Comment 3, page 2: 158-6-3.3

Summary of Comment: The Municipal League requests that language be incorporated to make it clear that public servants may make decisions affecting an employee who is a relative if the decision affects a class of five or more similarly situated employees.

Response: The Ethics Commission accepts this recommendation. The class exception is recognized in the Ethics Act, W.Va. Code § 6B-2-5(j) and is already incorporated into the proposed amended Rule in subsection 3.4. The Ethics Commission agrees the revision will assist public officials in understanding the law and related exception.

Comment 4, page 3: 158-6-3.4(a)

Summary of Comment:

#4.a. Summary: The proposed Rule, as amended, requires public servants to remove themselves from employment decisions uniquely

affecting relatives or persons with whom they reside. The Municipal League also requests that the Commission incorporate language found in another Legislative Rule governing public contracts, Title 158, Series 8. (In contrast, the proposed revised Rule under consideration relates to the use of public office for private gain provisions in the Ethics Act.)

The language the League requests that the Commission add to the Rule reads: "If a public official has a limited interest in a contract, he or she should recuse him or herself from voting. A public employee who has a limited interest should not be involved in any decision-making process relating to the award or review of the contract."

#4.a. Response: The Ethics Commission accepts this recommendation in part and declines it in part.

The Commission accepts the recommendation to add language relating to proper recusal from employment decisions. This language will serve to make the limitations in the Rule clearer to public servants.

The Commission declines to make the other requested change.

The public contract provisions, codified at W.Va. Code § 6B-2-5(d) and in Title 158, Series 8, are separate and distinct from the provisions in W.Va. Code § 6B-2-5(b) which is entitled "Use of office for private gain." To avoid confusion and unintended consequences, the language relating to public contracts and limited interests will not be incorporated into the restrictions on nepotism contained in this Rule.

#4.b. Summary: The proposed Amendment requires public servants to administer the employment and working conditions of relatives and "persons with whom they reside" in a "consistent and impartial manner." (*emphasis supplied*) The Municipal League proposes striking the term "consistent" as it is undefined or vague.

#4.b. Response: The Ethics Commission accepts this recommendation. The Commission finds the inclusion of the word "consistent" in this section of the Rule is not necessary to achieve the objective of the Rule. The Ethics Commission will strike this word.

Comment 5, page 4: 158-6-3.4(b)

Summary of Comment: This proposed revision relates to Comment 1 regarding extending the limitations on employment and personnel decisions to “immediate family members” in lieu of extending it to persons with whom the public servant resides.

Response: The Ethics Commission declines to accept this recommendation for the reasons set forth in its response to Comment 1.

Comment 6, page 4: 158-6-3.4(c)

Summary of Comment: This comment relates to the following language in the proposed rule:

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:

1. An independent third party shall be involved in the process;
and,

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.

The Municipal League requests that the Ethics Commission delete the Commission’s proposed paragraph on the following grounds: (1) “An ‘independent third party’ has no standing or authority to vote upon municipal affairs;” (2) “If these matters are defined as employment ‘contracts’ in which the public official has an interest, this exemption is not appropriate or necessary;” and (3) “If the governing body may not act because of a recusal required by these rules, the agency or official must be able to apply to the Commission for an exemption.”

Response: The Ethics Commission declines to make the change. While an independent third party may not in all circumstances have authority to vote, he or she would have authority, if granted by the municipality, to

participate in making recommendations relating to hiring and employment matters affecting a relative of a public official.

The Municipal League also expresses concern about the ability of a governing body to achieve a quorum. Normally, this situation would not occur as it appears unlikely that a majority of a governing body will be related to an employee. If that were to occur, in Advisory Opinion 2000-37 the Commission ruled it would not violate the Ethics Act for a member of a governing body to remain in the room in this situation or to vote "where necessary to secure a majority decision..."

