ADVISORY OPINION NO. 2014-16

Issued On May 1, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **City Hospital** asks whether employees may engage in fundraising for various purposes, whether selling commercial products in the workplace is permissible, and what, if any, limitations apply.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that some employees experience financial hardship such as unforeseen medical, burial, or other expenses which at times move co-workers to pull their resources together to help. Further, the Requester is contemplating the establishment of a hospital "Employee Hardship Fund".

As in many workplaces, some hospital employees are sales consultants for private catalog companies, such as Avon. Further, some employees' children participate in fundraising sales for school activities and extracurricular activities, such as Girl Scouts.

The Requester asks three questions with multiple sub-parts. The unabridged questions appear below in the Advisory Opinion portion.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) prohibits the use of public 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....

W. Va. Code§ 6B-2-5(0) reads, in relevant part:

> Except as provided in this section, a person who is a public official or public employee may not solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control. A person who is a public official or public employee

may solicit private business from a subordinate public official or public employee whom he or she has the authority to direct, supervise or control when:

> (A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or
>
> (B) The solicitation is limited to the posting of a notice in a communal work area; or
>
> (C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling; or
>
> (D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative....

The Commission's Legislative Rule governing solicitation of charitable gifts, 158 W. Va. C.S.R. § 7.6, states, in relevant part:

> 6.1. Public officials and public employees may solicit gifts for a charitable purpose when there is no resulting direct pecuniary benefit to the public official or public employee or an immediate family member.
>
> 6.2. The Ethics Commission may recognize programs or activities as involving a charitable purpose on a case-by-case basis.
>
> * * *
>
> 6.5. A reasonable amount of public resources may be used for a charitable solicitation or fund-raising drive that is conducted in furtherance of the West Virginia State Employees' Coordinated Campaign or a fund raising campaign officially approved by either the executive, legislative or judicial branch of State Government or the governing body of any political subdivision.
>
> * * *
>
> 6.7. 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....
>
> 6.8. Fundraising activities based on an exchange of value are not gift solicitations and are permissible.

158 W. Va. C.S.R. § 4.1 states:

> For purposes of the Ethics Act, W.Va. Code§ 6B-2-5(c)(2)(C), a nominal gift is any gift with a monetary value of twenty-five dollars ($25.00) or less. Some examples of nominal gifts include a T-shirt, hat, key chain, pen, pencil or any memento of that caliber. A public official or employee may accept from an interested party a nominal gift or gifts not exceeding twenty five ($25.00); Provided, That, the total dollar value of any nominal gift or gifts accepted from any one source may not exceed twenty-five ($25.00) in one calendar year.

ADVISORY OPINION

Generally, the Ethics Act prohibits public servants from soliciting gifts. The reasoning for the rule is to prevent coercion in the workplace and the use of public resources for private gain. There are two exceptions. The first is where the agency's enabling legislation expressly authorizes the solicitation. Advisory Opinions 2012-49 and 2013-40. Here, however, the first exception does not apply because the State Municipal Code, West Virginia Code§ 8-1-1, *et seq.,* does not specifically authorize fundraising for any of the activities in the three questions herein presented.

The second is the "charitable purpose" exception. The Ethics Commission explained, in Advisory Opinion 2013-46, based upon earlier Advisory Opinions, 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.

The Commission, in applying this standard, has found some solicitations to be impermissible. 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. Advisory Opinion 2012-08.

Conversely, in Advisory Opinion 2013-40, the Ethics Commission held that educating the children of West Virginia provides a significant public benefit and qualifies for the charitable purpose exception. Likewise, in Advisory Opinion 2005-02 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 and a recreational department for the homeless by an agency tasked with housing veterans.

In Advisory Opinions 2005-02, 1995-43 and 1999-37, the Commission authorized an agency to solicit for agency programs aimed at providing health care services to financially disadvantaged children. The Commission made clear that "the overriding purpose of the solicitation must be to provide a benefit to the public as opposed to defraying the internal administrative costs of the Board of Health." Advisory Opinion 1995-43.

