ADVISORY OPINION 2015-22

Issued on December 3, 2015, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Cabinet Secretary** asks if he and staff may organize, plan, and solicit funding for an Association's annual conference.

FACTS RELIED UPON BY THE COMMISSION

Requester's Department, along with comparable departments from 12 other states and Puerto Rico, comprise the membership of an Association. The Association was created to study various materials related to methods utilized by member states in carrying out their public duties, to discuss common problems and to exchange ideas and evaluate programs. The Association holds an annual conference in which member states have an opportunity to share ideas, learn from experts and explore best practices with their peers.

West Virginia has been asked to host the Association's annual conference. Requester represents that it will be necessary for him and his nine-member executive committee to plan and coordinate all aspects of the conference. Informative presentations and discussions will be held during the conference. Requester also notes that it is customary to have an opening reception, a closing ceremony, a golf tournament, and social outings for guests. Light refreshments will also be offered during meetings.

Requester states that no state funds will be utilized in planning and carrying out the annual conference. Funding for the conference and related events will be from multiple sources including registration fees from attendees, direct financial support from the Association and the solicitation of donations from businesses. Requester represents that the donations will be solicited in writing in accordance with 158 CSR 7-7 and that they will be expended for appropriate conference expenses. The Association's funds, which are to the best of Requester's knowledge and belief made up of registration fees and donations, may be used for any conference expense. The registration fees are $650 for delegates, $325 for a guest/spouse and $150 for children 12 years and older. Finally, neither the Association nor the member states authorize or approve any products or services offered by businesses that contribute to the conference. However, all contributors will be recognized in conference literature, on the Association's website and through similar means. The sponsors may also have booths in the vendor hall.

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)(1) 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: *Provided, however,* That nothing herein shall prohibit a candidate for public office from soliciting a lawful political contribution.

158 CSR 7-6.7 provides:

> State government agencies and the governing bodies of political subdivisions may solicit funds to support or underwrite agency programs which are statutorily created or authorized and are intended to help the poor and disadvantaged. If a state government agency or governing body of a political subdivision seeks to solicit funds for use by the agency for any other purpose, then the state government agency or governing body of a political subdivision must first seek permission from the Executive Director of the West Virginia Ethics Commission or the Ethics Commission through issuance of a formal advisory opinion. The Executive Director or Ethics Commission may only authorize such a solicitation if it serves a public purpose. This provision does not apply to the solicitation of donations by a member of the Legislature or a member of the Board of Public Works who is soliciting funds for a regional or national organization conference or other function in accordance with W.Va. Code§ 6B-2-5(c)(6) and § 6B-2-5(c)(7).

ADVISORY OPINION

Private Gain

The Ethics Commission will first address whether the Ethics Act authorizes Requester and his staff to plan and coordinate all aspects of the Association's conference. The Ethics Act prohibits public servants from using their public positions for their own private financial gain or the private financial gain of others. The question that arises in the instant Opinion is whether the use of paid State employees to perform work associated with the annual conference constitutes a prohibited use of office for the private gain of those attending the conference.

The Commission has considered similar questions in previous Opinions. In Advisory Opinion 2000-08, an Assistant Commissioner of a State Agency asked whether it would be a violation for agency personnel to be paid to assist in preparing for and presenting the social elements of a regional conference of an association to which the agency belongs. The Commission held that "[i]t would not be a violation of the Act for agency personnel to be paid for time spent scheduling and coordinating conference events, including those providing entertainment and recreational [sic]." Advisory Opinion 2000-08. The Commission reasoned that the conference workshops and meetings were calculated to enhance the skill and professional competence of agency personnel and that this constituted an overriding public benefit sufficient to justify the use of agency personnel to schedule and coordinate both business events and those social events which were an integral part of the conference. *Id.*

Similarly, in Advisory Opinion 96-04, the Commission considered state public officials' involvement in a meeting of a bipartisan regional state conference of which West Virginia was a member. As the host state, West Virginia was responsible for local logistics regarding registration, transportation, media relations, hospitality and emergency services. The host state usually arranged three social functions: an opening reception, a family night, and a state dinner. The Commission held, in a non-precedential Opinion, that it would not be a violation of the Act to "carr[y] out the usual and customary responsibilities of a host state by tending to local logistics, registration, transportation, media relations, hospitality and emergency services."