Comment 7, page 5: 158-6-3.5

Summary of Comment: The current Rule prohibits a public official or public employee from terminating the employment of a person without sufficient cause for the purpose of hiring a relative or political supporter. When the Legislature passed the Rule in 1992, presumably it was attempting to incorporate the common law rights of public servants under the First Amendment in "political firing cases." See *Adkins v. Miller*, 187 W. Va. 774, 776, 421 S.E.2d 682, 684 (1992) and *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909 (6th Cir.1991). Pursuant to the First Amendment, certain policy-making employees may be fired based upon political affiliation; other employees may not, e.g., employees protected by civil service.

In the proposed Amended Rule the Ethics Commission initially proposed revising the language to make it more consistent with the common law by amending it to read:

~~3.6. 3.5. It is improper for a~~ A public official or public employee ~~to~~ may not unlawfully terminate the employment of a person without sufficient cause for the purpose of hiring a relative; ~~or person with whom the public official or employee resides, friend or political supporter.~~ Public officials and employees shall comply with applicable laws, rules and regulations in hiring persons, particularly in hiring campaign contributors or paid campaign staff. Failure to abide by applicable laws, rules and regulations in hiring these persons constitutes a rebuttable presumption of unlawful favoritism in violation of the private gain provisions of the Act.

The Municipal League proposes striking the language because: "The employer-employee relationship is governed by West Virginia and federal

labor laws and precedent.” In turn, the Municipal League submits it is not necessary or practicable to include this language in the Legislative Rule.

Response: The Ethics Commission accepts the recommendation to strike all of 3.5. The laws governing which employees may be hired or fired based upon political affiliation are complex. The West Virginia Supreme Court, the United States District Courts in West Virginia, the Fourth Circuit Court of Appeals and the United States Supreme Court have issued numerous opinions regarding the test under the First Amendment in political firing cases. The Ethics Commission agrees the language should be struck.

Comment 8, page 5: 158-6-5

Summary of Comment: This section prohibits public servants from removing government property from the workplace for their private benefit. The Municipal League proposes incorporating the “de minimis exception” from the Ethics Act.

Response: The Ethics Commission accepts this recommendation. It will incorporate the de minimis exception.

Comment 9, page 6: 158-6-9

Summary of Comment: The Ethics Act recognizes that some public servants “bring to their respective offices or employment their own unique personal prestige which is based upon their intelligence, education, experience, skills and abilities, or other personal gifts or traits” and “it would be unfair to those individuals and against the best interests of the citizens of this state to deny those persons the right to hold public office or to be publicly employed on the grounds that they would, in addition to the emoluments of their office or employment, be in a position to benefit financially from the personal prestige which otherwise inheres to them.” The Ethics Act provides that these persons may apply to the Ethics Act for an exemption.

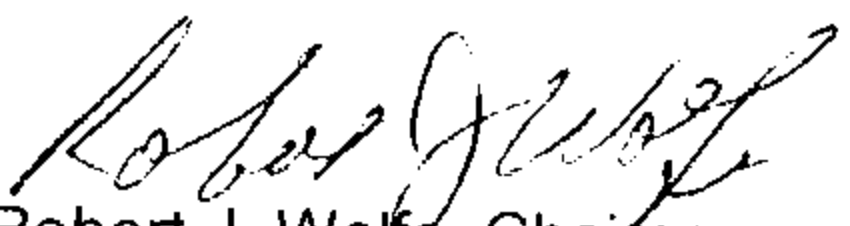
Section 158-6-9 of the Legislative Rule sets forth the process for applying for an exemption. The Municipal League expresses the concern that there may be times that compliance with this provision may make it difficult for a governing body to achieve a quorum. W. Va. Code § 6B-2-5(b)

Director Dooley
Page Seven
August 4, 2016

Response: The Ethics Commission declines to accept this recommendation. To obtain an exemption under this provision, it is the individual who applies; not the governing body or the employee's supervisor. Therefore, since a governing body does not request the exemption, it will not affect the ability of a governing body to obtain a quorum.

