ADVISORY OPINION NO. 2014-15

Issued On April 3, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** charged with providing health care benefits to public employees asks if it may sell advertising to help defray the costs of wellness tools on its website to assist public employees improve their health.

FACTS RELIED UPON BY THE COMMISSION

The Requester was established to provide hospital, surgical, group major medical, prescription drug, group life, and accidental death and dismemberment insurance coverage to eligible employees. Benefits are made available to all active employees of the State of West Virginia and various related State agencies and local governments.

The Requester is contemplating purchasing several wellness tools to assist public employees assess, tack, and improve their health status. The tools, for example, would help employees locate quality doctors and research various costs of procedures by location. Another wellness tool would be a portal with various videos, training material, food and fitness trackers.

These tools are very expensive to maintain, but the Requester anticipates an interest in advertising by private businesses such as sporting goods stores, exercise facilities, and existing vendors. The Requester seeks to sell advertisement banners and/or sidebars on its website to help defray the cost of new online tools.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W. Va. Code § 6B-2-5(b) provides:

> (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.... The performance of usual and customary duties associated with the office ... or the advancement of public policy goals or constituent services ... 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....

ADVISORY OPINION

The Ethics Act prohibits public servants from soliciting for donations to their agency. The Ethics Commission has clearly stated, however, that selling advertisements is not soliciting for donations. In Advisory Opinion 2004-24, for example, the Commission considered whether a state agency may sell advertising to defray the cost of publishing a quarterly newsletter it sends to vendors and regulated employers. The Commission stated that it:

> ... previously recognized in Advisory Opinions 2000-06 and 95-18 that a sales solicitation offering something of value is not a solicitation of a gift. In A.O. 95-18, the Commission determined that State agency personnel could solicit interested persons to purchase advertising space or exhibit space at a conference.

In Advisory Opinion 95-18, the Commission stated:

> The agency proposes to defray some of the costs of the conference by selling advertising space in the conference bulletin or program and charging exhibitors for exhibition space used at the meeting site. This will involve agency personnel soliciting advertising sales from agency vendors and persons or businesses engaged in activities regulated by the agency.
>
> 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. A commercially defensible sale of advertising or exhibit space with real commercial value does not constitute prohibited gift solicitation.[1]

Here, the Requester's proposed solicitation of advertisements to promote wellness falls within the Ethics Act's definition of "usual and customary duties ... [and) the advancement of public policy goals or constituent services...." Therefore, the Requester is permitted to sell advertising to help defray the costs of wellness tools on its website to assist public employees improve their health.

The analysis does not end here. Next, the Ethics Act prohibits public officials from endorsing products generally.[2] In Advisory Opinion 98-22, the Commission held that it

---

[1] These rulings are consistent with the rule on fund-raising found in W. Va. C.S.R. § 158-7-6.8 which states that "[f]und-raising activities based on an exchange of value are not gift solicitations and are rermissible.

There is a limited exception to the rule against endorsements which states that a commercial

would not violate the Ethics Act for a state agency to be referenced in a private industry brochure. This brochure did not contain a product endorsement from the state agency. The Ethics Commission determined that no provision in the Ethics Act prohibits a public official from permitting a private company to reference its work with a state agency in a brochure "which does not contain a product endorsement from the agency or the public official". Further, in Advisory Opinion 2012-31, the Ethics Commission concluded that the Ethics Act permits a public servant or entity to be listed on a vendor's promotional materials solely as a previous customer. Any language that tends to refer to the public servant or entity as a "satisfied customer" or otherwise serve to promote or endorse the vendor is expressly prohibited.

In Advisory Opinion 2009-12, the Ethics Commission approved payroll deductions for the purpose of allowing State employees to purchase various consumer products through a company. The Commission stated:

> The Requester states that his office will add a disclaimer that his office does not endorse or warrant any particular product offered by the company. As such, by permitting this payroll deduction, and allowing equal access to businesses which seek to implement similar programs, the Requester does not violate any provisions in the Ethics Act which prohibit the endorsement of a particular product.[3]

Accordingly, here, the Commission holds that selling advertising to help defray the costs of wellness tools would not be an improper endorsement under the Ethics Act. The Commission further holds that the website must include a disclaimer making clear that the appearance of advertising should not be construed as an endorsement of any particular vendor or product. Further, the Requester must allow equal access for advertising on its website to all businesses or class of businesses related to health and wellness.

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/ R. Kemp Morton, Chairman
Kemp Morton, Chairman

endorsement is only permissible when there is an overriding public benefit. That exception is not relevant here as the Requester does not seek to endorse the products. If he did, further analysis would be required. The Commission notes, however, that it has historically upheld the expenditure of public funds to promote wellness to provide agency-wide opportunities or incentives to promote wellness among employees. See *e.g.* Advisory Opinion 2011-13 and opinions cited therein.

[3] In Advisory Opinion 2004-24, the Commission stated that "the Agency should consider including a disclaimer in its newsletter which states that the appearance of advertising in the publication should not be construed as an endorsement of any particular vendor or product."