

ADVISORY OPINION NO. 2004-07

Issued On May 6, 2004 By The

WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

Two **Associations of Law Enforcement Officials** seek guidance on conducting various fund-raising activities in compliance with the Ethics Act.

FACTS RELIED UPON BY THE COMMISSION

A group of law enforcement officers have formed two separate, although related, organizations. The first is a non-profit membership Association. The voting members of the Association are employed by the State as law enforcement professionals. The Association has established a separate Fund as a charitable organization under Section 501(c)(3) of the Federal internal revenue code.

The Association uses funds generated from membership dues to persuade the public of a need for more law enforcement officers in their agency and to seek improved benefits for current and future officers. The Fund receives voluntary donations but also raises money by selling shirts and caps with the Association logo.

The Association has purchased a trailer and display depicting the work of the agency which it makes available to the agency for use at various public events. Law enforcement officers are assigned to work at this display providing information to the public on various laws enforced by the agency, as well as public safety issues related to their category of law enforcement.

The Association would like its members to sell shirts and caps to raise money for the Fund while working at this display on duty and in uniform. In the alternative, the Association proposes to have an officer on duty but out of uniform conducting the sales. If that is prohibited, the Association seeks to have its members conduct these sales while off duty and out of uniform, at the same location where uniformed officers are on duty performing their public education duties.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

WV Code 6B-2-5(b) *Use of public office for private gain.*, provides in part that ... 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.

WV Code 6B-2-5(c) *Gifts.* (1) ... 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 official duties.

ADVISORY OPINION

In Advisory Opinion 95-40, the Ethics Commission ruled that an association of public servants is bound by the same ethical standards that apply to its constituent members. The Commission also ruled that an association of public servants may not perform an act which its members are prohibited from performing. Further, public servants may not use surrogates to perform activities which they are personally precluded from doing. In this instance, both organizations and their individual members are subject to the requirements of the Ethics Act.

The Association receives funds from membership dues. The Fund primarily relies on voluntary donations but obtains some additional money by selling shirts and caps bearing the Association's logo. These three sources of funds will be discussed separately.

Fund-raising Activities

The Ethics Act contains a prohibition against the use of office for private financial gain. It says that public servants may not use the prestige or influence of their public positions for their own private financial gain or that of their friends, relatives, business associates or political allies.

However, public servants may use the influence of their public positions for charitable purposes or those which provide significant public benefit. For example, sales solicitations by or on behalf of law enforcement officers are an entirely appropriate and commendable way for those officers to make a contribution to the charitable needs of their communities.

Generally, lending the influence of their positions to sales which benefit the poor and disadvantaged is the kind of conduct the public has come to associate with law enforcement officers. However, the use of the officers' prestige in sales solicitations is a use of office and it would be improper for money raised in such a way to be used by the officers for their own private gain.

Thus, it would be an improper use of office for State regulatory personnel to benefit personally from sales solicitations focused on persons they regulate. Public servants, including law enforcement personnel and those engaged in regulatory activities, may not use the influence of their positions to further sales activities from which they benefit personally. To do so would violate the Act's prohibition against the use of office for private gain.

Funds raised by the Association or Fund through activities which rely heavily on the prestige of its members may only be used for charitable purposes or those which result in significant public

benefit. In Advisory Opinion 95-43, the Commission ruled that lobbying for public interest laws and presenting training aimed at enhancing professional competence meet the significant public benefit test and could be paid for with proceeds from such sales. However, the Commission further determined that funds generated by a use of office could not be used to pay the salaries of an association's officers, their office, travel or entertainment expenses, the cost of professional services for the association, nor expenses associated with lobbying for health or pension benefits for the association's members.

In the context of this particular inquiry, the Commission finds that sales of shirts and caps bearing the Association logo necessarily involves use of the prestige or influence of their public law enforcement positions. Solicitation of such sales, whether in or out of uniform, on or off duty, may result in use of office for private gain, unless the sales proceeds are used exclusively for charitable purposes.

Donations

The purposes for which donations from private individuals may be used depend on the amount of the donation and its source. Donations of \$25 or less may be used by the Fund for any lawful purpose, assuming the donor has not directed such gifts to be used for charitable purposes.

The use of donations in excess of \$25 is governed by the identity of the donor. Donations which come from an "interested person" must be used by the Fund for its charitable purposes. Donations in excess of \$25 which are not from "interested persons" may be used for any lawful purpose.

"Interested persons" include lobbyists, and those who (1) do or seek to do business of any kind with an Association member's agency, (2) are engaged in activities regulated or controlled by an Association member's agency, or (3) have financial interests which may be substantially and materially affected, in a manner distinguishable from the public generally, by the performance or nonperformance of a members' official duties.

The Commission has previously ruled that West Virginia State Police officers regulate every citizen and business in the State, since they enforce statewide laws which apply to all individuals and business entities. Here, the Commission finds that those who are subject to laws administered by the agency employing the members of the Association and Fund are also regulated, and therefore are "interested persons" for purposes of accepting donations.

The Ethics Act does not contain a definition of "charitable." The Commission decides whether a particular purpose is charitable within the meaning of the Act on a case-by-case basis. With regard to providing cardiopulmonary resuscitation (CPR) training or purchasing equipment and materials to be used in such training, the Commission finds that this involves a charitable purpose for which both donated funds and funds generated through sales of items bearing the Association logo may be used..

The Fund also proposes purchasing “equipment” for use by its members in performing their official duties. Ordinarily, purchasing equipment needed by an agency to perform its official mission is not considered a “charitable purpose” under the Ethics Act. For that reason, the Commission has previously rejected requests for approval of solicitations to purchase a drug dog for a County Sheriff, a polygraph machine for a County Prosecutor, and hand-held scanners for use by employees of a state licensing agency. However, the Commission has concluded that purchasing bullet proof vests for use by law enforcement personnel would encompass a charitable purpose.

As the Fund has done here in explaining the need for CPR equipment, it will be necessary for the Fund to request an additional Advisory Opinion, if it wishes to purchase additional equipment with funds that are restricted to charitable purposes.

Membership Dues

Voluntary membership dues paid to the association do not result from “solicitation” regulated by the Ethics Act . Such funds may be employed for any lawful purpose, whether or not such activities are considered “charitable.” Likewise, associations may engage in fund-raising activities which do not rely upon the prestige of its members. For example, the sale of raffle tickets, bake sales or car washes do not depend on or make significant use of the prestige of an Association’s members. In such situations, where there is no use of public office, the money raised may be used for any purpose, even the private financial benefit of the association’s members. However, the Commission expects fund-raising activities of this nature would be conducted while off duty and out of uniform.

The requester should note that the Association and Fund must segregate the proceeds of any fund-raising activities, if they come from different types of fund-raisers - based on whether use of office was involved. Funds generated by the use of office must be spent only for charitable purposes or those with significant public benefit. Funds generated without the use of office may be spent on any lawful purpose.

Solicitation While On Duty and In Uniform

The Ethics Act does not prohibit law enforcement officers from soliciting sales for charitable purposes while on duty and in uniform. However, there are two precautions that ought to be noted. First, due to the nature of their authority and the duties they perform, law enforcement officials must be particularly careful in avoiding any appearance of offering special treatment in exchange for purchases or donations. Second, the State agency which employs these officers is free to adopt rules and policies that are more restrictive than the limitations in the Ethics Act. Nothing in this Advisory Opinion should be construed as directing the agency to permit its officers to conduct charitable solicitations or sales for charitable purposes while on duty and in uniform.

S/S John N. Charnock Jr.
Chairman