Thank you for your comments.

Very truly yours,



Robert J. Wolfe, Chairperson
WV Ethics Commission

RJW/tmk



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August 4, 2016

Mark Gomez
3500 Staunton Avenue, S.E.
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Charleston, WV 25304

Dear Mr. Gomez:

Thank you for reviewing the proposed amendments to Title 158, Series 6 and your public comments. In response to your comment relating to the use of the word "may" in lieu of the word "shall," the Ethics Commission responds as follows.

Summary of Comment: In your comment you cite the dictionary definitions of "may" and "shall." You also state, "Under basic rules of legal writing, 'shall' is a stronger word that puts the covered public official on notice that he or she has little or no discretion in their actions." You request that the proposed rule use the term "shall."

Response: The Ethics Commission declines to make the proposed change. The Ethics Commission has changed the phrase "may not" to the phrase "shall not" throughout the Rule. This is a grammatical change intended to improve the Rule, not to weaken it. Legal commentators may have different opinions regarding correct grammatical usage of the phrase "shall not" versus "may not." See Bryan Garner, Shall We Abandon Shall? ABA Journal (August 1, 2012 7:20 AM), [www.abajournal.com/magazine/article/shall we abandon shall](http://www.abajournal.com/magazine/article/shall_we_abandon_shall). (article attached hereto). The Ethics Commission will defer to the legal drafting preferences and expertise of the Legislature in regard to the preferred usages of these terms.

Thank you for your comment.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Wolfe".

Robert J. Wolfe, Chairperson
WV Ethics Commission

RJW/tmk
Enclosure

Retrieved on Jul 25, 2016, 1:07 pm CDT



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BRYAN GARNER ON WORDS

Shall We Abandon Shall?

POSTED AUG 01, 2012 07:20 AM CDT

BY BRYAN A. GARNER



Photo by Terri Glanger

In March 1968 I was a fourth-grader at Rex Reeves Elementary School in Canyon, Texas, a small college town in the Panhandle. My teacher, the beloved Mrs. Percy, had a not-beloved student teacher, Mrs. Phillips, who was seeking her teacher certification. Mrs. Phillips, I realized early on, was not partial to me.

One day—it was the ides of March—Mrs. Percy announced to the class that Mrs. Phillips would be leading us in a lesson. There was a professor of education in the back of the room. Mrs. Percy explained to observe Mrs. Phillips—who soon took her place at the front of the classroom.

"Children," Mrs. Phillips said, "today I am going to teach you about contractions." This struck me as a little silly. We had learned all about contractions in the third grade. "Can anyone name a contraction?"

My hand shot into the air.

"Bryan."

"*Shan't*."

"Umm, no. That's not a word."

"It is, Mrs. Phillips! It's a contraction of *shall not*."

"No, that's not a word. Can anyone name a contraction? Craig."

"*Won't*."

"Good, Craig."

Other pupils started chiming in.

"*Can't! Isn't! Doesn't! Shouldn't! Wouldn't! Aren't!*"

"Good, children, good! Those are all contractions—and real words." She glanced disapprovingly at me with that last remark. I went silent for the rest of that class. I felt flushed. I remember the moment as if it were yesterday.

In the corner of the room, I knew, was a huge dictionary—as it turns out, *Webster's Third New International Dictionary*, published in 1961. As soon as class was over, I went to the corner and looked up *shan't*. There it was: "**shan't** *Contr.* Shall not." I heaved the huge tome off its stand and cheerfully approached Mrs. Phillips to give her the good news.

She was talking to the professor, so I stood by quietly. When they finished speaking, I said, "Look, Mrs. Phillips! It is a word! *Shan't* is right here in the dictionary!"

She turned from me and waved her hand behind her back, as if to shoo me away.

