

Advisory Opinion 2019-26

Issued on October 3, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **State Agency** asks whether it may raise funds and solicit donations to assist potential foster families in meeting requirements for their homes to become approved foster homes and to fund rewards and incentives to students who display positive behaviors.

Facts Relied Upon by the Commission

The Requester asks whether the agency may raise funds and solicit donations to assist potential foster families in meeting the state's requirements for their homes to be approved foster homes. The Requester states that potential foster families are often of limited means and struggle financially to comply with the requirements for certification. The donations sought would include, for example, fire extinguishers, smoke and carbon monoxide detectors, safety locks and gates, emergency ladders and first aid kits.

The Requester also states that often the need for placement of a child upon removal from a home is urgent, and the initial placement occurs before a family can qualify for and begin receiving a subsidy payment for the child.

The Requester also wants to raise funds and solicit donations to enhance existing programs which have limited funding. It cites to a new program designed to teach students with behavioral challenges pro-social skills in the classroom. The solicited funds and items would be used for rewards and incentives to students who consistently display positive behaviors. The Requester states that its operating budget is limited and does not allow for these rewards and incentives and that the program benefits the community at large.

Provisions Relied Upon by the Commission

W. Va. Code § 6B-2-5(b)(1) provides, in pertinent 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.

W. Va. Code § 6B-2-5(c)(1) provides, 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.

....

W. Va. Code R. § 158-7-6 provides, in relevant part:

6.1. Public officials and public employees may solicit gifts for a charitable purpose when there is no resulting direct pecuniary benefit to the public official or public employee or an immediate family member.

6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.

6.3. It is improper for a public official or public employee to solicit any gift or donation, including those for a charitable purpose, from a subordinate employee.

...

6.7. State government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged.

6.8. Fund-raising activities based on an exchange of value are not gift solicitations and are permissible.

....

W. Va. Code R. § 158-7-7 provides, in relevant part:

7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:

a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

b. A vendor which has a contract with the agency, is bidding on a contract or is in the process of soliciting business from the agency.

7.2. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated persons or vendors, is permissible; Provided, That the written solicitation may not be directed solely to persons under the regulatory authority of, or vendors, of the public official, employee or agency. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.

7.3. Solicitations should be conducted, and acknowledges made, in a fair and even-handed manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.

7.4. Under no circumstances should anyone soliciting a contribution for a charitable purpose state that contributors will receive some special treatment from a government agency or its employees, or any other sort of quid pro quo as a consequence of making a donation.

Advisory Opinion

The Ethics Act prohibits public employees and officials from soliciting gifts unless the gift is for a charitable purpose for which there is no resulting direct pecuniary benefit to the public official or public employee or his or her immediate family member. W. Va. Code § 6B-2-5(c).¹ As will be fully discussed below, fundraising activities are not prohibited by the Act.

Donations for Foster Homes

Although the Ethics Act does not define “charitable purpose,” the Ethics Commission previously has made determinations concerning the definition of “charitable purpose.” In Advisory Opinion 1999-37, the Commission found that a donation of diapers or baby food for poor or disadvantaged newborns was a charitable purpose. In that Opinion, the Commission explained, “Generally speaking those [purposes] which benefit the poor or disadvantaged are charitable. In this instance the program applies only to the children of financially disadvantaged families. It is clearly a charitable purpose and it would not be a violation of the Ethics Act for agency personnel to solicit support for the program.”

The Commission reached the same conclusion in several other Advisory Opinions involving poor or disadvantaged children. For instance, the Commission has held the following purposes to be charitable: a health care program for disadvantaged children

¹ The request for this Advisory Opinion does not reflect that agency officials or employees who would solicit donations would benefit from the donations.

(Advisory Opinion 1999-37), the study of early childhood development (Advisory Opinion 2013-40) and scholarships for poor or disadvantaged students (Advisory Opinion 1996-36).

The Ethics Commission holds that helping potential foster families meet the state's requirements for fostering children in their homes serves a charitable purpose under the Ethics Act and, therefore, the agency may solicit donations for this purpose.

The Requester's agency personnel must comply with the limitations in W. Va. Code R. § 158-7-6 and 158-7-7 when they solicit these donations.

Donations for Behavioral Program

The Requester also asks whether the agency may raise funds and solicit donations to enhance a new program designed to teach students with behavioral challenges pro-social skills. Team leaders in this program would like to offer rewards and incentives to students who consistently display positive behaviors, but the program's limited operating budget does not allow for these types of "extras," according to the Requester.

The Commission has held, "As a general rule, the Commission is hesitant to approve a governmental agency's solicitation for its own operational needs." Advisory Opinion 2012-08. However, the Commission's Legislative Rule, W. Va. Code R. § 158-7-6, which specifically governs using solicited funds for agency programs, provides that "[s]tate government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged." The Commission finds that the Requester's program is authorized and, in large part, intended to benefit poor and disadvantaged children in the state.

The Ethics Commission finds, therefore, that the Requester may solicit donations to enhance the agency program designed to teach pro-social skills to students with behavioral challenges².

The Requester's agency personnel must comply with the limitations in W. Va. Code R. § 158-7-6 and 158-7-7 when they solicit these donations as well.

Fundraising

The Requester has also asked whether the agency may raise funds for the purposes described above. The Legislative Rule governing the solicitation and receipt of gifts expressly states: "Fund-raising activities based on an exchange of value are not gift solicitations and are permissible." W. Va. Code R. § 158-7-6.8.

² In 2012-20, the Commission held that public funds may be used for incentives to participate in an employee wellness program.

The Ethics Commission holds, therefore, that the proposed fundraising activities are not prohibited under the Ethics Act.

The fundraising activities must be made in a fair and even-handed manner. Potential sponsors may not be coerced into participating and may not receive unlawful or political favoritism in return. Public officials and employees conducting the fundraising may not endorse a person or business. Advisory Opinion 2018-01.

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