

# **Advisory Opinion 2022-11**

**Issued on May 5, 2022, by**

**The West Virginia Ethics Commission**

## **Opinion Sought**

A **State Agency** asks whether posting a list of restaurants suggested by employees on its employee wellness website is permissible or a prohibited endorsement.

## **Facts Relied Upon by the Commission**

A State Agency has a wellness program for its employees. As part of the program, the Agency has created an employee wellness resource center website which is intended as a resource for its employees. The website is an interagency website, and it is not accessible through the State Agency's public website. The Requester<sup>1</sup> states that the purpose of the website is to "provide information and resources on nutrition, healthy eating, physical health, exercise, stress management, mental health, and more."

The Agency's wellness coordinator recently sent a survey to the Agency's employees asking them to give suggestions for restaurants that serve healthy food in their part of the state. The Agency then posted the names of the restaurants, with a brief description about them, on its wellness website under a heading entitled: "Employee Suggested Restaurants." There are no links to the restaurants.

## **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b)(1) states, in relevant part:

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.

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<sup>1</sup> The Requester is a Deputy Director in the Agency.

## **Advisory Opinion**

The Ethics Commission has held that W. Va. Code § 6B-2-5(b)(1), which prohibits the use of office for the private gain of public servants or others, restricts public servants from promoting or endorsing commercial products and services unless there is an overriding public benefit.<sup>2</sup> The Ethics Commission must determine, therefore, whether posting a list of employee suggested healthy restaurants on the Agency's internal wellness website constitutes an impermissible endorsement for purposes of the private gain provisions in the Ethics Act or if there is an overriding public benefit.

In the instant case, a State Agency, as part of its wellness program, surveyed its employees to determine their favorite restaurants. The State Agency then listed these employee suggested restaurants on its interagency employee wellness website under a heading entitled "employee suggested restaurants." The interagency website has been clearly designated as an agency employee wellness resource center.

The purpose of the employee wellness program website is to "provide information and resources on nutrition, healthy eating, physical health, exercise, stress management, mental health, and more" to the State Agency's employees as part of a wellness initiative. In examining wellness programs, the Commission has consistently held that agency-authorized wellness activities do not normally violate the private gain provisions in the Act. For example, in [Advisory Opinion 2017-08](#), the Commission held that a state agency charged with providing health care benefits to public employees may contract with a private company to provide a wellness program that offers financial rewards to public employees. While neither [Advisory Opinion 2017-08](#) or the opinions cited therein expressly addressed endorsements, the restrictions on endorsements arise from the private gain provisions in the Act. The Commission finds that its prior wellness opinions are, therefore, instructive in analyzing the issue before it.

**The Ethics Commission finds that allowing employees to share their favorite healthy restaurants in the context of an employee wellness program has an overriding public benefit because it relates to promoting employee wellness and morale. The Ethics Commission finds, accordingly, that allowing public employees and public officials to share information about their favorite restaurants on an agency's wellness website is not an improper endorsement under the Ethics Act.**

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<sup>2</sup> In [Advisory Opinion 2015-17](#), the Commission explained, "The Ethics Commission has steadfastly followed this general rule: 'A public official may not endorse a particular product or business. A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit.' [Advisory Opinion 2015-13](#), citing Advisory Opinions 1995-05 and [Advisory Opinion 2015-04](#)."

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission