ADVISORY OPINION NO. 2010-01

Issued On January 14, 2010 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An **Elected Member of the Board of Public Works** asks whether he or she may solicit donations to underwrite the costs of a National Conference and use the solicited funds for:

1. Breaks or lunches for attendees?

2. Dinners?

3. Social events?

4. If so, then may a particular business or contributor be listed as the sponsor of a particular function?

5. May funds appropriated by the Legislature to support the conference be used for meals or social events for conference attendees?

FACTS RELIED UPON BY THE COMMISSION

The Requester is an Elected Member of the Board of Public Works. The Requester's Office is a member of a National Nonpartisan Association whose membership is composed of other State Officials who hold the same or equivalent position in their respective states.

West Virginia has been asked to serve as the host state for the National Association's 2011 conference. The conference will consist of meetings and workshops. The host state is responsible for all aspects of the conference, including meals and social events. The conference will be held at a West Virginia resort.

A tentative schedule of social events includes a welcoming reception, golf tournament, an evening function at an exhibition coal mine and an outdoor evening festival. Also, spouse events will be provided, including a shopping trip and tours of the Capitol and State Museum. As the host State, the Requester would like to provide transportation to these events.

The Requester states that the anticipated means of funding the conference and related events include the following: registration fees from attendees, direct financial support from the National Association, a possible appropriation from the West Virginia Legislature and the solicitation of donations from businesses. The anticipated registration fee is $375.00 per attendee. The contributions from the National

Association may be used for any conference expense. Based upon information and belief, the National Association's funding, and any support it lends, comes from membership dues and corporate affiliates. The National Association does not endorse, authorize or approve any products or services offered by corporate affiliates.

The donations will be solicited in accordance with the Ethics Act, § 6B-2-5(c)(7). This provision in the Act authorizes solicitation by Elected Members of the Board of Public Works to support national or regional conferences being held in the State of West Virginia. It further sets forth specific restrictions on the manner of soliciting. The provisions of this section are discussed below.

Conference sponsors will be recognized in conference literature and at the conference through placards and similar means. They also have the option of setting up a booth in the vendor hall. The Requester seeks guidance on the use of solicited or appropriated funds for specific events at the conference.

CODE PROVISIONS AND LEGISLATIVE RULES RELIED UPON BY THE COMMISSION

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

(c) *Gifts*. -- (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;

(B) Is engaged in activities which are regulated or controlled by his or her agency; or

(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.

…

(7) Upon written notice to the commission, any member of the Board of Public Works may solicit donations for a regional or national organization conference or other function

related to the office of the member to be held in the state for the purpose of deferring costs to the state for hosting of the conference or function. The solicitations may only be made in writing. The organization may act as fiscal agent for the conference and receive all donations. In the alternative, a bona fide banking institution may act as the fiscal agent. The official letterhead of the office of the Board of Public Works member may not be used in conjunction with the fund raising or solicitation effort. The organization for which solicitations are being made shall file with the Joint Committee on Government and Finance, with the Secretary of State for publication in the State Register as provided in article two of chapter twenty-nine-a of the code and with the commission, copies of letters, brochures and other solicitation documents, along with a complete list of the names and last known addresses of all donors and the amount of donations received. Any solicitation by a member of the Board of Public Works shall contain the following disclaimer: "This solicitation is endorsed by (name of member of Board of Public Works.) This endorsement does not imply support of the soliciting organization, nor of the sponsors who may respond to the solicitation. Copies of all solicitations are on file with the West Virginia Legislature's Joint Committee on Government and Finance, with the West Virginia Secretary of State and with the West Virginia Ethics Commission and are available for public review." Any moneys in excess of those donations needed for the conference or function shall be deposited in the Capitol Dome and Capitol Improvement Fund established in section two, article four of chapter five-a of this code.

Title 158, Series 7, Section 6. Solicitation and Receipt of Gifts and Charitable Contributions by Public Officials and Employees reads in relevant part.

…

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. This provision does not apply to the solicitation of donations by a member of the Legislature or a member of the Board of Public Works who is soliciting funds for a regional or national organization conference or other function in accordance with W.Va. Code § 6B-2-5(c)(6) and § 6B-2-5(c)(7).

ADVISORY OPINION

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 public gain or that of another. Another underlying purpose is that public agencies should not solicit donations to cover their overhead costs or to underwrite traditional governmental functions. [For example, in A.O. 2007-15 the Commission noted that "[A]n equally important rule limiting solicitations by a government agency is that the government agency may not solicit funds to use for its internal operating expenses." In turn, in that opinion, the Commission ruled that a local Solid Waste Authority could not solicit donations to make site improvements for the construction of a recycling facility.] An equally compelling concern is that potential donors should not feel compelled to donate, or be led to believe that by donating, they will receive special treatment by a government agency.

