Advisory Opinion 2017-16

Issued on June 1, 2017, by

The West Virginia Ethics Commission

Opinion Sought

The **Director of a State Agency** asks whether the Ethics Act permits the agency's annual educational publication to include the Director's name, title and photograph and the names of the Governor and the agency's Commissioners, Section Chiefs and specialists in the agency.

Facts Relied Upon by the Commission

Each year the agency distributes to the public a document which the Requester characterizes as a "yearly educational publication" (hereinafter referred to as "the Publication") which contains a summary of agency regulations. The Publication, which consists of approximately 50 pages, includes contact information for the agency's district offices; an overview of licensure requirements for various activities; guidance on purchasing licenses; information about agency-sponsored events and other information.[1]

The Publication also includes a director's column which contains the Director's photograph and name, and a list of the names of the Governor and the agency's Director, Commissioners, Section Chiefs and specialists in the agency.[2]

Provisions Relied Upon by the Commission

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

> (c) "Educational materials" means publications, guides, calendars, handouts, pamphlets, reports or booklets intended to provide information about the public official or governmental office. It includes information or details about the office, services the office provides to the public, updates on laws and services and other informational items that are intended to educate the public.
>
> (e) "Likeness" means a photograph, drawing or other depiction of an individual.

[1] The Requester provided the Ethics Commission with a copy of a previous year's Publication for guidance on what the agency proposes to create and distribute this year.

[2] To protect the confidentiality of the Requester, the specific job titles of these specialists are omitted from this Opinion.

(h) "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.

W. Va. Code§ 6B-2B-2 provides, in pertinent part:

(d) *Educational Materials.* -- A public official's name or likeness may not be placed on any educational material that is paid for with public funds: *Provided,* That this prohibition does not apply to the submission of a report required to be issued by law.

W. Va. Code§ 6B-2B-4 provides, in pertinent part:

(a) A public official may use his or her name or likeness on any official record or report, letterhead, document or certificate or instructional material issued in the course of his or her duties as a public official: *Provided,* That other official documents used in the normal course of the agency, including, but not limited to, facsimile cover sheets, press release headers, office signage and envelopes may include the public official's name: *Provided, however,* If the official documents are reproduced for distribution or dissemination to the public as educational material, the items are subject to the prohibitions in subsection (d), section two of this article.

Advisory Opinion

The Ethics Act prohibits a public official's name or likeness from being placed on educational materials paid for with public funds. W. Va. Code§ 6B-2B-2(d).

This Opinion will analyze whether the agency's Publication is considered "educational material" under the Act and whether it may include the Director's name, title and photograph and the names of the Governor and the agency's Commissioners, Section Chiefs and agency specialists.

"Educational material" analysis

The Act defines "educational materials" as "publications, guides, calendars, handouts, pamphlets, reports or booklets intended to provide information about the public official or governmental office. It includes information or details about the office, services the office provides to the public, updates on laws and services and other informational items that are intended to educate the public." W. Va. Code§ 6B-2B-1(c). The prohibition against

placing an official's name or likeness on educational materials does not apply to the submission of a report required to be issued by law. W. Va. Code§ 68-28-2.

The Requester has indicated that the Publication will include contact information for the agency's district offices; an overview of licensure requirements for various activities; guidance on purchasing licenses; information about agency-sponsored events and other information. The Requester states that the Publication is issued by the agency's employees as part of their official duties.

The Requester cites a Code provision which requires the agency to "collect, organize and from time to time distribute to the public, through the news media or otherwise, interesting facts, information and data concerning the natural resources of the state and the functions and services of the department." This Code provision does not require the agency to submit this information in report form to the Governor, the Legislature or another public agency.

The Act prohibits the use of a public official's name or likeness on educational materials but excepts from this prohibition the "submission of a report required to be issued by law." W. Va. Code§ 6B-2B-2(d). The Commission finds that a publication created and issued by an agency pursuant to a statutory provision requiring the agency to distribute to the public facts about the agency through the news media or other sources does not constitute the act of creating and distributing a "report required to be issued by law." Hence, the Publication does not fall within the exception for reports required to be issued by law. To the extent it is required to be issued, the Act further narrows this exception by stating: "If the official documents are reproduced for distribution or dissemination to the public as educational material, the items are subject to the prohibitions in subsection (d), section two of this article."

Based upon the contents of the Publication, as it is not a report required to be submitted by law and as it is being disseminated to the public, the Ethics Commission finds that the Publication at issue is "educational materials" for purposes of the Act.

"Public official" analysis

Governor, Director and Commissioners

It initially must be determined whether the Governor and the agency's Director, Commissioners, Section Chiefs and agency specialists are considered "public officials" under the name and likeness provisions of the Ethics Act.

