

Advisory Opinion 2019-11

Issued on April 4, 2019, by

The West Virginia Ethics Commission

Opinion Sought

A **Town** asks whether it may solicit a neighboring County's Sheriff's Department for two police cruisers that are no longer in use for the purpose of donating the cruisers to a private college located in the Town.

Facts Relied Upon by the Commission

The Requester states that it desires to ask the Sheriff's Department in an adjacent county for two police cruisers that the Sheriff's Department is no longer using. The Requester wants to give the cruisers to a private, non-profit college located in the Town. The Requester states that its sole purpose for donating the cruisers is to enable the college to more thoroughly and adequately police its own campus, which should translate into additional safety and promote the public welfare of the Town.

The Town also states that the Mayor and other members of the Town's administration are current or former employees of the college.

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

W. Va. Code§ 68-2-5(c) states, in relevant part:

(1) 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: *Provided*, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or employee of the state and whose position is subordinate to the soliciting official or employee: *Provided, however*, That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution. 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;

(8) 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.

W. Va. Code § 68-2-5U) states, in relevant part:

(1) Public officials, excluding members of the Legislature who are governed by subsection (i) of this section, may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

(D) The appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by, or a compensated officer or board member of, the nonprofit:

Advisory Opinion

Solicitation

The Ethics Act prohibits public officials and public employees from soliciting gifts unless the solicitation is for a charitable purpose. W. Va. Code § 68-2-5(c)(1). The Ethics Commission has not previously addressed whether this provision prohibits a governmental entity from soliciting another governmental entity for a gift.

The Commission will first examine whether the plain language of the provision prohibits this type of solicitation. *Goff v. W. Va. Office of Ins. Commissioner*, 236 W.Va. 393, 780 S.E.2d 659 (2015). W. Va. Code § 68-2-5(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: *Provided*, That no public official or public employee may solicit for a charitable purpose any gift from any person who is also an official or

employee of the state and whose position is subordinate to the soliciting official or employee: *Provided, however,* That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution.

The provision is silent as to *from whom* -- other than subordinates of a soliciting official or employee - a gift may not be solicited. As to whether the provision prohibits soliciting from another governmental entity, the Commission finds that the provision is ambiguous. As a result, the Commission must determine whether it was the intent of the Legislature to prohibit the solicitation at issue. *Syl. Pt. 7, Liberty Mut. Ins. Co. v. Morrissey*, 760 S.E.2d 863 (W.Va. 2014) ("[I]nterpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent.").

In ascertaining legislative intent, the Commission will read W. Va. Code § 68-2-5(c) as a whole so as to accomplish the general purpose of the statute. *Syl. Pt. 9, Id.* Section (c)(2) lists specific categories of people "from" whom a public official or employee may not *accept* gifts, such as vendors and regulated persons. Other governmental entities are not included in the list of persons from whom a gift is prohibited.

In Advisory Opinion 2014-01, the Commission explained the reasons for the prohibition against soliciting gifts:

One underlying purpose of this prohibition is to ensure that public servants do not solicit for their own benefit or that of another. Another rationale is that public agencies should not solicit donations to cover their operational costs or to underwrite traditional governmental functions. An equally compelling concern is that potential donors should not feel compelled to donate or face unfavorable treatment, or be led to believe that by donating, they will receive preferential treatment by a government agency.

Based upon the above, it stands to reason that the Legislature did not intend to restrict government agencies from asking other government agencies for financial support or in-kind donations. For example, a county parks board may ask a county commission for a financial appropriation or in-kind donation to support a festival. While this is a solicitation, it is not the type of solicitation the Legislature intended the Ethics Act to prohibit.

The Ethics Commission holds, therefore, that the Town may solicit the neighboring County's Sheriff's Department for the police cruisers.

Donating Public Property to a Private College

Once the cruisers are in the possession of the Town, they are part of the "public coffers." Advisory Opinion 2014-01. The next issue, then, is whether the Town's gift of the police cruisers to the private college would violate W. Va. Code § 68-2-5(b) as an unauthorized use of public resources for private gain to the college.

The Commission stated the following in Advisory Opinion 2018-04:

The Commission held in Advisory Opinion 2016-09 that "the Ethics Act permits the expenditure of public funds if there is a legitimate government purpose for the expenditure. *Id. citing* Advisory Opinions 2015-12 and 2012-27. [footnote omitted] The Ethics Commission's authority, however, is limited to interpreting and enforcing the Ethics Act. The Commission does not have exclusive authority to decide whether state or common law authorizes an expenditure by a local government agency or by the state of West Virginia. The Ethics Commission only has authority to determine whether a proposed expenditure violates the private gain provision of the Act.

In analyzing if a public servant complies with the Ethics Act when he or she makes an expenditure, the Commission considers, among other factors, whether the proposed expenditure is authorized elsewhere. In Advisory Opinion 2012-50, the Ethics Commission stated, "In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure.

Given the limited facts presented and given that the Ethics Commission is limited to interpreting the Ethics Act, the Commission is unable to determine whether donating the cruisers to the college is permissible under other state statutes, common law or elsewhere.¹ If donating the cruisers to the college is allowable, doing so would not violate the Ethics Act.

Voting

The Ethics Act prohibits public officials from voting on the "appropriations of public moneys or the awarding of a contract to a nonprofit corporation if the public official or an immediate family member is employed by, or a compensated officer or board member of, the nonprofit" W. Va. Code§ 6B-2-50)(1)(D). The private college here is a non-profit corporation and some of the Town's officials are current or former employees of the college.

The Ethics Commission finds that any Town officials who are also current employees of the private college are prohibited from voting on whether the Town donates cruisers to the college. As to former employees of the private college, the

¹ The West Virginia Attorney General held in a 1974 Opinion that the Legislature may not appropriate "public funds to students for the purpose of attending private colleges or universities" because the expenditure is for a private purpose in violation of the West Virginia Constitution. 56 W. Va. Op. Att'y Gen. 22 (1974).

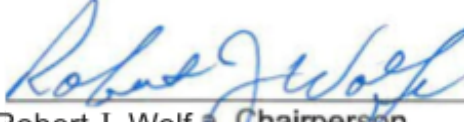
voting provision of the Ethics Act does not prohibit them from voting. See Advisory Opinion 2013-47 (finding that retired board of education employees have no financial interest in whether the town in which they served deeded real property interests to the board of education).

Conclusion

The Ethics Commission holds that the Ethics Act does not prohibit the Town from soliciting a neighboring County's Sheriff's Department for two police cruisers that are no longer in use for the purpose of donating the cruisers to a private college located in the Town if giving the cruisers to the private college is an authorized use of public resources. To determine whether this use is authorized, the Town should review applicable laws to determine if there is express or implied authority for the expenditure. Further, the Town may consider requesting an opinion from the Office of the Attorney General.

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 §§ 68-1-1 through 68-3-11, and does not purport to interpret other laws or rules.

In accordance with W. Va. Code § 68-2-3, 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. Wolf, Chairperson
West Virginia Ethics Commission