When a State hosts a national conference for Public Officials, there are competing interests. On one hand, it is an opportunity to showcase the State and to ensure that conference attendees leave with a positive impression of the State. Most states appear to welcome the opportunity to serve as the host state, in part, generally as there is an overriding economic benefit to the city, hotel or resort where the conference is being held. However, there are attendant costs to the State or agency hosting a conference.

To defer costs to the taxpayers, it is normal to solicit funds to underwrite national conferences. On the other hand, there may be harm to the taxpayers and citizens, including those asked to contribute, if solicitations are not conducted in an even-handed manner. There may be further harm if citizens get the impression that attendees were wined and dined at lavish events either on at the taxpayer's expense or from corporate funding; particularly, when the overriding purpose of the conference is that public officials may attend classes and share information in order that ultimately their states and the public will benefit from the conference and from the existence of the National Association which provides a formal means of information sharing.

Recognizing these competing interests, the Requester has sought specific guidance on various issues to ensure that the Requester's office takes any necessary steps as the conference planning begins. Before addressing each specific question, it is necessary to review existing precedent and law in relation to the hosting of **national** conferences.

In A.O. 96-04, the Commission considered whether it was a violation of the Ethics Act for the legislative leadership to encourage funding for an intergovernmental conference hosted by the State of West Virginia through a mass mailing of a form letter. In its opinion, the Commission held that "[I]t would not be a misuse of a public position for private gain if the requesters carried out the usual and customary responsibilities of a host state by tending to local logistics, registration, transportation, media relations, hospitality and emergency services." The Commission noted that care should be taken to avoid the appearance of direct personal solicitation or any suggestion of a *quid pro quo* for donations. The Commission further limited the opinion to the facts presented.

In 2004, the Ethics Act was amended to provide clear guidance to Members of the Legislature in regard to soliciting. [H. B. 2801, 2004 Regular Session.] W.Va. Code § 6B-2-5(c)(6). These same provisions were added by the Legislature in 2005 in regard to Members of the Board of Public Works. W.Va. Code § 6B-2-5(c)(7). This is the first opportunity the Commission has had to address the application of these provisions.

West Virginia Code § 6B-2-5(c)(7) provides in relevant part that: (1) Upon written notice to the Ethics Commission, any Member of the Board of Public Works may solicit donations for a regional or national conference for the purposes of deferring costs to the state; (2) The national organization may act as the fiscal agent or a bona fide banking institution for purposes of depositing funds; (3) The official letterhead of the Member of the Board of Public Works may not be used; (4) The organization for which the solicitations are being made shall file with the Legislative Joint Committee on Government and Finance, with the Secretary of State, and the Commission, copies of letters mailed and a list of donors; (5) The solicitation shall contain the following disclaimer, "This solicitation is endorsed by (name of Board of Public Works). This endorsement does not imply support of the soliciting organization, nor of the sponsors…; and, (6) any monies in excess of those donations needed for the conference shall be deposited in the Capitol Dome and Capitol Improvement Fund.

The Ethics Act specifically provides that a Member of the Board of Public Works may solicit donations for purposes of deferring costs to the State for a regional or national conference and further sets forth a specific manner of acceptable solicitation. The Requester is seeking this opinion for purposes of clarification on what solicited funds may be used for to ensure that the use of the funds complies with the other provisions in the Ethics Act.

Specifically, the Ethics Act provides that solicited funds may only be used for a charitable purpose which is generally defined as public programs intended to help the poor and disadvantaged. Title 158, Series 7, Section 6. If a solicitation is not for this stated purpose, then the Ethics Commission may only authorize a solicitation if it serves a public purpose. Id. However, this same provision of the Legislative Rule notes an exception for solicitation for a national conference in accordance with W.Va. Code 6B-2-5(c)(7).

Accordingly, the Commission finds that in accordance with the Ethics Act, related Legislative Rule and A.O. 96-04, a Member of the Board of Public Works may solicit for a **national** conference. Next, the Commission will consider for what the solicited funds may be used.

1. May solicited funds be used for breaks or lunches for attendees?

Yes. The Commission finds that when the State hosts a national conference, that

oftentimes breaks and lunches are held at the conference site. At times, there is insufficient time for the attendees to leave the conference site for lunch. At other times, there may be a speaker at the luncheon. As such, the Ethics Commission finds that solicited funds may be used for refreshment breaks or lunch. However, no particular event should be attributed to one sponsor. To do so may create the perception that companies are competing to see who may throw the most lavish event or, in the alternative, companies may feel compelled to spend more to "compete" with other sponsors in hosting events.

