ADVISORY OPINION NO. 2014-01

Issued on February 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Economic Development Authority** asks if it may solicit and spend funds to underwrite its "County Day at the Legislature".

FACTS RELIED UPON BY THE COMMISSION

The Requester is a County Economic Development Authority (EDA). Established pursuant to W. Va. Code§ 7-12-7, it has broad powers and duties and responsibilities regarding economic development. For example, the purposes section reads, in relevant part, as follows:

> The purposes for which the authority is created are to promote, develop and advance the business prosperity and.economic welfare of the municipality or county for which it is created, its citizens and its industrial complex; to encourage and assist through loans, investments or other business transactions in the locating of new business and industry within the municipality or county and to rehabilitate and assist existing businesses and industries therein; to stimulate and promote the expansion of all kinds of business and industrial activity which will tend to advance business and industrial development and maintain the economic stability of the municipality or county, provide maximum opportunities for employment, encourage thrift, and improve the standard of living of the citizens of the county; to cooperate and act in conjunction with other organizations, federal, state or local, in the promotion and advancement of industrial, commercial, agricultural, and recreational developments within the municipality or county; and to furnish money and credit, land and industrial sites, technical assistance and such other aid as may be deemed requisite to approved and deserving applicants for the promotion, development and conduct of all kinds of business activity within the municipality or county.

W. Va. Code§ 7-12-2.

For a number of years, various counties have participated in "Day at the Legislature", where they have the opportunity to showcase their counties, observe the Legislature in action, meet with public officials, and seek favorable legislation for their constituents.

Often a county will coordinate such an event, widely invite participation, and provide food and transportation for interested citizens.

The Requester states that the County EDA intends to take part in its County Day at the Legislature, and, as in years past, provide lunch and bus transportation. Billed as an educational (and fun) event, the day ends with a reception at the Culture Center which the governor and Members of the Legislature are invited to attend.

The Requester seeks to solicit funds from local businesses, the county commission and county agencies. In addition to paying for lunch, transportation, and costs associated with the reception (including rental fees), a portion of the funds will be spent on advertising, printing, and office supplies.

CODE PROVISIONS AND LEGISLATIVE RULE RELIED UPON BY THE COMMISSION

W. Va. Code§ 6B-2-5 (c) reads:

> (1) 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. No official or employee may knowingly accept any gift, directly or indirectly, from a lobbyist or from any person whom the official or employee knows or has reason to know:
>
> (A) Is doing or seeking to do business of any kind with his or her agency;
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> (B) Is engaged in activities which are regulated or controlled by his or her agency; or
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> (C) Has financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of his or her official duties.

Title 158, Series 7, Section 7. Manner of Solicitation and Use of Funds reads:

> 7.1. Public officials, public employees and agencies who regulate individuals or businesses may not orally solicit donations from:

a. Persons under the regulatory control of the agency. A person is under the regulatory control of the public official, employee or agency if the person has a matter pending before the agency or had a matter pending within the past 12 months. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons;

b. A vendor which has a contract with the agency, is bidding on a contract or is in the process of soliciting business from the agency.

7.2. A written solicitation to the public or business community at large, even if the targeted group may encompass regulated persons or vendors, is permissible; Provided, That the written solicitation may not be directed solely to persons under the regulatory authority of, or vendors, of the public official, employee or agency. This subsection does not apply to purely law enforcement agencies, officials or employees who do not actually regulate or exercise regulatory control over other persons but merely enforce existing laws and rules as to all applicable persons.

7.3. Solicitations should be conducted, and acknowledgments made, in a fair and evenhanded manner. Each solicitation should contain a statement setting forth that donations are purely voluntary.

7.4. Under no circumstances should anyone soliciting a contribution for a charitable purpose state that contributors will receive some special treatment from a government agency or its employees, or any other sort of quid pro quo as a consequence of making a donation.

W. Va. Code§ 7-12-7 reads, in relevant part:

(a) The development authority is hereby given power and authority as follows: (1) To make and adopt all necessary bylaws and rules for its organization and operations not inconsistent with laws; ... (3) to enter into contracts with any person, agency, governmental department, firm or corporation, including both public and private corporations, and generally to do any and all things necessary or convenient for the purpose of promoting, developing and advancing the business prosperity and economic welfare of the county in which it is intended to operate, its citizens and industrial complex, including, without limiting any of the foregoing, the construction of any building or structure for lease to the federal government or any of its agencies or departments, and in connection therewith to prepare and submit bids and negotiate with the federal government or such agencies or departments in accordance with plans and specifications and in the manner and on the terms and conditions and subject to any requirements,

> regulations, rules and laws of the United States of America for the construction of said buildings or structures and the leasing thereof to the federal government or such agencies or departments; ... (7) to apply for, receive and use grants-in-aid, donations and contributions from any source or sources and to accept and use bequests, devises, gifts and donations from any person, firm or corporation; ... and (12) to expend its funds in the execution of the powers and authority herein given, which expenditures, by the means authorized herein, are hereby determined and declared as a matter of legislative finding to be for a public purpose and use, in the public interest, and for the general welfare of the people of West Virginia, to alleviate and prevent economic deterioration and to relieve the existing critical condition of unemployment existing within the state.

