

# **Advisory Opinion 2018-01**

**Issued on January 4, 2018, by**

**The West Virginia Ethics Commission**

## **Opinion Sought**

A **County Commission** asks whether its employees and officials, including its Parks Commission board members and employees, may solicit local businesses and individuals to sponsor public park benches.

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

The County Commission (“County Commission” or “Requester”), in conjunction with the County Parks and Recreation Commission (“Parks Commission”), owns and operates a county park. The County Parks Commission members and its Executive Director oversee the day-to-day operations of the park. The County Commission appoints the Parks Commission board members and provides funding to the park through a budget appropriation to the Parks Commission. At times, the County Commission also directly pays for improvements to the park.

The County Commission recently awarded a bid to a contractor for major renovations at the park, including a new community center and baseball fields. Pursuant to the bid specifications and contract, the contractor must install park benches. Purchasing the benches, however, was not part of the bid.

The County Commission or Parks Commission needs to purchase new park benches. The Requester wants to raise money to cover or offset the expense of purchasing the benches by selling sponsorships to local businesses and individuals. Sponsors would be recognized by a plaque or marker on the benches which would be located throughout the park for the use and enjoyment of the public.

The Parks Commission has been granted public charity status by the United States Internal Revenue Service (“IRS”). The IRS has sent a letter to the Parks Commission memorializing its determination that the Parks Commission is “exempt from federal income tax under Internal Revenue Code (IRC) Section 501 (c) (3).” The letter further states: “Donors can deduct contributions they make to you under IRC Section 170.”

The Parks Commission has a separate bank account for gifts and donations. This bank account is under the name “Friends of the Park;” however, the funds in the account are directly under the control of the Parks Commission and are audited along with the Parks Commission’s finances. Only the Parks Commission’s Executive Director, Board President and Treasurer have signatory authority on the Friends of the Park account. The County Commission states that any funds raised through the sale of the sponsorships will be deposited in the “Friends of the Park” account.

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

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

(1) 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 (2008) 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.

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

W. Va. Code R. § 158-7-6 (2008)

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.

### **Advisory Opinion**

The Ethics Act and related Legislative Rule prohibit public servants from soliciting gifts for the benefit of the government agency on which they serve or are employed unless the gift is for a charitable purpose. See W. Va. Code § 6B-2-5(c) and W. Va. Code R. § 158-7-6 (2008).<sup>1</sup> The Act and Rule also restrict the manner in which public servants may solicit charitable donations. See Advisory Opinion 2012-49 (analyzing when public agencies may solicit the public for monetary donations to support the agencies' programs and outlining the rules governing the manner of solicitation). In contrast, a different rule of law applies when a government agency is conducting a sales solicitation, *e.g.*, the sale of advertising.

Based upon the restrictions in the Ethics Act, the Requester seeks guidance on whether its County Commissioners, Park Commission board members or employees of these entities may directly contact area businesses or individuals to solicit sponsorships for public park benches. The sale of sponsorships will be used to pay for, or offset the costs of, the park benches.

While the Ethics Act imposes restrictions on the solicitation of gifts by public servants for the benefit of their agencies, there is no provision in the Act that bans a public agency from selling a thing of value, including advertising. See Advisory Opinion 2014-15 (holding a state agency may sell advertising to help defray the costs of wellness tools on its website and cautioning the agency that it may not endorse a private entity or product) and Advisory Opinion 1995-18 (selling advertising does not constitute soliciting a gift, unless the advertising charge is merely a contribution in disguise or the advertising, on its face, renders no real benefit to the advertiser). Additionally, 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 (2008).

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<sup>1</sup> An exception to this prohibition is when the Code authorizes a public agency to solicit gifts. See Advisory Opinion 2013-40 (finding a statewide task force may solicit financial support for itself based upon its enabling legislation which expressly authorized it to do so).

The Ethics Commission has never ruled whether the sale of a sponsorship for a public park bench constitutes a fund-raising activity based upon an exchange of value or is the solicitation of a charitable gift. The Requester states that benches would be placed throughout its public parks for the use of the public. As consideration for their sponsorship, the sponsors would receive recognition in the form of a plaque or marker on the benches.

**The Ethics Commission finds for purposes of the Ethics Act, at W. Va. Code § 6B-2-5(c) and W. Va. Code R. § 158-7-6.8 (2008), the sale of sponsorships for the park benches is a fund-raising activity based upon an exchange of value either commercial or personal. The value to the sponsors is that they or their business are given the equivalent of naming rights for benches which will be situated in a public area. Therefore, the Requester's public officials or employees may sell the sponsorships and directly contact local businesses and individuals for that purpose.<sup>2</sup>**

The Commission also holds that the sponsorships meet the charitable purpose exceptions in the Ethics Act.<sup>3</sup> This finding, however, is academic as the sale of the sponsorships, like the sale of advertisement, does not need to meet the definition of "charitable" to be permissible. Further, as it constitutes the sale of a thing of value, the provision in the Legislative Rule which limits the manner of solicitation does not apply. See W. Va. Code R. § 158-7-7 (2008).

The sales solicitations must be made in a fair and even-handed manner. Potential sponsors may not be coerced into buying a sponsorship and may not receive unlawful or political favoritism in return for purchasing a sponsorship. See *generally* Advisory Opinion 1993-08 and 1996-19.<sup>4</sup> County officials and employees conducting the sales solicitations may not endorse a person or business.

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<sup>2</sup> The Commission makes this finding based upon its analysis of the language "exchange of value" in its Legislative Rule. The IRS may find that for purposes of federal tax law, it is a charitable gift contribution versus an advertising expense; however, even if that is the case, it does not change the Commission's interpretation of its Legislative Rule which states that "[f]und-raising activities based on an exchange of value are not gift solicitations."

<sup>3</sup> The Commission has held that government agencies may solicit funds for municipal recreational facilities and programs based upon the charitable purpose exception. In Advisory Opinion 1993-08 the Commission held that a city recreational department may solicit funds for programs which "are geared toward the youth of the community." In Advisory Opinion 1996-19 the Commission authorized a city board of parks to solicit donations from area businesses to maintain the local public pool. The Ethics Commission held that the solicitation was for a charitable purpose as the "operation of municipal recreation facilities does benefit the public at large, especially the children of the area, and as such the project does constitute a 'charitable purpose' as that term is used in the Ethics Act."

<sup>4</sup> While these Opinions relate to the solicitation of gifts for charity, the Commission finds the guidance sound for purposes of outlining general restrictions for sales solicitations by public agencies.

Whether a government agency has legal authority to sell sponsorships may be governed by other laws prescribing the powers of the government agency. Additionally, any money raised by the agency is public money and may only be used for authorized purposes.<sup>5</sup>

**The Ethics Commission finds that the expenditure of the public funds raised through the sale of sponsorships to purchase park benches constitutes the “advancement of public policy goals or constituent services” and does not, therefore, “constitute the use of prestige of office for private gain.” W. Va. Code § 6B-2-5(b)(3).**

*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.*

/s/ Robert J. Wolfe  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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<sup>5</sup> See Advisory Opinion 2014-11 (emphasizing that expenditures from the Sheriff’s Concealed Weapons Fund are public funds, may not be used for private gain, must be authorized expenditures, and must be related to law enforcement purposes or the operating needs of the Sheriff’s Office), and Advisory Opinion 2016-16 (holding a state agency may sell calendars).