

Advisory Opinion 2019-14

Issued on May 2, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **City Police Officer** asks whether he may include pictures of himself in uniform in his campaign material.

Facts Relied Upon by the Commission

The Requester is employed by a city as a police officer. The City gives the police officers a clothing allowance to buy uniforms, and the police officers get to keep their uniforms when they retire from or leave their City employment.

The Requester is exploring a run for county sheriff in the next election. During his candidacy, he would still be employed by the City as a police officer.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b) 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.

W. Va. Code R. § 158-6-5 states, in relevant part:

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.

Advisory Opinion

The Ethics Act, at W. Va. Code § 6B-2-5(b)(1), prohibits public officials from knowingly and intentionally using their public office for their own or another person's private gain.

This Code section excepts from this prohibition the incidental use of public resources “for personal or business purposes resulting in *de minimis* private gain”

The Commission has on limited occasions addressed private gain relative to political activities. First, in Advisory Opinion 1995-34 (revised), the Commission held that an incumbent public official may use his public title to endorse a candidate. The Commission reasoned:

Endorsing candidates for office who share that goal can be considered a part of the First Amendment rights of an officeholder. In addition, although the official endorsement of an incumbent public official may have substantial ‘political’ value, such an endorsement does not create the type of private gain contemplated by the Act’s prohibition against the use of office for private gain.

Further, in Advisory Opinion 2012-15, the Commission held that, for the same reasons set forth in Advisory Opinion 1995-34 (revised), an elected county sheriff may use his public job title to endorse his chief deputy or any other candidate for public office through newspaper advertisements or radio announcements. The Commission was not asked and did not address whether he may wear his uniform in newspaper advertisements containing his endorsements.

In Advisory Opinion 1998-09, the Commission addressed whether an elected sheriff could engage in a limited amount of campaign-related activities while using his cruiser. The Commission noted that the sheriff drove his vehicle, presumably in uniform, for “personal travel within his county, so he can monitor and direct his agency’s police activities and react to crimes committed in his presence.” The Commission held that, as there was an overriding public benefit to the use of the patrol car for personal travel, it legitimized the use of the cruiser for a limited amount of campaign activities during the sheriff’s “normal daily duties.” The Commission held that “‘glad-handing’ while out and about in the patrol car” was not a violation, but that the sheriff could not, however, use his official vehicle to canvass streets for support or to transport campaign signs, supporters or other candidates. Therefore, the Commission permitted the sheriff to use a limited amount of public resources for campaigning because he was always on duty.

In Advisory Opinion 2016-11, the Ethics Commission held that a state legislator may, with private funds, purchase business cards that replicate his state-issued business card on one side and have his campaign information on the other. The Commission ruled, in relevant part, “that using the design and format of the business card in this manner is an incidental use of public resources resulting in *de minimis* private gain.”

Some other jurisdictions have addressed whether police officers may wear their uniforms for campaign activities. The Seattle Ethics and Elections Commission ruled that a police officer could not wear his uniform in campaign advertising. The Seattle Ethics and Elections Commission reasoned:

The SPD uniform, however, is a facility of a public office that may not be used to assist a candidate, or to promote or oppose a ballot issue. Even though the officers purchase their own uniforms, they do so with City funds, a department allowance. The uniform is a part of the equipment issued by the City to police officers to perform their duties. Officers may wear the uniform only under circumstances approved by the department.¹

The New York State Board of Elections made a contrary finding when it held that a “sheriff or other police officer campaigning for election can appear in uniform in the political communications of their own campaign for election.” N.Y State Bd. Of Elections, 2015 Opinion #1.

The Ethics Commission must determine, based upon the plain language of the Act and its own precedent, whether police officers may be pictured in their uniforms in their own campaign material. The Commission has historically held that law enforcement officers must exercise caution in using the authority of their office for outside activities. For example, the Commission’s Legislative Rule governing charitable solicitations imposes limitations on the use of titles and uniforms by law enforcement officers in soliciting for charity “due to the unique nature of the authority which law enforcement officers exercise over the public, including arrest powers.” W. Va. Code R. § 158-7-8.1. The Rule states: “Except as otherwise provided for in these rules, law enforcement officers may not solicit for charity while in uniform but may show identification upon request.” W. Va. Code R. § 158-7-8.4.

The Commission finds that the Requester’s police uniform conveys the endorsement of his police agency. This would result in the type of private gain the Act is intended to prohibit. **The Commission holds that the Requester may not include pictures of himself in uniform in his campaign material.**

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 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

¹ RE: Request for Elections Advisory Opinion No. 95-2A-0302-1, Use of Title, 1995 WL 870081, at *2.