"But it's right here. . . ." My enthusiasm melted as she turned back to me and said sternly: "Bryan Garner, that's not a word. I'm not looking at that. Put the dictionary away and go play. It's recess now." So ended one of the most important lessons of my life—the one that would ignite my interest in lexicography. It was also the beginning of my recognition of an anti-intellectual strain in my hometown.

WHAT YOU'RE REALLY SAYING

In retrospective fairness, Mrs. Phillips had a point. No American says *shant*. I had heard a television character use it—the very English Mr. French in the 1960s series *Family Affair*.

Nor do Americans use the positive form *shall* except in two expressions: *We shall overcome* and *Shall we* . . . ? Otherwise, this modal verb isn't really a part of normal American English.

Which brings us to legal English, where *shall* is ubiquitous in contracts, statutes, ordinances, rules and regulations. In the ordinary contract, almost every sentence contains a *shall*. The U.S. Constitution is chock-full of *shalls*.

In law school, we learn that *shall* is "mandatory" and *may* is "permissive." There are even statutes enshrining this idea. If you don't look closely at *shall* and its semantic content, those statutory provisions seem to make sense.

But let's do look more closely. What about laws stating that "No person shall . . . ?" If *shall* means "has a duty to" or "is required to," we have a problem. We're negating a command to do something. You're not required to do it (but, by implication, you may if you like).

That's plainly not the meaning. What is meant is to prohibit altogether—to disallow. Hence it should be "No person may . . ." That is, no person is allowed to do this.

Confronted with a "No person shall" provision, courts routinely hold that *shall* means *may*. In every English-speaking jurisdiction that I know of—don't be so shocked—*shall* has been held to mean *may*. As Justice Ruth Bader Ginsburg remarked in a majority opinion: "though *shall* generally means *must*, legal writers sometimes use or misuse *shall* to mean *should*, *will* or even *may*."

In the ninth edition of *Black's Law Dictionary*, I list five meanings for *shall*:

shall, vb. (bef. 12c) 1. Has a duty to; more broadly, is required to: "the requester *shall* send notice" "notice *shall* be sent." This is the mandatory sense that drafters typically intend and that courts typically uphold. 2. Should (as often interpreted by courts) "all claimants *shall* request mediation." 3. May "no person *shall* enter the building without first signing the roster." When a negative word such as *not* or *no* precedes *shall* (as in the example in angled bracket), the word *shall* often means *may*. What is being negated is permission, not a requirement. 4. Will (as a future tense verb) "the corporation *shall* then have a period of 30 days to object." 5. Is entitled to "the secretary *shall* be reimbursed for all expenses." Only sense 1 is acceptable under strict standards of drafting.

In short, *shall* is a chameleon-hued word.

For teachers of legal drafting, there are two main pedagogical approaches today for teaching lawyers and aspiring lawyers about this word: (1) restrict *shall* to meaning either "has a duty to" or "is required to" (meaning that 40 to 80 percent of the *shalls* in existing forms will be replaced), or (2) eliminate *shall* altogether on grounds that lawyers as a group cannot realistically master the semantic subtleties of the word (meaning that 100 percent of *shalls* get dropped).

When I acted as style consultant to the U.S. Judicial Conference's Standing Committee on Rules of Practice and Procedure, beginning in the 1990s, the federal judges for whom I worked experimented with the first option, but settled on the second. Hence when I revised the full sets of civil, appellate and criminal federal rules, the *shalls* were dropped. Rule 10(b) of the Federal Rules of Civil Procedure read like this:

"All averments of claim or defense *shall* be made in numbered paragraphs, the contents of each of which *shall* be limited as far as practicable to a statement of a single set of circumstances, and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials *shall* be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth."

Now it reads like this:

"A party *must* state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances. A later pleading may refer by number to a paragraph in an earlier pleading. If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—*must* be stated in a separate count or defense."

