

## **Advisory Opinion 2022-20**

**Issued on December 1, 2022, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **Public Park** asks whether its employees may accept gifts valued over \$25 per calendar year from the Park's Foundation.

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

A Supervisor of a Public Park ("Park") was approached by the Treasurer of the Park's Foundation ("Foundation") with an offer to donate \$50 to each Park employee as a Christmas gift. The Park currently has ten employees.

The Foundation is registered as a nonprofit corporation with the West Virginia Secretary of State's Office. The Foundation sells memberships to the public to help support the Park's facilities, trails, and programs. Some of these programs include nature walk tours, outdoor classrooms, and concerts. The Foundation also publishes a newsletter. The Foundation has around 130 members and strives to advance the goals of its members as well as the Park's administration and the state Department of Natural Resources. The Requester asserts that the Foundation has received grants earmarked for certain projects at the Park, but such funds may not be used for the proposed gifts to the Park employees. Finally, the Foundation may charge an entrance fee to its public events and for refreshments it sells at them.

The Park is not a member of and provides no funds to the Foundation. The Park's employees do not solicit donations for the Foundation.

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

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

*Gifts.* - (1) A public official or public employee may not solicit any gift unless the solicitation is for a charitable purpose.... 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 or her official duties.

(2) 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.... The provisions of subdivision (1) of this subsection do not apply to:...

(C) Unsolicited gifts of nominal value or trivial items of informational value;....

W. Va. Code R. § 158-7-4.1 states:

4.1. For purposes of the Ethics Act, W. Va. Code § 6B-2-5(c)(2)(C), a nominal gift is any gift with a monetary value of twenty-five dollars (\$25.00) or less.

W. Va. Code R. § 158-7-3.2 states:

3.2. An interested third party is 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 or her official duties....

## **Advisory Opinion**

### **Gift Rules**

The Ethics Commission must determine whether the Act and related Legislative Rule, W. Va. Code § 6B-2-5(c)(1) and W. Va. Code R. §§ 158-7-1 through 158-7-9, prohibit the Park employees from accepting more than a nominal gift, i.e., \$25 in value<sup>1</sup>, from

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<sup>1</sup> W. Va. Code R. § 158-7-4.1 states: “4.1. For purposes of the Ethics Act, W. Va. Code § 6B-2-5(c)(2)(C), a nominal gift is any gift with a monetary value of twenty-five dollars (\$25.00) or less.”

the Park's Foundation. The restrictions on gifts to public servants apply only if the gift giver is a lobbyist<sup>2</sup> or any person whom the official or employee knows or has reason to know:

1. Is doing or seeking to do business of any kind with his or her agency,
2. Is engaged in activities which are regulated or controlled by his or her agency, or
3. 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 or her official duties . . . .

The Ethics Commission must determine whether the Foundation is an "interested person" of the Park.<sup>3</sup>

The Foundation does not fall in category one (1) above because the Foundation is not doing or seeking to do business with the Park. W. Va. Code § 6B-2-5(c)(1)(B). This finding is consistent with [Advisory Opinion 2015-18](#), in which the Commission permitted a state health employee to accept a \$2,000 award from a non-profit health association. The Commission found that the association was not doing or seeking to do business with the agency because the state agency was not a member of the association and therefore public funds were not used to pay membership dues. The Commission also found that the association was not seeking to do business with the state agency by merely making its memberships available on its website. Here, the Park is not a member of the Foundation, so it does not pay membership fees to the Foundation. The Requester states that the Park is also not a donor or grantor of funds to the Foundation. Therefore, for purposes of this provision, the Foundation does not fall in category one (1).

The Commission will now consider whether the Foundation falls under category two (2) above, which consists of persons "engaged in activities which are regulated or controlled by" the public official or employee's agency. W. Va. Code § 6B-2-5(c)(1)(B). In [Advisory Opinion 1991-83](#), the Commission found that the board of education's drug education coordinator could work for a drug prevention association because, among other factors, the board of education did not regulate the drug prevention association. Also, in [Advisory Opinion 1991-03](#), the Commission found that an educational

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<sup>2</sup> The Foundation is not represented by a registered lobbyist in West Virginia, so that category of restricted gift givers is inapplicable.

<sup>3</sup> In [Advisory Opinion 2003-05](#), the Ethics Commission used the designation "interested persons" to describe persons who fall within the categories of restricted gift givers. The Foundation is a "person" for purposes of this provision as defined in W. Va. Code § 6B-1-3(h) ("Person" means an individual, corporation, business entity, labor union, association, firm, partnership, limited partnership, committee, club, or other organization or group of persons, irrespective of the denomination given such organization or group.")

broadcasting authority does not regulate a non-profit corporation dedicated to providing assistance to the operations of the authority.

On the other hand, the Commission held in [Advisory Opinion 1992-02](#) that a state agency that inspects coal mines did regulate a mine rescue association whose members were private coal companies subjected to the agency's mining regulations. In that Opinion, the Commission applied a common definition of "regulate" in its analysis: "to control or direct according to a rule." In this case, the Foundation's mission is to provide assistance to the Park, and its members are not subject to Park rules or regulations except when they are using the Park like any other member of the public. Based on these Opinions, the Commission finds that the Park does not regulate the Park's Foundation.

Finally, the Commission finds that the Foundation does not fall in category three (3) above: A person with "financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of" the employees' official duties. W. Va. Code § 6B-2-5(c)(1)(C). In [Advisory Opinion 1995-03](#), the Commission found that a sheriff may not accept a gift from a county deputy sheriffs' association because the purpose of the association is to address concerns and complaints about the sheriff's administration. Therefore the association (and its members who included deputies under the supervision of the sheriff) had a financial interest, which may substantially and materially be affected, by the sheriff's performance or non performance of the sheriff's official duties. The Park Foundation's purpose is to support the mission of the Park. The Ethics Commission finds that the Foundation is not a person with financial interests which may be substantially and materially affected by the performance or non performance of the Park employees or administrators' official duties.<sup>4</sup>

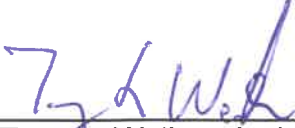
**The Ethics Commission holds that the Public Park employees may accept gifts valued at over \$25 per calendar year from the Park's Foundation because the Foundation is not an interested person of the Public Park for purposes of the gift restrictions in the Ethics Act and related Legislative Rule.**

*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, including whether there is express or implied authority for the expenditure.*

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<sup>4</sup> In [Advisory Opinion 2022-13](#), in analyzing another provision of the Act governing the disclosure of gifts on financial disclosure statements, the Commission held that a foundation did not, based upon the facts presented, have a direct and immediate interest in a governmental activity over which that state board had control for purposes of W. Va. Code § 6B-2-7(a)(10).

*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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Terry L. Walker, Acting Chairperson  
West Virginia Ethics Commission