



**WEST VIRGINIA
SECRETARY OF STATE**

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OFFICE OF
WEST VIRGINIA SECRETARY OF STATE

FORM 4 -- NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY **Ethics Commission**

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

RULE NAME **Private Gain** **06**

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

THE ABOVE PROPOSED LEGISLATIVE RULES, FOLLOWING REVIEW BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE, IS HEREBY MODIFIED AS A RESULT OF REVIEW AND COMMENT BY THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE. THE ATTACHED MODIFICATIONS ARE FILED WITH THE SECRETARY OF STATE.

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS 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: 33157

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 29, 1992.~~

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

1.5. Sunset Provision: This rule shall terminate and have no further force or effect upon the expiration of five years from its 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:

2.1.a. usual and customary duties associated with the office or position, ~~or~~

2.1.b. services relating to the advancement of public policy goals, or

2.1.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. The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office or the prestige of their office for their own private gain or the private gain of another person. Nepotism is one form of the use of office for private gain because if public officials or employees use their positions to give an unfair advantage to relatives or persons with whom the public official or employee resides, the primary benefit to such action is to the public official or employee or another person rather than to the public.

~~3.3. "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.~~

3.4. A public official or employee may not influence or attempt to influence the employment or working conditions of his or her relative or a person with whom he or she resides.

3.5. A public agency, including its officials and employees, must administer the employment and working conditions of a relative of a public employee or a public official or a person with whom the public official or employee resides in an impartial manner.

3.5.a. To the extent possible, a public official or public employee may not participate in decisions affecting the employment and working conditions of his or her relative or a person with whom he or she resides. If he or she is one of several people with the authority to make these decisions, others with authority shall make the decisions.

3.5.b. A public official or public employee may not directly supervise a relative or a person with whom he or she resides. This prohibition includes reviewing, auditing or evaluating work or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

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

3.5.c.1. An independent third party shall be involved in the process. A public official or public employee may not use a subordinate for the independent third party unless it is an elected public official who may not lawfully delegate the powers of his or her office, e.g., county assessor or county clerk; and,

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

~~3.4. 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. It is improper for a public official or public employee to terminate the employment of a person without sufficient cause for the purpose of hiring a relative, friend or political supporter.~~

3.6. A public official may not vote on matters affecting the employment or working conditions of a relative unless the relative is a member of a class of persons affected. A class shall consist of not fewer than five similarly situated persons. For a public official's recusal to be effective, he or she must excuse him or herself from participating in the discussion and decision-making process by physically removing him or herself from the room during the period, fully disclosing his or her interests and recusing him or herself from voting on the issue.

3.7. 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 or that of another person 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 or that of another person. 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 or that of another person.

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.

5.3. This ~~subsection~~ section 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~~ 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~~ 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. 9.1. 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. 9.2. 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. 9.3. 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.