2. May solicited funds be used for a dinner?

Yes. Weighing and balancing this matter, the Commission finds that traditionally, when hosting a national conference, it is standard to sponsor a dinner as the host State. As such, as the host State, West Virginia may host dinners and use solicited funds for this purpose. Once again, a dinner should not be attributed to one sponsor.

While solicited funds may be used to host dinners, the Commission finds that solicited funds should not be used to provide alcoholic beverages. While there is no bright line test for what is appropriate, in this day and age where the public has the perception that companies may be paying for access to public officials, considering that cash bars are commonplace, and that public officials do not or should not feel entitled to have alcoholic beverages purchased for them, the Commission finds that the best course of action is not to use solicited funds for this purpose.

3. May solicited funds be used for social events?

The tentative schedule of social events includes a welcoming reception, golf tournament, an evening function at an exhibition coal mine and an outdoor evening festival. Also, spouse events will be provided including a shopping trip, and tours of the Capitol and State Museum.

The Commission finds that solicited funds may be used for all of the events, **except** for the golf tournament. The Commission finds that the reception, evening functions and spouse events are a reasonable means of being a hospitable host with no real value to the attendees, who are also public officials. While there are strict limits in the Ethics Act against public agencies soliciting for social events as they are normally, non-charitable in nature, here, there is a specific provision in the Ethics Act which expresses a Legislative intent that Members of the Legislature or Elected Members of the Board of Public Works may solicit funds to defer costs to the State. While the Commission does not find that this provision creates a blanket exception to use solicited funds for any purpose, still, it appears that historically the host State provides some form of social events to visiting officials from other States.

However, the Commission finds that a different analysis applies to the golf tournament. Pursuant to the WV Ethics Act, public officials may **not** accept a gift in excess of $25.00

from an interested party, including a round of golf. See A.O. 2008-06 wherein the Commission ruled that a public servant could not accept a gift of free admission to a golf tournament held in conjunction with a conference). Presumably the round of golf and associated cart fees will exceed $25.00. As such, public employees or officials in this State may not accept such a gift if offered to them in-state or at an out-of-state conference. Accepting such a gift would violate the Ethics Act if the gift is from an interested party.

Even if the golf event is held at a course which may cost less than $25.00 per round, the Commission still finds that solicited funds should not be used for this purpose. Instead, if visiting or in-state officials want to participate in the tournament, then they should use their own personal funds through payment of entrance fees or through payment directly to the golf course. Further, the Commission finds that the Requester should not use funds provided by the National Association for this purpose either. Those funds consist of membership dues, and solicited funds from corporations which may be interested parties. As such, the Commission finds that the use of National Association funds for this purpose would not alleviate its concerns about outside funding for this event; hence, funds should not be used in the State of West Virginia for this purpose.

4. If the solicited funds may be used for meals or social events, may a particular business or contributor be listed as the sponsor of a particular function?

No. As discussed above, no particular event should be attributed to one sponsor. This practice also ensures that it does not appear that any of the sponsors are receiving favorable treatment based upon the quality of a social event. Instead, sponsors may be collectively listed and acknowledged; provided no mention is made of a specific amount any sponsor contributed.

5. May funds appropriated by the Legislature to support the conference be used for meals or social events for conference attendees?

The Ethics Act prohibits the use of public office for a public official's own private gain or that of another. W.Va. Code § 6B-2-5(b). If there is a rational basis and legal authority for the expenditure of public funds for a particular purpose, then normally such expenditures would not violate the Ethics Act. In regard to the use of public funds to host the **national** conference and social events, **excluding the golf tournament**, the Commission finds that it would not violate the Ethics Act for the Requester to use public funds as the host state for a **national** conference for these purposes. Still, the Requester should seek guidance from the State Auditor on this issue.

In regard to the use of public funds for a golf tournament, the Ethics Commission is unaware of any State law which expressly authorizes the expenditure of public funds for this purpose. As such, public funds should not be used for the golf tournament unless the Requester obtains an opinion from the State Auditor or express direction from the Legislature in regard to using public funds for this purpose.

Conclusion

The Commission commends the Requester for seeking this opinion. The issues relating to conference sponsorship are complicated. It appears that most states allow some form of solicitation for hosting national conferences. However, it also appears to be an emerging area of ethics law in regard to what is the best practice in these changing times.

This opinion is limited to Elected Members of the Legislature or Elected Members of the Board of Public Works who are soliciting for national or regional conferences in accordance with W.Va. Code §§ 6B-2-5(c)(6) and 6B-2-5(c)(7). This opinion may not be relied upon by other public officials who may be hosting conferences, particularly if the conference attendees are mainly in-state public officials or employees. In those instances, a public official seeking to host in-state training should consult with the Executive Director of the Ethics Commission.

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 unless and until it is amended or revoked, or the law is changed.

/s/ R. Kemp Morton, Chairman
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