



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

NOTICE OF RULE MODIFICATION OF A PROPOSED RULE

AGENCY: Ethics Commission

RULE TYPE: Legislative

TITLE-SERIES: 158-06

RULE NAME: Use of Office for Private Gain, Including
Nepotism

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

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 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~~ August 1, 2027.

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

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

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

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

~~2.1.c. 2.1.3. constituent~~ 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~~ A public official or public employee ~~include~~ may travel out-of-state ~~travel~~ to attend seminars or to inspect certain facilities or products on behalf of his or her public agency, ~~these~~ provided that such activities ~~constitute the usual and customary duties associated with~~ are among the public official's or public employee's office or position job responsibilities and if there is a legitimate government reason for the travel. Such travel constitutes usual and customary duties associated with the office or position.

§ 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 a relative or persons person with whom the public official or public employee resides.

3.2. As used in this section, the term "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. As used in this section, the term "supervise" or "supervision" means reviewing, auditing or evaluating work, or taking part in discussions or making recommendations concerning employment, assignments, compensation, bonuses, benefits, discipline, or related matters.

3.4. ~~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. Nepotism constitutes improper use of office for private gain.~~

~~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.~~ 3.5. 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.~~ 3.6. 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. 3.6.1. To the extent possible, a~~ 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 unless an independent third party is involved in the process. ~~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. 3.6.2.~~ 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.a. 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.~~

3.6.3. A public official or public employee may not use a subordinate as an independent third party required by subdivision 3.6.1 of this section. This prohibition does not apply to an elected public official who may not lawfully delegate powers of his or her office (for example, a sheriff, county assessor, or county clerk).

~~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 such relative or person is a member of a class of five or more similarly situated 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 himself~~ or herself from participating in the discussion and decision-making process by physically removing ~~him himself~~ or herself from the room during the period in which the matter is under consideration, fully disclosing his or her interests, and recusing ~~him himself~~ 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 For example, of prohibited conduct would be a public official requiring~~ may not require 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 For example, of prohibited conduct would be a public official or public employee supervisor requiring~~ may not require his or her subordinate state employees employee to repair a garage or pave a driveway for ~~the supervisor~~ the public official or public employee during work hours. ~~This subsection~~

prohibition 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~~ A public official or public employee ~~to~~ may not 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~~ A public official or public employee ~~to~~ may not 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.

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 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.