ADVISORY OPINION NO. 2014-03

Issued On February 6, 2014 by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **County Hospital** asks whether Members of its Board of Trustees may solicit donations of cash or products for hospital projects from community businesses, individuals, and other organizations.

FACTS RELIED UPON BY THE COMMISSION

The Requester is a County Hospital. The Requester states that all solicited donations of cash and products would be used to further the mission of the Hospital. A Board of Trustees is charged with the administration and management of a County Hospital. W. Va. Code§ 7-3-14. The County Hospital is also a tax exempt 501(c)(3) corporation. As such, it filed its "Agreement of Incorporation" with the West Virginia Secretary of State's Office in 1948. This Agreement states that one of the Hospital's purposes is to furnish medical equipment for physicians to use "as will enable them without undue hardships to give their best efforts without compensation to those unable to pay for their services".

W. Va. Code§ 7-3-14 authorizes a county commission to issue and sell negotiable revenue bonds to fund a County Hospital, payable solely from the net revenues from the operation of a County Hospital. Further, W. Va. Code§ 7-18-14 authorizes a county commission to allocate from its hotel/motel tax revenues up to $200,000.00 per year to a County Hospital, but only if certain conditions are satisfied. W. Va. Code§ 7-18-14(c)(9). The County Commission here has indeed issued and sold revenue bonds to fund the County Hospital.

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 . . . .

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.

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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....

ADVISORY OPINION

Generally, the Ethics Act prohibits public servants from soliciting for donations to their agency. There are two exceptions. First, the Commission, in Advisory Opinion 2013-40, held as follows:

> 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. See Advisory Opinion 2012-49 wherein the Commission found that the County Farmland Protection Boards and the West Virginia Agricultural Land Protection Authority may solicit for their respective entities, based on their enabling legislation. See also 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. The Commission held that a Task Force was expressly authorized to engage in fundraising by Executive Order.

Here, however, this exception to the prohibition against fundraising does not apply because the enabling legislation for County Hospitals, in W. Va. Code§ 7-3-14, does not expressly authorize them to solicit funds to support their operating costs.

Second, the Ethics Commission explained, 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 Ethics Commission, continued to state, 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 guideline, has found some 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. Advisory Opinion 2012-08.

Conversely, 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).

Further, in Advisory Opinion 2005-02, the Commission concluded, as follows:

> [T]he Commission finds that public health programs, which serve to protect the health and safety of West Virginia citizens, fall within the categories of activities or programs which are charitable. While funds which are received through solicitations may be used to support these programs, 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. (See A.O. 95-43)

Likewise here, the Commission holds that funding 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.

The Commission reminds the Requester 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.

Next, the Commission will consider what limitations, if any, apply to such fundraising efforts. The Commission incorporates the limitations set forth in Advisory Opinion 2013-40. In soliciting businesses, the Requester shall not endorse a particular product,

company or business. This action would constitute the prohibited use of office for private gain.[1] Should the Requester solicit funds from its vendors or entities subject to its regulatory control, the solicitation must conform to the conditions set forth in the Legislative Rule 158 W. Va. C.S.R. § 7.7. Here, there is no indication that the Requester will solicit funds therefrom. Nevertheless, the Commission takes this opportunity to restate that there are limitations upon the manner in which solicitations are made to such entities. Finally, 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 any source; and, supervisors shall not solicit their subordinates for a contribution.

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

[1] Solicitations conducted and acknowledgments made in a fair and even- handed manner should not suggest endorsement and would not violate the Ethics Act's prohibition against the use of office for private gain. Advisory Opinion 99-37.