IF YOU *MUST* BE BOSSY

With one exception, *shall* has now been purged from all four major sets of federal rules, including evidence

What is the exception? With Federal Rule of Civil Procedure 56—the summary judgment rule—the advisory committee confronted warring factions on whether a federal judge *must* or *may* award summary judgment upon finding the requisite elements. Initially, the rule was promulgated with a *may*. But so much rancor ensued that the committee retreated to *shall*. It issued a note saying, more or less, "We're not sure whether this rule is mandatory or permissive, so we're reverting to the ambiguous *shall*. Let the courts figure it out."

What about contracts? Isn't *must* a bit bossy-sounding in the context of a private agreement? Yes, it is—unless it's a take-it-or-leave-it consumer contract. If it's an ordinary bilateral agreement, *will* is perfectly adequate. "The parties agree as follows," the lead-in says, and then "Jones will do this. Smith will do that."

The advantage of *will* is that nobody—nobody—misuses this word in any of the myriad ways in which lawyers misuse *shall*. Nobody writes *will* instead of *may* or *should* or *is entitled to*. In American English, *will* is the ordinary verb of promise.

Reflect on how we, as a profession, landed in this semantic snarl of *shalls* in our documents. Here's how I reconstruct it. If you grew up in this country, you grew up without *shall* as part of your working vocabulary. You encountered *shall* in some of your reading, but you never used it. You did well in school and ultimately enrolled in law school, where you were bombarded by *shalls* in statutes and contracts. You intuited that *shall* is "the drafting verb" that makes legal instruments precise.

In fact, it does the opposite. In most legal instruments, *shall* violates the presumption of consistency. Words are presumed to have a consistent meaning in clause after clause, page after page. Which is why *shall* is among the most heavily litigated words in the English language (with hopelessly inconsistent court holdings).

My own practice is to delete *shall* in all legal instruments and to replace it with a clearer word more characteristic of American English: *must*, *will*, *is*, *may* or the phrase *is entitled to*. This approach might well please Mrs. Phillips, but shall we consider that factor relevant at all? No, we shan't.

Bryan A. Garner is president of LawProse Inc. and editor-in-chief of *Black's Law Dictionary*. He is also the author of *Garner's Dictionary of Legal Usage*, *Garner's Modern American Usage* and *Making Your Case: The Art of Persuading Judges* (with Justice Antonin Scalia).



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August 4, 2016

Mark Gomez
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Dear Mr. Gomez:

Thank you for reviewing the proposed amendments to Title 158, Series 6 and your public comments. In response to your comment relating to the definition of the term "relative," the Ethics Commission responds as follows.

Summary of Comment: The subsection of the proposed Rule containing the anti-nepotism provision incorporates the definition of relative from the Ethics Act.

You state, in relevant part, "Today, our community recognizes close and intimate relationships between persons that may not be considered 'traditional' family members under the law." You encourage the Legislative Rule Making Review Committee to consider expanding the definition of relative to include step-brothers, half-sisters and persons who are raised together.

Response: The Ethics Commission declines to make the proposed change. The Ethics Commission incorporated the definition of "relative" into the Rule directly from the Ethics Act. See W.Va. Code § 6B-1-3(I). As this term is defined in the Code, the Ethics Commission does not have authority to re-define this term in the proposed Legislative Rule.

Thank you for your comment.

Very truly yours,

A handwritten signature in black ink, appearing to read "Robert J. Wolfe".

Robert J. Wolfe, Chairperson
WV Ethics Commission

RJW/tmk



STATE OF WEST VIRGINIA
WEST VIRGINIA ETHICS COMMISSION
210 BROOKS STREET, SUITE 300
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(304) 558-0664 - FAX (304) 558-2169
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August 4, 2016

Mark Gomez
3500 Staunton Avenue, S.E.
Suite 7
Charleston, WV 25304

Dear Mr. Gomez:

Thank you for reviewing the proposed amendments to Title 158, Series 6 and your public comments. In response to your comment about the language in the proposed revised Rule relating to the use of an independent third party, the Ethics Commission responds as follows.

