

## **Advisory Opinion 2021-19**

**Issued on August 5, 2021, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **Town Recorder** asks whether a Town employee may have on her desk a cup that has a campaign slogan for a former candidate for federal office.

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

The Town has an employee who has a cup that has a campaign slogan on it for a person who was a candidate for federal office in the 2020 election. The employee brings the cup to work daily and keeps it on her workstation desk in the Town Hall.<sup>1</sup>

The Town Hall has a customer service counter. Members of the public who come to Town Hall to pay bills or seek other assistance normally are welcomed and helped at the customer service counter. The employee, who has the cup, is the first and main point of contact for members of the public who come to the Town Hall.

The employee's workspace, which the Requester describes as a stall, is located near the service counter: she does not have an enclosed office. The employee's desk is visible to citizens standing at the service counter, but the Requester states that the employee tries to keep the cup turned so that the campaign slogan on it is not visible to the public. The employee asserts that the cup means a lot to her because her daughter gave it to her and that she wants to continue bringing it to work. Some Town Officials believe that the employee should not bring the cup to work nor keep it on her desk. The Town seeks guidance from the Ethics Commission on this issue.

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

W. Va. Code § 6B-2-5(b)(1) states:

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. ...

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<sup>1</sup> The Town in question has a small population, so few citizens enter Town Hall daily. The amount of citizens entering Town Hall has decreased even more since the Town opened a drive-thru window for citizens to pay bills without the need to enter Town Hall.

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.

W. Va. Code § 6B-2B-2(b)(1) provides:

Public officials, their agents, or anyone on public payroll may not use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish, or display the public official's name or likeness for the purpose of advertising to the public.

W. Va. Code § 6B-2B-1(a) provides, in pertinent part:

"Advertising" means publishing, distributing, disseminating, communicating, or displaying information to the public through audio, visual, or other media tools with the purpose of promoting the public official or a political party.

W. Va. Code § 6B-2B-1(i) provides:

"Public official" means any person who is elected or appointed to any state, county, or municipal office or position, including boards, agencies, departments, and commissions, or in any other regional or local governmental agency.

### **Advisory Opinion**

The Ethics Commission has previously addressed the application of the private gain restrictions in the Ethics Act to political activities in certain circumstances. 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 that "[e]ndorsing candidates for office . . . can be considered a part of the First Amendment rights of an officeholder" and did "not create the type of private gain contemplated by the Act's prohibition against the use of office for private gain." See *also* Advisory Opinion 2012-15 (holding that an elected county sheriff may use his public job title to endorse his chief deputy or any other candidate for public office.)

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 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.”

More recently, in Advisory Opinion 2019-14, the Ethics Commission held that a city police officer may not include pictures of himself in uniform in his campaign material. The Commission reasoned that the officer’s uniform conveyed an endorsement by his police agency, and, therefore, including the pictures in the campaign materials would violate the Ethics Act’s private gain provision.

In Advisory Opinion 2021-06, the Ethics Commission was asked whether a public college may allow a political candidate to speak to a class. The Commission held that “public higher education institutions may not use public resources to support or promote a candidate for public office.”

Based upon its prior precedent and facts presented, the Ethics Commission must determine whether having a cup with a campaign slogan for a candidate in a prior federal election constitutes the prohibited use of public resources (office space) to support or promote a candidate or a political party when the cup is kept on a desk visible to the public. The Ethics Commission must also determine whether the totality of circumstances arises to the use of public space to “advertise” a public official or political party in violation of W. Va. Code § 6B-2B-2(b)(1).

In the instant case, the Town employee is the first, and sometimes main, point of contact for citizens who come to the Town Hall. The Town employee’s workstation is near the customer service counter, and her desk is visible to the public. The employee brings a cup to work with a campaign slogan for a candidate in a federal election. Although the federal election has already occurred and while the Requester states that she tries to keep the campaign slogan out of public view by turning the cup, nevertheless, she is at times displaying a campaign slogan in a manner visible to members of the public who come to Town Hall for municipal business purposes.

**Based upon the totality of the circumstances, the Ethics Commission finds that there is no prohibition in the Ethics Act against the Town employee bringing a cup that contains a campaign slogan for a former candidate for federal office to Town Hall and keeping the cup in her personal workspace. The employee may not, however, display the cup on her desk in a manner which makes the campaign slogan visible to the public; even though the election is over, displaying the former candidate’s name in an area or in a manner which makes it visible to the public could constitute advertising a political party which is prohibited by the restrictions in the Ethics Act, at W. Va. Code § 6B-2-5(b) and § 6B-2B-2(b)(1).<sup>2</sup>**

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<sup>2</sup> Displaying the former candidate’s name to the public on a coffee cup is likely a de minimis use of public resources, and, therefore, not a violation of W. Va. Code § 6B-2-5(b). W. Va. Code § 6B-2B-2(b)(1), however, does not have a de minimis exception. The holding of this Opinion is meant to give practical advice to the Requester.

The Requester may adopt its own policies and rules that govern whether its employees may bring items with political or campaign slogans to work and keep them in nonpublic areas of Town Hall. The Commission recommends that the Requester consult its attorney before adopting such a policy to ensure compliance with other rules or laws governing the political activities of employees.<sup>3</sup>

*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.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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<sup>3</sup> Policies restricting the political activities of public employees in West Virginia must comply with the United States Constitution and the West Virginia Constitution.