In Advisory Opinion 2014-03, the Commission held:

> [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.

Last in Advisory Opinion 2014-07, the Commission held:

> [S]oliciting 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.

Having set forth the standards, the Commission now turns to the specific questions presented.

Question 1. What limits are placed on fundraising events for employees experiencing a financial hardship; whether due to unforeseen medical, burial, or other expenses which at times move co-workers to collectively pull their resources together to help (i.e. "pass the hat", or have a bake-sale)? These fundraising efforts could be advertised through a company-wide email or flyers placed throughout the facility.

In light of the foregoing precedential Advisory Opinions, the Commission hereby finds that raising funds for employees experiencing financial hardship serves a "charitable purpose" within the meaning of the Ethics Act. Advisory Opinion 2013-46, *infra,* is most notable because it includes "those which benefit the poor or disadvantaged" as a charitable purpose under the Ethics Act.[1]

Next, the Commission will consider what limitations, if any, apply to employees' solicitation of donations for co-workers under financial hardship. First, a public servant may never solicit a contribution from which he or she may personally benefit; a public servant may never coerce a contribution from anyone. Additionally, public servants may not solicit subordinate employees for a contribution towards to helping employees in financial hardship.[2] A reasonable amount of public resources may be used for a charitable solicitation.

The Commission adds that any posted notice must be in an area **not** accessible to the general public but in spaces generally reserved for employees, such as an office or the lunch room. The notice and solicitation must not be made to the public at large from the workplace.[3]

Finally, while it is permissible for co-workers to take up a voluntary donation among them, the donations may not be deposited in any hospital account, as will be fully

---

[1] The distinction here from Advisory Opinion 2014-07 wherein the Commission held that a bereavement fund was not a charitable purpose, is two-fold. First, bereaving citizens, *i.e.,* those grieving the loss of a loved one, may not necessarily be suffering a financial hardship. Second, the city council members proposed soliciting from its citizens over whom it has regulatory control, not from co-workers.

[2] The recipient employee is cautioned not to accept a gift from a subordinate valued at over $25.00. 158 W. Va. C.S.R. § 4.1.

[3] A bake sale is not a gift solicitation. This is fully discussed in answering Question 3 and the same limitations applicable to selling Girl Scout cookies and Boy Scout popcorn apply to bake sales. See 158 W. Va. C.S.R. § 7.6.8. ("Fundraising activities based on an exchange of value are not gift solicitations and are permissible.")

explained in response to Question 2, next. Advisory Opinion 2013-40.

Question 2. What is the opinion of the Commission about an "employee hardship fund" which serves to provide financial assistance to employees who request it? Advertising is accomplished as described above. Additionally, the program is explained during orientation and paperwork is provided for those who have an interest in making a recurring contribution through payroll deduction. The program is voluntary and is available to the employees to request support regardless of whether they contribute or not. Examples of financial support might include giving to an employee because utilities are threatened to be shut off for non-payment; an employee's family member is ill and the travel expenses to and from the hospital has become a burden.

The Commission finds that the "Employee Hardship Fund" contemplated by the hospital is **not** permissible under the Ethics Act. A public agency may only spend funds, from whatever source, for an authorized purpose. "Regardless of the source of funds, all funds in the possession of a government entity are part of the "public coffers". Without exception, money in the public coffers may only be expended by a government entity for an authorized purpose." Advisory Opinion 2012-50. Once an agency receives funds, even if they are donations intended to help employees under a financial hardship, a public agency may only give the funds to an affected employee if the purpose is authorized. "In determining whether an expenditure of public funds violates the Ethics Act, the Commission relies upon the common law, West Virginia Code, Legislative Rules, Attorney General Opinions and opinion letters issued by the Auditor's Office to determine whether there is express or implied authority for the expenditure." Advisory Opinion 2012-50.

