ADVISORY OPINION 2015-21

Issued on November 5, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether it may, through the formal procurement process, contract with a vendor to provide flat screen monitors which will broadcast public service announcements, state-provided service news and paid advertising in the lobbies of its regional offices.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a State Agency which has a high volume of citizens who conduct business at its regional offices. It uses an electronic queuing system in its waiting area. When citizens check in, they are given a number.

The electronic system assigns queues for windows using pre-designated priority levels. The system uses audio and video systems to direct customers to the correct counter for the type of service selected.

The State Agency is in the process of issuing a Request for Quotations through the State Purchasing Division for new queuing software and hardware. As part of this upgrade, the State Agency seeks to issue a separate Request for Quotations for a vendor to provide flat screen monitors for its waiting areas and video content to stream on the monitors. Pursuant to the proposed Request for Quotations, the flat screen monitors must have a split screen which allows the queuing numbers to be simultaneously displayed on all monitors.

The video content will be streamed without audio. The successful vendor will be required to stream programming provided by the State Agency, including public service announcements issued by the Requester and other state agencies, for 42 minutes of each hour. Throughout the remaining 18 minutes of each hour, the vendor may stream paid advertising. Pursuant to the Request for Quotation, the vendor may not stream advertising which violates the community standards of decency; contains electioneering messages; advertises for alcohol or tobacco, or displays any product or service which is contrary to the mission of the State.

The State Agency will also use the monitors to stream training for its employees outside of its public business hours.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-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.... 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) reads, 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 ...

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The Ethics Commission has steadfastly followed this general rule: "[A] public official may not endorse a particular product or business. A commercial endorsement of a product or business is only permissible when it results in an overriding public benefit." Advisory Opinions 95-05 and 2015-04, *citing* Advisory Opinion 2005-10. *See also* Advisory Opinions 2012-21 and 2014-15.

The Commission has previously considered whether state agencies may sell advertising without violating the Ethics Act's prohibition against public officials endorsing a particular product or business. In Advisory Opinion 2014-15 the Commission held that a State Agency may sell advertising to help defray the costs of wellness tools on its website if the website includes "a disclaimer making clear that the appearance of advertising should not be construed as an endorsement of any particular vendor or product." The Commission held that if the State Agency included this disclaimer, then the selling of advertising for its website would not constitute a prohibited endorsement. *See also* Advisory Opinion 2004-24 (allowing a state agency to sell advertising to defray the cost of publishing a quarterly newsletter which it distributed to vendors and regulated businesses) and Advisory Opinion 95-18 (allowing a state agency to defray costs of a conference by selling advertising space).

In the present case, the State Agency may allow a third-party vendor, selected in accordance with state procurement laws, to stream advertising on video monitors in its waiting areas provided that the State Agency or vendor also broadcasts a disclaimer on the video screens during the advertisements, or immediately before or after, indicating that they are paid advertisements and should not be construed as an endorsement of any vendor, product or service. The advertisements may not include political advertisements or feature persons or the names of persons who are candidates for public office.

The Commission further finds the sale of advertising, either by the State Agency or by the vendor on its behalf, does not constitute a prohibited solicitation as the Commission has previously held "a sales solicitation offering something of value is not a solicitation of a gift." *See* Advisory Opinion 2004-24, *citing* Advisory Opinions 2000-06 and 95-18.

The Ethics Commission concludes that streaming of private advertisements in the State Agency's public lobby space is permissible under the Ethics Act if: (1) the vendor is selected in accordance with applicable purchasing laws; (2) the advertisements do not include political advertisements or feature persons or the names of persons who are candidates for public office; (3) a disclaimer, substantially similar to the one outlined above, is included to ensure that the advertising does not constitute a prohibited endorsement, and (4) public service announcements from other agencies may not contain the name or likeness of a public official.

If there are public policy reasons for not allowing the streaming of advertisements under the facts presented, then those persons statutorily charged with the oversight of the State Agency may wish to impose stricter standards than those contained in the Ethics Act.

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 § 68-1-1, et seq., and does not purport to interpret other laws or rules. In accordance with W.* Va. *Code § 68-2-2, 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
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