In the instant situation, the Ethics Commission likewise finds that the Association's annual conference is calculated to enhance the skill and professional competence of state personnel. Just as the conference considered in Advisory Opinion 2000-08 provided a forum for the exchange of information among Association members and afforded them an opportunity to share common ideas, experiences and current developments, so too does the annual conference that is the subject of the instant Opinion. **The Association's annual conference thus provides an overriding public benefit which is sufficient to justify Requester and his staff planning and coordinating both the business and social events associated with the conference. Accordingly, it would not be a violation of the Ethics Act for Requester and his staff to plan and coordinate all aspects of the Association's annual conference.**

Solicitation

Requester also asks whether he and staff may solicit donations for the Association's conference. The Ethics Act, at W.Va. Code §68-2-5(c)(1), prohibits public servants from soliciting gifts unless they are intended for a "charitable purpose" from which the public servant or members of his immediate family derive no direct pecuniary benefit. "As a general guideline, the Commission recognizes two main categories of programs or activities which constitute a charitable purpose: (1) Those which benefit the poor or disadvantaged; and, (2) [t]hose which serve a public purpose or provide a significant public benefit." Advisory Opinion 2007-15; 158 CSR 7-6.1.

The Commission has addressed similar requests for Opinions regarding the solicitation of donations for annual association meetings. In Advisory Opinion 97-25, the Commission considered whether it was a violation of the Ethics Act for a public employee to solicit contributions for an association's annual conference. The conference was to inform and educate various public servants on current affairs affecting the public agencies which employ association members and to introduce speakers from surrounding states to provide insight into management techniques and hold panel discussions on the various problems facing association members. Advisory Opinion 97-25. The Commission found "that the conference would not be considered a 'charitable purpose' as that term is used in the Ethics Act." *Id.* Thus, the Commission determined that "it would be a violation of W.Va. Code§ 68-2-5(c)(1) for the requester to solicit donations to fund the association's annual conference." *Id. See also* Advisory Opinion 2000-29 ("Prior decisions of the Commission have established that conducting a conference which serves to maintain or enhance the professional competence of its members does not represent a 'charitable' purpose within the meaning of the Ethics Act.").

Two prior Advisory Opinions allowed such solicitations, but neither Opinion is persuasive here. In Advisory Opinion 96-04, the Commission authorized Legislative leadership to provide a mass mailing outlining the existence of an annual conference to traditional supporters and others who might have an interest in supporting West Virginia's turn in hosting the conference. In Advisory Opinion 2010-01, the Commission authorized a member of the Board of Public Works to solicit donations for a national conference. These two Opinions, however, deal with public officials who are expressly allowed under the Ethics Act to solicit donations for hosting regional or national conferences and functions provided that certain limitations are followed. See W.Va. Code §§ 68-2-5(c)(6) and 68-2-5(c)(7). Neither of these provisions apply to Requester, and the Legislature has not created any similar provisions that apply to other public officials.[1] Syllabus Point 3, *Manchin v. Dunfee,* 174 W.Va. 532, 327 S.E.2d 710 (1984) ("In the interpretation of

[1] While Advisory Opinion 96-04 was issued before the Legislature enacted W. Va. Code§§ 6B-2-5(c)(6) and 6B-2-5(c)(7), the Opinion is nonetheless consistent with the intent of the Legislature as later reflected in W. Va. Code§ 6B-2-5(c)(6). W. Va. Code§ 6B-2-5(c)(6) provides that "any member of the Legislature may solicit donations for a regional or national legislative organization conference ... " Advisory Opinion 96-04 was limited to only permit "written solicitations of public support by *Legislative leadership"* and further provided that it "should not be relied upon by any other public official or employee[.]" Advisory Opinion 96-04 (emphasis added).

statutory provisions the familiar maxim *expressio unius est exclusio alterius,* the express mention of one thing implies the exclusion of another, applies.").

The Ethics Commission concludes that as the Association's conference is designed to maintain or enhance the professional competence of its members, it does not represent a "charitable purpose" within the meaning of the Ethics Act. The Requester and his staff accordingly may not solicit donations to fund the Association's annual conference.[2]

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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[2] The Commission notes that its holding in regard to solicitation does not prohibit unsolicited contributions. As noted in Advisory Opinion 2012-08:

> ... the Commission's holding applies to solicitation by the Requester, and does not prevent ... accepting an **unsolicited** gift. As the Commission held in A.O. 90-176, government agencies may accept gifts **as an entity** if the acceptance of such gifts inures to the benefit of the public generally or is in furtherance of the operation of the *office. See also* A.O. 92-06. The key is that the gift is given to, and utilized by, the government agency, and is not for the personal, private gain of a particular public servant.

Advisory Opinion 2012-08 (citing W.Va. Code§ 6B-2-5(c)(1)) (emphasis *in original).*