

ADVISORY OPINION NO. 2010-17

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WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether it is permissible under the Ethics Act for its public employees to fundraise for the Agency and/or its related private, non-profit organizations.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a public agency responsible for the oversight and administration of public broadcasting within the State. The Agency is statutorily designated as a public benefit corporation, and governed by a board of gubernatorial-appointed members and representatives of other State public agencies.

The Agency employs approximately eighty-five (85) individuals throughout the state, including an Executive Director. The Executive Director manages the day to day operations of the Agency, and is also tasked with managing all public broadcasting throughout the State, including 3 primary television stations, 10 radio stations, and related frequency translators. In total, the Agency holds approximately fifty (50) public broadcasting licenses for television and radio stations throughout the state.

The Legislature annually appropriates money to the Requester for its operations. Additionally, the Agency is statutorily authorized “to apply for and receive appropriations, gifts, bequests or grants ... to assist in achieving the [Agency’s] public purpose”.

Although the statute allows the Agency to receive private donations, the Agency generally does not accept private contributions directly. Instead, the private contributions are deposited in the name of one of two private, non-profit organizations affiliated with the Agency. The two organizations are 501(c)(3) non-profits established to raise and distribute private donations on behalf of the Agency. One non-profit solicits and receives larger, corporate donations and the other solicits and receives individual donations and memberships. Each non-profit has its own board of directors.

As part of their solicitations for funds, the non-profits conduct fundraising drives throughout the year. These drives include on-air appeals as well as direct mailings and membership drives. The monies collected are deposited into the respective accounts of the non-profits. The Agency employees oversee and conduct the various fundraising events. Additionally, the Agency’s cameras and sound board, among other equipment and public resources, are used during the on-air fundraising and membership appeals.

According to the Requester, the funds raised have been a vital source of private funding for the Agency and public broadcasting in general. Due to the constraints associated with public funds, the Agency relies heavily upon private contributions and grants to augment its operational budget. Over the past four years, private funding has accounted for approximately 39% of the Agency's annual overall budget, and federal grant money has accounted for approximately 5%.

Public broadcasting organizations and corporations throughout the United States engage in similar fundraising to support their operations and programs. The Agency maintains that fundraising is an accepted practice and consistent with the Agency's mission.

Earlier this year, the West Virginia Legislative Auditor conducted a performance review of the Agency, including the manner in which the funds were raised. Although the Legislative Auditor found no misappropriation of funds, he questioned the relationship between the two non-profits and the Agency. Specifically, the Legislative Auditor found that the Agency's employees performed all fundraising activities and administrative support for the non-profits. The Legislative Auditor also found that the Agency staff controls the non-profits' financial accounts, including depositing and withdrawing funds from the non-profits' accounts in furtherance of the Agency's operations.

Ultimately, the Legislative Auditor recommended that the Agency and the non-profits operate as complete and separate entities. He recommended that the Agency staff not solicit on behalf of the two non-profits. The Auditor further concluded that the Agency's enabling statute did not authorize the Agency to use public resources, including its employees, to solicit donations.

Following the issuance of the Legislative audit, the Agency has reviewed its relationship with the two non-profits and the manner in which it raises funds.¹ The Agency acknowledges that its staff is responsible for the operation and administration of the non-profits. The Requester maintains that depriving it of the use of public resources to solicit funds would impede its operations. The Agency further maintains that its enabling statute authorizes its use of staff and other public resources to raise funds for the Agency and its related non-profits.

Notwithstanding the foregoing, in an effort to fully comply with the Ethics Act, the State Agency asks whether it is permissible under the Ethics Act for its public employees to fundraise for the Agency and/or its related private, non-profit organizations.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) reads in relevant part:

¹After the Legislative Auditor's report, one of the non-profits partially dissolved and the Agency assumed a majority of its funds and operations. The other non-profit continues to operate.

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in *de minimis* private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.

W.Va. Code § 6B-2-5(c) states in relevant part:

A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family: *Provided*, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position is subordinate to the soliciting official or employee[.]

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In establishing the Ethics Act, the Legislature sought to create a code of ethics to guide public officials and employees in their public employment. The expressed goal was to assist public servants in avoiding conflicts between their public service and any outside personal interests. W.Va. Code § 6B-1-2(d).

