ADVISORY OPINION 2015-19

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Assessor** asks whether his office may use envelopes and business cards bought with public funds which contain his name, and whether he may distribute calendar books and pens, which also contain his name and which were bought with his private funds, in his public office without violating the "trinkets" or "name and likeness" provision of the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

The Requester provided samples of envelopes and business cards used by his office that display his name, title and the Assessor's office address. His name is somewhat larger and bolder than his title and address on both items. The envelopes and business cards are paid for with public money and are used on a daily basis to send official correspondence from the Assessor's Office.

The calendar or appointment books, which were purchased with the Requester's personal funds, have a vinyl cover and cost the Requester $2.57 each when bought in large quantities. The cover of each book states, "Compliments of" the Requester and his public title. The Requester states that he hands out these calendar or appointment books each December.

The Requester asks whether he may provide the appointment books to individuals while he is working in his public job outside of the county building, *i.e.,* while he is assessing real property. He also asks whether he may provide the appointment books to individuals who, apparently knowing of his practice in distributing such books, request copies of them while they are in the county building conducting business.

The Requester also wants to leave ink pens which contain his name and public title on the counter of the Assessor's office for the public to use or take.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code § 68-2-5(b)(1) provides:

> 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. *(emphasis added)*

W.Va. Code § 6B-2-5c provides:

(a) Public officials, their agents, or anyone on public payroll may not:

(3) 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** including, but not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. *(emphasis added)*

(b)(2) "Trinket" means items of tangible personal property that are not vital or necessary to the duties of the public official's or pubic employee's office, including, but not limited to, the following: magnets, mugs, cups, key chains, pill holders, band-aid dispensers, fans, nail files, matches and bags.

(c) This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued **in the course of their duties as public officials,** or on promotional materials used for tourism promotion. *(emphasis added)*

(d) This section shall not be interpreted as prohibiting public officials from using public funds to communicate with constituents in the normal course of their duties as public officials so long as such communications do not include any reference to voting in favor of the public official in an election.

(e) The commIssIon may propose rules and emergency rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to effectuate this section by July 1, 2015.

The emergency Legislative Rules promulgated by the Ethics Commission provide, at 158 C.S.R. 21, as follows:

3.1 Incidental use of public resources for personal or business gain resulting in *de minimis* private gain to a person subject to this section or another person does not constitute a violation of this section.

4.1 "Advertising" for purposes of W.Va. Code § 6B-2-5c(a)(3), means any form of publication or media communication intended for general dissemination to the public that has the **primary intent or effect of promoting a public official.** Dissemination of office press releases or official information via e-mail, social media or other public media tools for official purposes is not considered advertising under W.Va. Code § 6B-2-5c(a)(3). *(emphasis added)*

ADVISORY OPINION

Envelopes and Business Cards

The prohibition in the Ethics Act against public officials using their names and likenesses on publicly-owned vehicles, on trinkets and for purposes of advertising does not prohibit public officials from using their names on official letterhead or related official documents. As set forth in the "trinkets" section of the Act:

> This section does not prohibit public officials from using their names or likenesses on any official record or report, letterhead, document or certificate, or instructional material issued in the course of their duties as public officials, or on promotional materials used for tourism promotion.

W.Va. Code§ 6B-2-5c(c).

The envelopes and business cards are clearly not vehicles or trinkets, so the only provision which could potentially apply is if these items are construed to be advertising. Public funds may not be used to distribute, disseminate, publish or display advertising, which includes, but is not limited to, billboards, public service announcements, communication sent by mass mailing, or any other publication or media communication intended for general dissemination to the public. W.Va. Code § 6B-2-5c(a)(3). "Advertising" is defined in the Emergency Legislative Rules as "any form of publication or media communication intended for general dissemination to the public that has the primary intent or effect of promoting a public official." 158 C.S.R. 21-4.1.

The Commission finds that the envelopes and business cards at issue do not have "the primary intent or effect of promoting a public official" and are therefore not prohibited advertising under W.Va. Code § 6B-2-5c(a)(3) and 158 C.S.R. 21.4.1. These materials are used in the usual and customary course of the Requester's

public job duties and are accordingly permissible. W.Va. Code§§ 68-2-5(b)(1), 68-2-Sc(c) and (d).

Calendar Books and Pens

Nothing in the Ethics Act, including the "trinkets" provlslon, prohibits the Requester from using his private funds to purchase and distribute the calendar or appointment books and pens which contain his name. The Requester also may use his public title on these calendar books and pens.[1]

However, the Requester may not use public funds or public resources to offer or distribute these calendar books and pens to the public. Accordingly, the Requester and/or his staff may not place the calendar books and pens on a counter in the Assessor's office, may not distribute them while in the field assessing property, and may not give them to individuals who request them while he is performing his public job duties.

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 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, et seq., and does not purport to interpret other laws or rules. In accordance with W.Va. Code § 6B-2-2, this Opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended, revoked or the law is changed.

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

[1] In Advisory Opinion 2012-15, the Commission ruled that a sheriff could use his public title to endorse a candidate for public office.