ADVISORY OPINION NO. 2014-20

Issued on August 7, 2014, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Legislator** asks a series of questions about mailing letters to constituents.

FACTS RELIED UPON BY THE COMMISSION

The Requester states that he intends to send unsolicited letters about his service in the most recent legislative session to certain constituents of his district. The letters would be printed on official West Virginia Legislature letterhead, paid for from the Legislature's budget for constituent services, and stuffed and mailed by State employees. He intends to send the letters to between 2,000 and 10,000 constituents.

The Requester asks, then, if it is permissible to print his letters on special stationery and include his photograph, which would incur an undefined additional cost. The Requester also asks whether a political party may provide him with a list of voters who have participated in at least 75% of recent primary or general elections. Finally, he asks if it is permissible to mail those letters primarily to those citizens who have been identified as registered members of a particular political party.

CODE SECTION RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5(b) states:

> 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. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. 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.

ANALYSIS

In order to answer the Requester's questions, the Commission must determine what restrictions, if any, the Ethics Act places on the letters. As an initial matter, the sending of letters pertaining to official legislative business with taxpayer funds, also known as "franking," is a usual and customary practice of legislatures at both the state and federal

levels. It is generally considered a "constituent service," and is not a *per* se prohibited use of "prestige of office for private gain" under W. Va. Code§ 6B-2-5(b).

The Requester asks three questions. First, he asks whether adding a personal photograph, on special stationery, to constituent letters would violate the Ethics Act. For an action to violate W. Va. Code§ 6B-2-5(b), that action must actually generate, or be intended to generate, private gain for the public official or for another person. We find that the proposed action of adding a photograph does not meet that standard.

Letters from a legislator almost uniformly already include the legislator's name, address, phone number, e-mail address and other identifying descriptors. Despite this, the letter remains neutral in content. It is not transformed into a political advertisement by the addition of a photograph. Therefore, the addition of a photograph on special stationery does not rise to the level of a W. Va. Code § 6B-2-5(b) violation under the Act.

Next, the Requester asks whether he may create a list of constituents to whom he mails the unsolicited letters from a list compiled by a political party. The use of a partisan list to construct a mailing database does not generate or constitute private gain to either the legislator constructing the list or to the political party whose list is being used. Accordingly, nothing in the Ethics Act prohibits a legislator from using a mailing list compiled by a political party.

Finally, the Requester asks whether it is permissible to send his letters primarily to voters who have been identified as registered members of a particular political party. He states that since his proposed letters to constituents will focus on many of the issues that he championed during the most recent legislative session, he plans to target like-minded recipients, *i.e.,* those voters who have been identified as registered members of the political party to which the Requester belongs. Again, nothing in the Ethics Act *per* se regulates a legislator's choice of letter recipients.

While the Ethics Act permits the Requester to send informative letters to whomever he chooses, even if he limits his mailings to a political party or regular voters, the Requester may not use the legislative mailing system to send constituents campaign advertising or communications. Such an action would constitute the impermissible use of office for private gain in violation of W. Va. Code § 6B-2-5(b).

The Ethics Act does not define "campaign advertising or communications." However, the West Virginia Code does. For example, W. Va. Code§ 3-1B-2(a), "Fair Campaign Practices," defines "[c]ampaign advertising or communication" as "a communication authorized by a candidate or a candidate's committee for the purpose of advocating the nomination, election or defeat of a candidate."

W. Va. Code§ 3-8-1a(13), dealing with regulation of election communications, defines "[e]xpressly advocating" as any communication that:

(A) Uses phrases such as "vote for the Governor", "re-elect your Senator", "support the Democratic nominee for Supreme Court", "cast your ballot for the Republican challenger for House of Delegates", "Smith for House", "Bob Smith in '04", "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory", "defeat" accompanied by a picture of one or more candidates, "reject the incumbent";

(B) Communications of campaign slogans or individual words, that can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, advertisements, etc., which say "Smith's the One", "Jones '06", "Baker", etc; or

(C) Is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Further, W. Va. Code§ 3-8-1a(13)(C) tracks the United States Supreme Court's language from *FEC v. Wis. Right to Life, Inc.,* 551 U.S. 449, 469-470 (2007), which explains, "a court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Accordingly, this Commission adopts the above definition and holds that legislators may not use the franking privilege to send material that "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The Requester's final question is whether his intended actions, taken in the aggregate, would cause the production and mailing of the letters to be considered "the use of prestige of office for private gain." "Franking" is generally considered under W. Va. Code § 6B-2-5(b) to be "[a] usual and customary dut[y] associated with the office or position or the advancement of public policy goals or constituent services," and therefore does not constitute the use of public office for private gain.

However, the totality of the circumstances involving a particular letter may transform otherwise informative mailings into *de facto* political advertisements that violate the Ethics Act's prohibition on private gain. Here, the Requester wants to add a photograph to his letter, and then mail the letters only to those who have been identified as both registered members of a political party and frequent voters. The Requester does not state when these letters are to be sent, but considering the proximity of the request to the November elections, the intent of the Requester's action is clear.

Accordingly, the Ethics Commission holds the following:

If a Legislator sends mail using the franking privilege, during any election season when that Legislator's seat is being contested, to recipients selected due to their voting frequency, that action cannot realistically be construed as anything other than an

attempt to influence voters in order to win an election. (W. Va. Code§ 6B-2-3(a) forbids this Commission from accepting or initiating a complaint during the sixty days before a primary or general election. "Election season," for purposes of this opinion, is the sixty days immediately preceding the date of any election [primary, general, or special].)

Therefore, the Requester's stated actions, if taken during the sixty days immediately before a primary or general election, would constitute a violation of the Ethics Act. The act of adding a photograph, regardless of the circumstances surrounding its addition, does not violate the Ethics Act.

In establishing the Ethics Act, the Legislature sought to create a code of ethics that would guide public officials and employees "in the exercise of their official duties and employment," and to "define and establish **minimum** ethical standards for elected and appointed public officials and public employees." W. Va. Code§ 6B-1-2(b) [emphasis added]. While the Ethics Act sets minimum standards, agencies, including the Legislature, are both permitted and encouraged to set higher, and more specific, internal standards.

The federal franking privilege, for example, is regulated internally by committees within the United States House and Senate. Those committees have detailed rules governing, among other things, picture size, appropriate methods of creating mailing lists, and similar regulation of minutiae. Notably, the federal franking rules, at 39 U.S.C. Section 3210 (a)(6)(A), prohibit members from sending mass mailings "during the 90 days immediately preceding the date of any election (primary, general, special, or run off) in which the Member's name will appear on the ballot as a candidate for election or re-election to any public office."

In contrast, according to legislative staff, neither the West Virginia House, nor the Senate, has any written internal rules governing the subject. The House Orientation Manual merely suggests that members "show restraint in mailing." Accordingly, we believe it would be more appropriate for the House and Senate to revisit their practices to provide guidance on the franking privilege.

Finally, the Commission cautions the Requester to be mindful of all statutes, rules, and regulations regarding political activities by public servants.

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 public servants and other persons unless and until it is amended or revoked, or the law is changed. Advisory opinions are prospective only, and do not apply to past actions of the Requester or other similarly-situated public officials.

/s/ R. Kemp Morton, Chairman
Kemp Morton, Chairman