

ADVISORY OPINION NO. 97-24

Issued On August 7, 1997 By The

WEST VIRGINIA ETHICS COMMISSION

PUBLIC SERVANT SEEKING OPINION

A State Employee

OPINION SOUGHT

Is it a violation of the Ethics Act to accept donations of services and supplies for use on private property that also serves as the site for a living history exhibit?

FACTS RELIED UPON BY THE COMMISSION

The requester is employed by a State Division with regulatory authority over numerous companies. Some of those companies hire earthmoving contractors to do the actual on-site work. Neither the requester nor the department in which he serves has any regulatory authority over these contractors. However, another section of this State Division does regulate the contractors.

The requester is also member of a local living history Organization which is established as a non-profit corporation. His membership in that Organization predates his employment with the State. Each year this Organization, in conjunction with the County Parks and Recreation Commission, presents a living history drama for students, teachers and the general public. Visitors view demonstrations and live exhibits which depict the life of early pioneers. They may also follow a living history trail where actors reenact a historical event.

The requester owns the property which hosts this annual living history presentation. This year the property which serves as the site for the drama is in need of minor repairs. Specifically, the emergency access route requires a minimal amount of bulldozer work and gravel is needed on the various hiking trails in order to make them safer and more accessible to young children and older participants.

Prior to the requester's employment with the State, he was employed as a sales engineer and was a member of a professional Association. Through this Association the requester developed personal and professional friendships with area contractors and other suppliers. In the past, Association members have donated their services or products to assist the Organization in the preparation of the outdoor event. Neither the requester, nor the Organization solicit this assistance.

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code 6B-2-5(b)(1) provides in pertinent part that... 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.

West Virginia Code 6B-2-5(c)(1) provides in pertinent part that ...No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:

(A) Is doing or seeking to do business of any kind with his or her agency;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his official duties.

West Virginia Code 6B-2-5(c)(2) states in pertinent part that...Notwithstanding the provisions of subdivision (1) of this subsection, a person who is a public official or public employee may accept a gift described in this subdivision, and there shall be a presumption that the receipt of such gift does not impair the impartiality and independent judgment of the person. This presumption may be rebutted only by direct objective evidence that the gift did impair the impartiality and independent judgment of the person or that the person knew or had reason to know that the gift was offered with the intent to impair his or her impartiality and independent judgment. The provisions of subdivision (1) of this subsection do not apply to:

...

(F) Gifts that are purely private and personal in nature;...

ADVISORY OPINION

The requester is a public employee and a member of a local living history organization which presents a living history drama for students, teachers and the general public. The requester owns the property which serves as the site for this drama. This year the property needs a few repairs in order to make the drama more accessible and enjoyable for younger children and older participants.

During the years prior to the requester's public employment, members of the professional Association donated their services or products to assist the Organization in the preparation of the event.

The Ethics Act prohibits a public servant from accepting a gift from any "person" who is engaged in activities which are regulated or controlled by his agency. The requester is now employed by a State Division which has regulatory authority over numerous companies.

Although neither the requester nor his department have regulatory authority over these contractors, another department within this State Division does regulate the contractors.

In most instances this section would preclude the requester from accepting any goods or services from area contractors. However, WV Code 6B-2-5(c)(2) creates certain exceptions from the gift prohibition. One such exception pertains to gifts which are purely private and personal in nature. The Commission has also held that gifts to public servants which provide an over-riding public benefit may be acceptable.

Under the facts provided, the Association has historically donated goods and services to the living drama Organization to assist in the preparation of the outdoor event. These donations predate the requester's public employment and, in fact, are related to the his membership in the living drama Organization.

The Commission finds that the specific facts of this case establish that the donation of minimal services to the Organization, and ultimately the public servant, is not related to the requester's public employment position and is not intended to impair his impartiality and independent judgment. Rather, it is related to his private membership in the living drama Organization and his personal and working relationships which have developed over the years with these contractors. In short, the donation is merely a continuation of an established social practice between the Organization and the Association.

The Commission is further persuaded by several relevant factors. First, neither the requester nor the Organization members solicit donations from the area contractors. Second, the contractors have expressed a desire to provide assistance to a community project which they consider to be worthwhile.

Most importantly, although the requester may receive some minimal private benefit from the donation of services described in the facts, there is an overriding public benefit to the living history exhibit. This drama will provide an important informational resource and serve as a tool to educate students and the general public about the history and culture of the area and the state. The minimal improvements proposed add little commercial value to the requester's property beyond enhancing its use for the annual presentation of the living history program.

The Commission determines that this particular donation of services from the contractors to assist in the presentation of a living history drama is a purely private and personal gift not related to the requester's public position and one which provides an overriding public benefit. Therefore, the requester may accept the gift without violating WV Code 6B-2-5(c)(1).

However, the Commission cautions that this opinion is limited to the precise facts of this case and the specific repairs required only for this year's production. No other person may rely on this opinion without first obtaining the prior written approval of the Commission or its staff.

Should further repairs to the requester's property become necessary, the requester should request additional guidance from the Ethics Commission. This will enable the Commission to compare the potential gain to the value of the requester's property with the resulting benefits to the general public.



Chairman