



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE AND FILING WITH THE LEGISLATIVE RULE-
MAKING REVIEW COMMITTEE**

AGENCY: Ethics Commission TITLE-SERIES: 158-06
RULE TYPE: Legislative Amendment to Existing Rule: Yes Repeal of existing rule: No
RULE NAME: 158-06 Use of Office for Private Gain, Including Nepotism

PRIMARY CONTACT

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

EXPLANATION OF THE STATUTORY AUTHORITY FOR THE LEGISLATIVE RULE, INCLUDING A DETAILED SUMMARY OF THE EFFECT OF EACH PROVISION OF THE LEGISLATIVE RULE WITH CITATION TO THE SPECIFIC STATUTORY PROVISION WHICH EMPOWERS THE AGENCY TO ENACT SUCH RULE PROVISION:

The Ethics Act, at W. Va. Code § 6B-2-2(a), requires the Ethics Commission to propose rules to carry out the purposes of the Ethics Act. This Rule establishes rules for complying with the restrictions in the Act against use of public office or employment for private gain, including nepotism. The changes are technical.

IS THIS FILING SOLELY FOR THE SUNSET PROVISION REQUIREMENTS IN W. VA. CODE §29A-3-19(e)? No

IF YES, DO YOU CERTIFY THAT THE ONLY CHANGES TO THE RULE ARE THE FILING DATE, EFFECTIVE DATE AND AN EXTENSION OF THE SUNSET DATE? No

DATE eFiled FOR NOTICE OF HEARING OR PUBLIC COMMENT PERIOD: 3/22/2021

DATE OF PUBLIC HEARING(S) OR PUBLIC COMMENT PERIOD ENDED: 4/22/2021

COMMENTS RECEIVED: No

(IF YES, PLEASE UPLOAD IN THE COMMENTS RECEIVED FIELD COMMENTS RECEIVED AND RESPONSES TO COMMENTS)

PUBLIC HEARING: No

(IF YES, PLEASE UPLOAD IN THE PUBLIC HEARING FIELD PERSONS WHO APPEARED AT THE HEARING(S) AND TRANSCRIPTS)

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

WHAT OTHER NOTICE, INCLUDING ADVERTISING, DID YOU GIVE OF THE HEARING?

There was no public hearing. There was a public comment period, and the Ethics Commission posted the proposed Rule and Notice of Public Comment Period on its website. The Rule was also sent via mail or electronic mail to the following persons or groups W.Va. Division of Personnel, Association of Counties, County Commission Association, Rural Water Association, School Board Association, Sheriffs Association, Municipal League, State Auditor and State Treasurer.

SUMMARY OF THE CONTENT OF THE LEGISLATIVE RULE, AND A DETAILED DESCRIPTION OF THE RULE'S PURPOSE AND ALL PROPOSED CHANGES TO THE RULE:

The Rule, with proposed technical amendments, contains 1) exceptions to the use of office for private gain restrictions, e.g., public officials performing normal and customary duties; 2) restrictions and requirements relating to the employment and supervision of relatives and persons with whom public officials and public employees reside, i.e., nepotism restrictions; 3) prohibitions against using government property, subordinates, or public work hours for private gain; 4) a provision stating that kickbacks and bribes are unlawful; 5) the procedure for certain public officials and employees to obtain an exemption when warranted based upon their unique job skills and employment contract, and 6) a section stating that public agencies may impose stricter limitations.

STATEMENT OF CIRCUMSTANCES WHICH REQUIRE THE RULE:

The Rule is set to terminate per the sunset provision. The Ethics Commission made technical changes to make the Rule more concise.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED LEGISLATIVE RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

0

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

0

C. ECONOMIC IMPACT OF THE LEGISLATIVE RULE ON THE STATE OR ITS RESIDENTS:

0

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2021 Increase/Decrease (use "-")	2022 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs and Alterations	0	0	0
Assets	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

Not applicable

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 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. -- This legislative rule establishes ~~guidelines~~ requirements relating to the private gain provisions, including nepotism, 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. -- ~~May 3, 2017~~.

1.4. Effective Date. -- ~~May 15, 2017~~.

1.5. Sunset Provision: This rule shall terminate and have no further force or effect ~~on May 15, 2022~~ upon the expiration of 7 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 he or she performs:~~ It does not constitute use of office for private gain for a public official or public employee to perform:

~~2.1.a.~~ 2.1.1. usual and customary duties associated with the office or position,

~~2.1.b.~~ 2.1.2. services relating to the advancement of public policy goals, or

~~2.1.c.~~ 2.1.3. constituent services without compensation.

2.2. A public official acting in his or her capacity as a public official may ~~make an inquiry for request~~ 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 do not apply to a public official acting in his or her private capacity.

2.3. 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 persons with whom the public official or public employee resides.

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

3.3. "Relative" means spouse, mother, father, sister, brother, son, daughter, grandmother, grandfather, grandchild, mother-in-law, father-in-law, sister-in-law, brother-in-law, son-in-law, or daughter-in-law.

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

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

~~3.5.a.~~ 3.5.1. To the extent possible, Subject to the exception provided in 3.6 of this rule, 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~~ must make the decisions.

~~3.5.b.~~ 3.5.2. Subject to the exception provided in 3.6 of this rule, a A public official or public employee may not directly supervise a relative or a person with whom he or she resides. ~~This prohibition~~ Supervision includes reviewing, auditing or evaluating work, ~~or~~ taking part in discussions, or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline, or related matters. This prohibition does not extend to matters affecting a class of five or more similarly situated employees.

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

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

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

3.6. 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 an independent third party must be involved in the process.

3.6.1. A public official or public employee may not use a subordinate for the independent third party unless:

3.6.1.a. ~~It~~ The public official is an elected public official who may not lawfully delegate the powers of his or her office, e.g., sheriff, county assessor, or county clerk, and

3.6.1.b. ~~Such~~ The elected official removes him or herself from decisions affecting his or her relatives or a person with whom he or she resides to the extent possible.

~~3.6.~~ 3.7. A public official may not vote on matters affecting the employment or working conditions of a relative or person with whom the public official resides unless the relative or person is a member of a class of persons affected. A class shall consist of not fewer than consists of at least 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.~~ 3.8. 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 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 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 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 may not remove government property from the workplace for their private benefit or that of another person.

5.2. Improper Use - Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This 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 money or 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 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 the person.

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

~~Public Appointed public~~ Public officials and part-time and full-time public employees may not receive private compensation for performing private work during their public work hours. This section 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:

9.1. 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;

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

9.3. 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~~ imposes stricter standards, then public officials and public employees must comply with the stricter

standards.