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The Ethics Act restricts public servants from soliciting funds for non-charitable purposes. One underlying purpose of this prohibition is to ensure that public servants do not solicit for their own benefit or that of another. Another rationale 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 Ethics Act generally prohibits a public official or public employee from soliciting any donation 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. W. Va. Code§ 6B-2-5(c). Although the statute does not define "charitable purpose", the Commission's legislative rules provide that the Commission will make such a determination on a case-by-case basis. 158 W. Va. C.S.R 7 § 6.2. In Advisory Opinion 2005-02, the Commission recognized 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.

Additionally, previous precedential advisory opinions have acknowledged the permissibility of otherwise prohibited solicitations when there is express statutory authority for a public entity to solicit private funds, citing W. Va. Code§ 18B-2A-4(m); W. Va. Code§ 49-9-17(b); and W. Va. Code§ 5-1E-3(6). *See* Advisory Opinion 2011-11 wherein the Commission found it was permissible for a public agency that provides housing for veterans to solicit, since its enabling legislation authorizes it. *See also* Advisory Opinion 2012-49 wherein the Commission recognized the ability of County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority to engage in fundraising, based on ample statutory authority therefor.

Here, the Requester's enabling legislation expressly states that the EDA's expenditures "are hereby determined and declared as a matter of legislative finding to be for a public purpose and use, in the public interest, and for the general welfare of the people of West Virginia". W. Va. Code§ 7-12-7(a)(12). Additionally, the EDA is statutorily authorized to: "apply for, receive and use grants-in-aid, donations and contributions from any source or sources and to accept and use bequests, devises, gifts and donations from any person, firm or corporation...." W. Va. Code§ 7-12-7(a)(7).

As a result of the foregoing, the Commission hereby finds that the EDA may solicit donations to underwrite its "County Day at the Legislature".

Next, the Commission must address the manner of solicitation. The Commission's Legislative Rule prohibits oral solicitations of "persons under the regulatory control of the agency" and a vendor which has a contract with or is seeking to contract with the agency. Title 158, Series 7, Section 7.1.(a) and (b). Although the EDA does not regulate businesses, it is authorized to enter into contracts. W. Va. Code§ 7-12-7(a)(3).

The Requester may not orally solicit donations from a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester. The term "vendor" shall include appraisers, attorneys and consultants who provide compensated services, even in the absence of a written contract.

The Requester may send a written solicitation to the public or business community at large, even if the targeted group may encompass a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester. The Requester may not direct such written solicitation solely to a vendor with which it has a contract, which is bidding on a contract, or is in the process of soliciting business from the Requester.

In soliciting businesses or companies, the Requester shall not endorse a particular product, company or business. This action would constitute the prohibited use of office for private gain. Should the Requester seek to solicit donations from a vendor or potential vendor, it must conform its solicitation to the conditions set forth in the Legislative Rule. *See* 158 W. Va. C.S.R. § 7.7.

Finally, the Commission must determine whether the EDA may spend the donated funds on box lunches, transportation expenses, costs to host the reception, advertising, printing and office supplies. The Commission reminds the EDA that once it receives donations, that money becomes public funds. As the Commission held in Advisory Opinion 2012-50, the limitations on the use of public funds apply regardless of whether the funds are from general revenue or special revenue (e.g. Sheriff's Concealed Weapons Account, or fee generating government activities). The Commission further held that all funds in the possession of a government entity, regardless of the source, are part of the public

coffers and may only be expended for an authorized purpose.

As previously stated, the EDA's enabling legislation contains a provision stating that the EDA's expenditures serve a public purpose. *See* W. Va. Code§ 7-12-7(a)(12). Nevertheless, those expenditures are still subject to the Ethics Act's restrictions, and may not be for private gain. *See* W. Va. Code 68-2-5(b).

The proposed expenditures for transportation, advertising, printing, and office supplies are reasonably related to the purpose of advancing the county's interest in obtaining favorable legislation and showcasing the county. It is the expenses associated with meals that give pause. The Ethics Commission has issued many opinions regarding the expenditure of public funds for meals, but most have been in the context of meals for employees or officials during the performance of official duties. *See generally* Advisory Opinions 2000-15, 2001-01, 2001-04, 2001-18, 2012-27.

The proposed expenditure here, however, is more like the situation described in Advisory Opinion 2013-38. There a County Council proposed to dedicate a new public safety building and then invite dignitaries to a private catered meal thereafter. The Ethics Commission prohibited the proposed expenditure, but authorized the entity to spend a reasonable amount of money to provide light refreshments at the dedication ceremony to which the public was invited.

Here, the boxed lunches will be provided to all who heed the invitation to join in the celebration and promotion of the county. It is not a private event limited solely to dignitaries. Similarly, the evening reception-with food and beverages-is open to the public as well as public officials. As a result, these expenditures are also permissible. The agency may not, however, serve lavish meals; instead, it must exercise fiscal responsibility in expending public funds on meals for this event. *See* Advisory Opinion 2012-27. Likewise, the Requester should check with the Auditor's Office to ensure that it does not run afoul of laws or regulations governing authorized expenditures.

This advisory opinion is limited to questions arising under the Ethics Act, W. Va. Code § 68-1-1, *et seq.* and W. Va. Code§ 61-10-15, and does not purport to interpret other laws or rules. In accordance with W. Va. Code§ 68-2-3, this opinion has precedential effect and may be relied upon in good faith by other public agencies unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
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