Summary of Comment: The comment states the amendments, "[w]ill allow public officials to hire their relatives and roommates as long as they get someone else 'involved' with the decision."

The comment states the Rule does not include a definition of independent third party.

The comment states the phrase "Notwithstanding the limitations in this subsection" should not be used.

Response: The Ethics Commission accepts the recommendation requesting it to further define what constitutes an independent third party. The Ethics Commission declines to accept the remaining proposed changes.

Hiring of relatives and independent third party:

The comment expresses a concern that the Rule authorizes public officials to hire relatives. The Ethics Act does not ban nepotism. Hence, the Rule may not impose legal restrictions which are not within the scope of the authorizing statutory authority, *i.e.*, the Ethics Act.

In regard to the definition of the term "independent," the dictionary defines it, in relevant part, as follows: "not subject to another's authority or jurisdiction; autonomous; free" independent. (n.d.)." *Dictionary.com Unabridged*. Retrieved June 22, 2016, from Dictionary.com website <http://www.dictionary.com/browse/independent>. The Ethics Commission believes the commonly accepted and common law definition of the term "independent" is sufficient and that there is no need to define a commonly used term in the Rule. However, in response to the comment, the Commission will revise the Rule to restrict public officials from using a subordinate as their "independent third party" in hiring and personnel matters involving relatives.

Use of word "notwithstanding"

In regard to the use of the term "notwithstanding," the Ethics Commission states this word is a proper conjunction to use. See definition of "notwithstanding." *Dictionary.com. Dictionary.com Unabridged*. Random House, Inc. (accessed July 18, 2016).

The term "notwithstanding" is used to incorporate exceptions to the general rule. The exceptions are similar to the exceptions incorporated when the Rule was adopted in 1992. The exceptions presumably were originally incorporated to recognize that, at times, at the county or local governmental level, certain elected officials may not be able to entirely remove themselves from personnel matters as they may not lawfully delegate certain powers of their office.

For example, if two sisters work in the county clerk's office, and one is elected as county clerk, the elected county clerk may not show favoritism to her sister. The elected county clerk must involve others in decisions directly affecting her sister. The Rule recognizes that the elected county clerk may not be able to delegate all decision-making power because she is statutorily charged with the day-to-day administration of the office. Nevertheless, the

Mr. Gomez
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Rule imposes limitations to ensure that independent third parties are involved in decisions affecting the employment and working conditions of relatives of public officials.

For these reasons, the Commission declines to eliminate the exceptions to the general rule.

Thank you for your comments.

Very truly yours,

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Robert J. Wolfe, Chairperson
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Mark Gomez
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Dear Mr. Gomez:

Thank you for reviewing the proposed amendments to Title 158, Series 6 and your public comments. In response to your comment relating to requiring new hires in state or local government to disclose whether they have relatives employed in government positions, the Ethics Commission responds as follows.

Summary of Comment: The comment reads, in relevant part, "It is unacceptable that an unlawfully hired relative/roommate of the public official would be allowed to remain in the government position. As a condition of employment, new hires should be required to list any and all relatives that are employed in government positions. Omissions and nondisclosure of this information should merit suspension during the investigation and termination, without benefits, if confirmed."

Response: The Ethics Commission declines to accept the proposed change. The Commission does not have authority to incorporate language which exceeds the scope of the Ethics Act. Certain elected officials, including county and state officials, must file financial disclosure statements. One required disclosure is that they must list: "The name and business address of any child or step-child who is eighteen years or older and employed by state, county or municipal government." W.Va. Code §6B-2-7(12). This existing statutory requirement, in part, addresses the concern raised in your comment.

Thank you for your comment.

Very truly yours,

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Robert J. Wolfe, Chairperson
WV Ethics Commission

RJW/tmk