The situation presented is unique. The Agency is a public benefit corporation whose mission is to provide public broadcasting throughout the State. Although the organizational structure differs from other States, the mission of the Agency is similar in nature to entities throughout the country, including the federal government.

In order to accomplish its mission, the Agency receives public appropriations from the State and federal government. Additionally, the Agency, like similar entities in other states, supplements its budget through fundraising and private donations. With respect to the Requester, the Agency's fundraising has been ongoing for many years and generally appears to be in accord with national industry practices; however, the structure of the financial relationship between public broadcasting agencies and related foundations or nonprofits appears to vary from state to state.

Recently, the Legislative Auditor questioned, among other things, the Agency's use of its employees and resources in fundraising for the non-profits. Although this issue falls within the purview of the Ethics Act, other laws and policy determinations govern this matter as well. Ultimately the determination of whether agency resources may be used for this purpose will need to be resolved by the Legislature.

The Ethics Commission notes that before it can answer the question presented, it must first determine whether the Agency is even authorized to solicit funds on its behalf, as well as on behalf of its two related non-profit organizations. This is a necessary first step before the Commission can address the **method** of solicitation.

Statutory authority for soliciting

The West Virginia Ethics Act generally prohibits a public official or public employee from soliciting any gift unless the solicitation is for a charitable purpose with no resulting direct pecuniary benefit conferred upon the official or employee or his or her immediate family. W.Va. Code § 6B-2-5(c). Although the statute does not define “charitable purpose”, the Commission’s legislative rules provide that the Commission will make such a determination on a case-by-case basis. 158 C.S.R 7 § 6.2. See Advisory Opinion 2005-02 (“As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and, (2) Those which serve a public purpose or provide a significant public benefit.”); and Advisory Opinion 2005-02 (“The overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying the internal administrative costs of the [Agency].”)

This is distinguishable from those situations where there is express statutory authority for a public entity to solicit private funds. See e.g. W. Va. Code § 18B-2A-4(m); W. Va. Code § 49-9-17(b); W. Va. Code § 5-1E-3(6). Thus, the Commission must determine whether the Requester’s enabling legislation similarly authorizes the Agency to solicit. The provision reads:

The [Agency] is further authorized and empowered to **apply for and receive** appropriations, **gifts**, bequests or grants from any agency . . . or any other person, firm, partnership, association or corporation, within or without this state... to assist in achieving the public purpose of the [Agency].

W.Va. Code § 10-5-4 (emphasis added)

Although the statute does not use the term solicit, as the Legislative Auditor observed, the Commission notes that the statute expressly allows the Agency to “apply for and receive gifts”. One definition of “apply” is “to request or seek assistance...” American Heritage Dictionary 121 (2nd ed.). While the Agency should consider seeking clarification from the Legislature in light of the Auditor’s report, the Commission finds that this statute authorizes the Agency to solicit funds for purposes of the Ethics Act.²

²The Legislature established the Agency as a public benefit corporation. Although not defined within the enabling statute, the Commission finds that the term refers to a public entity created to perform a specific purpose, often in a regulated industry. The Commission also finds the term is more broadly used to define a public agency that performs a charitable purpose, similar to a private non-profit. Thus, the Commission takes administrative notice that the Agency provides an educational public service to the citizens of this State, and that the Agency’s mission serves an overriding public purpose distinguishable from other governmental agencies.

The Commission also notes that this portion of the enabling legislation appears to have been in effect since at least 1967. The Ethics Act was passed in 1989. A rule of statutory interpretation is:

A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it was intended to form a part; it being **presumed** that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, **statutory** or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.

Kessel v. Monongalia County General Hospital Company, 648 S.E.2d 366 (W.Va. 2007). The Commission notes that fund-raising drives by the agency appear to pre-date the Ethics Act. Hence, the Commission's finding that the Requester may solicit appears to be consistent when the two statutes are read together.