For the purposes of these provisions, a "public official" is "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." W. Va. Code§ 68-28-1(h).

The Governor is elected by the voters of the state and as such, is a public official. The Director of the state agency at issue and the Commissioners are appointed by the Governor. **Therefore, the Governor and the agency's Director and Commissioners are "public officials" for purposes of W. Va. Code § 68-28-2.**

Section Chiefs

It is less clear whether the agency's Section Chiefs are "public officials" for purposes of the name and likeness provisions. The West Virginia Supreme Court of Appeals has provided guidance on this issue in a series of cases setting forth the following factors to be considered.

> Among the criteria to be considered in determining whether a position is an office or a mere employment are whether the position was created by law; whether the position was designated [as] an office; whether the qualifications of the appointee have been prescribed; whether the duties, tenure, salary, bond and oath have been prescribed or required; and whether the one occupying the position has been constituted a representative of the sovereign.

Carr v. Lambert, 179 W. Va. 277, 279, 367 S.E.2d 225, 229 (1988) *(quoting* Syl. Pt. 5, *State ex rel. Carson v. Wood,* 154 W. Va. 397, 175 S.E.2d 482 (1970)).

In another case, *City of Bridgeport v. Matheny,* 223 W. Va. 445, 675 S.E.2d 921 (2009), the Court found that the position of a municipal police officer constituted a public office because the West Virginia Code establishes the position; provides for a police officer's removal from office; establishes the qualifications of a police officer; establishes the duties, tenure, salary, bond and oath of a police officer, and vests the police officer with the power to enforce laws of the State, thereby making a police officer a representative of the sovereign. *Id.* at 449-50, 675 S.E.2d at 925-26.

Moreover, in a case before the federal court in the Southern District of West Virginia, the court determined that, given the broad authority granted to the position of Executive Director for the Charleston Housing Authority, that position constituted a representative of the sovereign and was therefore a public official. *Boggess v. Housing Authority of City of Charleston,* 273 F.Supp.2d 729 (S.D. W. Va. 2003).

West Virginia Code states that "[t]he director shall select and designate a competent and qualified person to be chief of each section." W. Va. Code § 20-1-14. Therefore, the Section Chief position was created by law and is filled by appointment by the Director. Further, the Code establishes the duties of the position. The Section Chief "is the principal administrative officer of that section and is accountable and responsible for the orderly

and efficient performance of the duties, functions and services thereof." W. Va. Code§ 20-1-14. Further:

> [Section Chiefs] shall be responsible for the selection, training, assignment, distribution and discipline of ... officers and the effective discharge of their duties in carrying out the law-enforcement policies, practices and programs of the department in compliance with the provisions of article seven of this chapter and other controlling laws. Except as otherwise provided in this chapter, he or she and his or her ... officers are hereby authorized to enter into and upon private lands and waters to investigate complaints and reports of conditions, conduct, practices and activities considered to be adverse to and violative of the provisions of this chapter and to execute writs and warrants and make arrests thereupon.

W. Va. Code§ 20-1-13

In addition, the job description for Section Chiefs states that they are responsible for "recommend[ing] and oversee[ing] the preparation of legislation and administrative procedures." Section Chiefs are given a "wide latitude to exercise independent judgment in the execution of a full range of activities within jurisdiction." Finally, they "exercise delegated authority to organize and staff the section to pursue general goals and orderly and efficient execution and administration of activities " Therefore, the position constitutes "a representative of the sovereign."

Based upon this analysis, the Ethics Commission holds that the agency's Section Chiefs are appointed "public officials" for purposes of the name and likeness provisions of the Ethics Act.

Agency specialists

Neither the West Virginia Code nor the agency's associated Legislative Rules create the position being referred to herein as "agency specialist." Moreover, no statute or Rule provides for their appointment, election or hiring, or sets forth their qualifications, tenure, salary, bond or oath. The job descriptions for these specialists state that they are responsible for compiling, reviewing and analyzing data, and conducting informational presentations and laboratory work. None of these duties or responsibilities includes any type of policymaking authority or sovereign authority delegated by the agency Director.

Therefore, the Ethics Commission concludes that the agency specialists are not "public officials" for purposes of the name and likeness provisions of the Act.

Conclusion

The Ethics Commission concludes that the Publication described by the Requester is considered "educational materials" for purposes of the name and likeness provisions of the Ethics Act. Moreover, the Governor and the agency's Director, Commissioners and Section Chiefs are "public officials" for purposes of these provisions and their names and photographs may not appear in the Publication. The Ethics Commission concludes that the agency specialists are not "public officials" for purposes of the name and likeness provisions of the Act and their names and photographs may appear in the Publication.

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.*

/s/ Robert J. Wolfe, Chairperson
Robert J. Wolfe, Chairperson