For example, the Commission was asked whether an agency could use public funds to purchase funeral flowers and held, in Advisory Opinion 2010-19, that:

> [t]he Commission is unable to find express or implied authority to use public funds for this purpose. The Commission hereby finds that, in the absence of statutory authority by the Legislature or other government agency authorized to opine on whether such expenditure is authorized, the purchase of funeral flowers or other expressions of sympathy, including monetary donations, constitutes an impermissible use of public office for private gain.

Likewise here, spending public funds designated for employee hardship is not authorized. The Commission is unaware of any authority to use public funds for this purpose. State Municipal Code, West Virginia Code§ 8-1-1, *et seq.,* does not specifically or implicitly authorize giving funds to employees under financial hardship. Therefore, any funds solicited by employees for the purpose of helping other employees in financial hardship may **not** be collected by the hospital or distributed through a hospital "Employee Hardship Fund".

Question 3.

Are employees who are individual "sales consultants" for catalog-style companies (Avon, Pampered Chef) permitted to solicit their co-workers for orders; what if the employees' co-workers are aware that he/she is a sales consultant and seeks him/her out to place orders?

The general prohibition against soliciting a gift does not apply to selling a commercial product because selling a product involves an exchange of value. In Advisory Opinion 2014-15, the Commission held that it is permissible for a public agency to sell advertising because the advertiser receives commercial value therefrom. Here, however, it is an individual employee, not the public entity, engaging in selling products for personal benefit.

Although permissible, limitations apply. A public servant may never coerce a co-worker to purchase goods or services. Additionally, the Ethics Act prohibits public servants from using more than *de minimis* amount of public time and resources to conduct non-agency related activities.

Moreover, W. Va. Code§ 6B-2-5(0) must be strictly followed when soliciting **private** business from a **subordinate.**

> A person who is a public official or public employee may solicit **private business from a subordinate** public official or public employee whom he or she has the authority to direct, supervise or control when:
> (A) The solicitation is a general solicitation directed to the public at large through the mailing or other means of distribution of a letter, pamphlet, handbill, circular or other written or printed media; or
> (B) The solicitation is limited to the posting of a notice in a communal work area; or
> (C) The solicitation is for the sale of property of a kind that the person is not regularly engaged in selling; or
> (D) The solicitation is made at the location of a private business owned or operated by the person to which the subordinate public official or public employee has come on his or her own initiative....

The solicitation for selling commercial products, such as Avon products, to subordinates must be limited to the posting of a notice in a communal work area. The Commission adds that the notice must be in an area not accessible to the general public but rather space generally reserved for employees, such as an office or the lunch room. The notice and solicitation must not be made from the workplace to the public at large. For instance, an employee may not leave an Avon catalog in the general waiting area. This would be a prohibited use of public office for private gain.

This opinion should not be construed as a requirement that all public entities allow their

employees to engage in private business at the workplace. Instead, it is intended to be a general guideline interpreting and applying the Ethics Act. Public employers, including county and municipal entities, are free to adopt more restrictive guidelines.

What about employees who sell items for their children's school's fund-raising program or extracurricular program (Girl Scout Cookies, Boy Scout Popcorn, or field trip fundraisers). Are there limitations placed on these types of programs outside of the facility based on the employees "public employee" status?

Finally, the Ethics Commission considers a third category of solicitation - selling fundraising products in the workplace, such as Girl Scout cookies and Boy Scout popcorn. The Commission holds that public employees may fundraise in the workplace by selling products such as Girl Scout cookies and Boy Scout popcorn because the general prohibition against soliciting gifts does not apply to **selling a product** for **fundraising.** See 158 W. Va. C.S.R. § 7.6.8. ("Fundraising activities based on an exchange of value are not gift solicitations and are permissible."); nor does W. Va. Code § 6B-2-5(o) apply because it is not soliciting commercial business from a subordinate to benefit an employee. Therefore, the Ethics Act and its Rules do not prohibit selling fundraising products in the workplace, even to subordinates.

Although permissible, limitations apply. A public servant may never coerce a co-worker to purchase anything. Additionally, the Ethics Act prohibits public servants from using more than de minimis amount of public time and resources to conduct non-agency related activities.

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