As a result of the foregoing, the Commission further finds that it is implicit in the authorization to seek funding that the Agency may use its resources, including public employees, to raise funds for the Agency. Further, the Commission notes that its Legislative Rule governing solicitation authorizes "a reasonable amount of public resources [to] be used for a charitable solicitation or fund-raising drive". 158 C.S.R. 7 § 6.5. Therefore, the use of public employees to conduct fundraising and on-air solicitations on behalf of the Agency does not violate the Ethics Act.³

Solicitations for the Non-Profit Organizations

The Requester also inquires whether public resources, including public employees, may be used to solicit funds on behalf of its two private non-profit organizations. While the Commission's Legislative Rule may allow solicitation on behalf of a private charity, the Commission declines to approve such a broad exception for the two private non-profits at issue in this matter absent clear legislative authority. See Cabot Oil & Gas v. Huffman, Nos. 35508, 35509, 35510, 35511, ___ W. Va. ___, ___ S.E.2d ___, (Slip Op. at 16, filed Nov. 3, 2010) (per curiam). "Absent a direct expression of such intent by the Legislature, we are constrained to apply the law in effect at the time...." *citing* Syl. pt. 1, Loveless v. State Workmen's Comp. Comm'r, 155 W. Va. 264, 184 S.E.2d 127 (1971).

³ Since it is resolving the question presented on other grounds, the Commission need not analyze whether the fundraising violates the prohibition against soliciting a gift which results in the public servant's direct pecuniary benefit. W.Va. Code § 6B-2-5(c). The Commission notes that the Agency desires to solicit funds for its own operations. This could necessarily include the Agency's employees' compensation, and create a potential direct pecuniary benefit to the public servants who are soliciting. The Commission recognizes, however, that the Agency receives funds from additional sources, and its budget may be structured so as to prevent a direct pecuniary benefit to the person(s) making the solicitation. These are all considerations which the State Agency must evaluate when deciding how to solicit.

First, the Commission notes that the Ethics Act prohibits a public servant from using public resources for the private gain of another. W.Va. Code § 6B-2-5(b). This includes private non-profit organizations.

Second, the Commission is mindful of the concerns the Legislative Auditor expressed. According to his Report, the non-profits have no administrative staff, and rely entirely on employees of the Agency to oversee and maintain its operations. Further, the employees use the accounts of the non-profits to pay certain expenses of the Agency. As cautioned by the Legislative Auditor, the non-profits' accounts are not subject to review or public audit, and could allow them to circumvent governmental regulations.

While the Requester maintains that the two non-profits are solely established to raise funds for the Agency, the Commission is concerned about allowing public resources, including public employees, to be used to operate and maintain private entities whose financial records are outside the government's jurisdiction to review. As a result, there is no guarantee of transparent accounting of their funds raised and how they are spent.

The Commission, however, is cognizant of the Agency's desire to use private non-profits to oversee the fundraising and administration of private endowments. Hence, the Agency should consider establishing private-public partnerships and/or statutorily created foundations. See e.g. W.Va. Code § 18-10H-2 & 3 (foundation to solicit sector funds and resources on behalf of the operation of a public academy); W.Va. Code § 49-9-17 (establishment of a council to solicit funds which are placed in a special account in the State treasury for use and benefit of the council); W.Va. Code § 12-1-12d (foundation for investment of funds on behalf of university institutions). While this would require legislative action and statutory revision of the Agency's funding statute, greater transparency and resolution of the Legislative Auditor's concerns would likely result.

Therefore, absent express statutory authority therefor, public servants **may not** work for, or otherwise administer a private organization during their prescribed compensated public work hours or use more than a *de minimis* amount of public resources. Further, absent express statutory authority, public servants **may not** fundraise on behalf of the private non-profits during prescribed compensated public work hours or use more than a *de minimis* amount of public resources. ⁴

⁴Public servants are permitted to volunteer or perform work for the private non-profits, including solicitations on behalf of the non-profits, provided the public employees perform all such work on their own personal time and do not use their public title or public resources. Further, since the non-profits are not public entities, the Ethics Act's prohibition against solicitations does not apply to the employees, officials or members of the non-profits. The Ethics Act does not prohibit a private, non-profit organization from soliciting on its own behalf.

Conclusion

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 6B-1-1, *et seq.*, and does not purport to interpret other laws or rules. A request from a different government agency may result in a different outcome, depending on the specific facts.

Thus, the Commission declines to make a broad ruling herein. Instead, such determinations must be decided on a case-by-case basis. Therefore, this opinion is limited to the facts and circumstances of this particular case, and may **not** be relied upon as precedent.

Mindful of the Agency's need to maintain operational efficiency through the current fiscal year, the Commission hereby suspends implementation of this Advisory Opinion until July 1, 2011. As earlier expressed, the Commission encourages the Agency to seek legislative change to clarify its fundraising abilities, obligations and responsibilities.

S/S
R. Kemp Morton, Chairperson