ADVISORY OPINION NO. 2014-07

Issued On March 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **Municipality** asks whether Members of its governing body may go door-to-door to solicit donations of cash used to purchase food for bereaved citizens.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a Municipality. Prior to taking public office, a Member of its governing body formed an informal group with friends and neighbors to go door-to-door to solicit donations to purchase food for bereaved families. Now that the Requester has taken Public office, she asks whether she and the other Members of the governing body may continue to solicit these donations. The Requester states that the balance of the funds would be given to the families, not kept by the Municipality.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

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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Generally, the Ethics Act prohibits public servants from soliciting for donations to their agency. There are two exceptions. First, where the public agency's enabling legislation authorizes it or where there is express statutory authority for a public entity to solicit private funds, it may do so. Second, if the Commission finds that the solicitation is for a "charitable purpose" under the Ethics Act.

As for the first exception, in Advisory Opinion 2012-49, the Commission found that the County Farmland Protection Board and the West Virginia Agricultural Land Protection Authority may solicit for their respective entities, based on their enabling legislation. Conversely, in 2014-03, the Commission held that County Hospitals lack statutory authority to solicit funds even to meet their mission goals. (The County Hospital was permitted to solicit funds, however, under the "charitable purpose" exception, discussed below.) Here,

as well, the enabling legislation for Municipalities does not authorize them to solicit funds to give to bereaved citizens. *See* W.Va. Code§ 8-12-1.

W. Va. Code§ 6B-2-5(c) provides the second exception to the prohibition against soliciting: the "charitable purpose" exception. The Ethics Commission, stated, in Advisory Opinion 2013-46, as follows:

> 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) Those which serve a public purpose or provide a significant public benefit.

In Advisory Opinion 2014-02, for example, the Commission stated, as follows:

> [F]unding County Hospital projects which support the mission of a County Hospital to enable physicians to offer their best medical care to patients who Are unable to pay for medical services is indeed a charitable purpose Therefore, it would not violate the Ethics Act for a County Hospital to solicit donations of cash or products from community businesses, individuals, and other organizations for hospital projects to further this and similar missions which serve to protect the health and safety of West Virginia citizens.

Further, in Advisory Opinion 2013-40, the Ethics Commission held that educating the children of West Virginia is indeed a significant public benefit. Likewise, in Advisory Opinions 2005-02, 2010-17 (non-precedential) and 2011-11, the Ethics Commission found that the overriding purposes of the solicitations were indeed to provide a benefit to the public. These purposes include: a public health program administered by a county board of health; public broadcasting throughout the state by an agency tasked with administering on-air broadcasting to offset its own operating costs; and, a recreational department for the homeless by an agency tasked with housing veterans.

In Advisory Opinion 2005-02, the Commission held that health programs of a county health department qualify as charitable purposes under the Ethics Act. The Commission stated, as follows:

> In past opinions, the Commission has held that the following programs or activities fall within these exceptions: A conference on Adult and Elder Abuse and Neglect (Committee of State and County Public Servants - A.O. 94-14); An information booth promoting environmental protection and conservation (A.O. 95-29); Programs to benefit disadvantaged youth (City Recreational Department - A.O. 93-08); Scholarships for the poor or disadvantaged (Association of public servants - A.O. 96-36); A bicycle safety program (City Chief of Police -A.O. 97-19); and, A program aimed at providing health care services to financially disadvantaged children (State Health Care Agency A.O. 99-37).

The reasons for the prohibition against soliciting were explained by the Ethics Commission

in Advisory Opinion 2013-46, as follows:

> The Ethics Act restricts public servants from soliciting funds for non-charitable purposes. One underlying purpose of this provision is to ensure that public servants do not solicit for their own benefit or that of another. Another underlying purpose is that public agencies should not solicit donations to cover their operational costs or to underwrite traditional governmental functions. An equally compelling concern is that potential donors should not feel compelled to donate or face unfavorable treatment, or be led to believe that by donating, they will receive preferential treatment by a government agency.

The Commission has found impermissible solicitations. In Advisory Opinion 2013-46, for example, the Commission held, as follows:

> [R]ecognizing volunteers in an effort to promote volunteerism, while laudable, does not provide an overriding public purpose sufficient to overcome the prohibition against soliciting the public. While volunteers provide valuable services to West Virginia communities, actively soliciting donations from local businesses to recognize them would violate W. Va. Code§ 6B-2-5(c).

Likewise, solicitations for the purchase of a police canine and shotgun/rifle racks are not permissible under the Ethics Act as they do not constitute charitable gifts. *See* Advisory Opinion 2012-08.

Here, the Commission holds that soliciting funds to purchase food for bereaved citizens does not rise to the level of significant public benefit sufficient to overcome the prohibition against the solicitation of funds from constituents. Like promoting volunteerism, helping local grieving families is indeed laudable. The Ethics Commission must carefully balance the public benefit and the purposes of the prohibitions of the Act, however, to ensure that the exceptions to the prohibition do not swallow the protections of the rule. To be clear, there is nothing to suggest that the Requester's motives are anything but honorable and charitable. Nonetheless, the Ethics Commission is charged with protecting the public from the potential of feeling compelled to make donations for a cause simply because the Requester is a public official.

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-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies as hereinabove set forth unless and until it is amended or revoked, or the law is changed.

/s/ Father Douglas Sutton
Father Douglas Sutton, Acting Chairperson