ADVISORY OPINION 2016-10

Issued on August 4, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

An elected **County Clerk** asks whether she may authorize private organizations to use her name and public job title when recognizing her for personal donations she makes to charitable events.

FACTS RELIED UPON BY THE COMMISSION

The Requester is an elected county clerk. She states throughout her years of service in this position she has been asked to sponsor events by giving a donation. When she makes these donations, she uses personal, not public, funds.

At times, an organization to which she has made a personal donation will publicly recognize her for the donation by putting up a sign with her name and public job title on it. For example, the Requester states in the past the Veterans of Foreign Wars (VFW) asked her to sponsor a hole at a golf tournament to raise funds for wounded soldiers. She used personal funds to make a donation to this event. The VFW recognized her for the contribution by placing a plaque with her name and public job title, *i.e.,* County Clerk, at a hole on the golf course during the tournament. At other times, she may be publicly recognized by name and public job title for a personal contribution at an event.

CODE PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2B-2 provides in relevant part:

> (a) *Trinkets.* -- Public officials, their agents, or anyone on public payroll may not place the public official's name or likeness on trinkets paid for with public funds: *Provided,* That when appropriate and reasonable, public officials may expend a minimal amount of public funds for the purchase of pens, pencils or other markers to be used during ceremonial signings.
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> (b) *Advertising.* -- (1) Public officials, their agents, or anyone on public payroll may not use public funds, including funds of the office held by the public official, public employees, or public resources to distribute, disseminate, publish or display the public official's name or likeness for the purpose of advertising to the general public.

W.Va. Code§ 68-28-4 provides in relevant part:

> (d) The prohibitions contained in section two of this article do not apply to a public official's campaign-related expenditures or materials.
>
> (e) The prohibitions contained in section two of this article do not apply to items paid for with the public official's personal money.

W.Va. Code§ 68-2-5(b) provides in relevant part:

> (b) *Use of public office for private gain.* -- (1) 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.

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The Requester states in her request that due to legislation passed during the 2016 Regular Session relating to "trinkets," she seeks guidance on whether she may allow organizations to use her name and public job title when recognizing her for personal donations to a charitable cause.[1] While this law is commonly referred to as the "trinkets law," as discussed below, the law regulates not only the use of public funds to purchase trinkets, but other matters as well. Further, as addressed below, other relevant provisions in the Ethics Act must also be analyzed to answer the question posed.

In 2015, the Legislature passed a law prohibiting public officials and employees from using their name and likeness (picture) on certain items and advertising materials purchased with public funds.[2] In 2016, the Legislature revised this law by repealing the prior Code section and adding a new article entitled "Limitations on a Public Official from Using His or Her Name or Likeness." *See* W.Va. Code §§ 68-28-1 through 68-28-6. The new legislation more comprehensively defines the limitations on the use of a public

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[1] H.B. 4618, 82nd Leg., Regular Session (W.Va. 2016)

[2] H.B. 2457, 82nd Leg., Regular Session (2015). Following the passage of H.B. 2457, the Ethics Commission filed an Emergency Legislative Rule, 158 C.S.R. §§ 21-1 through 21-6, relating to the limitations on the use of a public official using his or her name or likeness. This Rule was repealed during the 2016 Legislative Session due to the passage of the new law.

official's or public employee's name and likeness on trinkets, advertising material, publicly-owned vehicles, educational material, public websites and a public agency's social media. The new law also establishes exceptions to the limitations.

Applying the plain language in the Code, the Commission finds that nothing in the "trinkets law" prohibits a public official or public employee from authorizing the use of his or her name or likeness when being recognized by a private organization for a charitable contribution made with personal funds. The prohibitions on use of name and likeness only apply when public funds or resources, not private funds, are used. The Commission bases this conclusion on the plain language in the Code, which reads: "Public officials, their agents, or anyone on public payroll may not place the public official's name or likeness on trinkets paid for with *public funds."* (emphasis supplied). W.Va. Code§§ 6B-2B-2(a) through (b). This article in the Code also contains the proviso: "The prohibitions contained in section two of this article do not apply to items paid for with the public official's personal money." W.Va. Code§ 6B-2B-4(e).

In considering the question, the Commission must also determine whether allowing a private organization to use the names of public officials or public employees to recognize them constitutes the prohibited use of public office for the private gain of another person. The Ethics Commission has previously ruled that the private gain provisions in the Ethics Act prohibit a public official or employee's "commercial endorsement of a product or business" unless "it results in an overriding public benefit." *See* Advisory Opinion 2015-17 (citing the rule of law and relevant opinions) and W.Va. Code§ 6B-2-5(b).

The Commission holds that allowing a private entity to use a public official's or employee's name or title for purposes of recognizing him or her for a personal contribution to a charity or a charitable cause does not constitute a commercial endorsement of a product or business. In reaching this conclusion, the Commission finds that a charity or charitable cause is not the equivalent of a "commercial product" or "business." Further, this conclusion is consistent with the Commission's Legislative Rule governing gifts which specifically permits the use of public job titles in soliciting gifts for charities. It reads:

> In soliciting a gift for charity in either their personal or official capacities, public officials and employees may use their titles; Provided, that law enforcement officers are subject to the limitations in section 8.

158 C.S.R. § 7-6.4

While use of public job title for charitable purposes is generally permissible, there are restrictions. A public official or public employee may not use his or her public job title if he or she is employed by a charitable organization on whose behalf he or she is soliciting. 158 C.S.R. § 7-6.1. Further, a public official or public employee may not solicit gifts for a charitable purpose if there is a "direct pecuniary benefit to ... an immediate family

member." *Id.*[3] Public resources may not be used to assist the private organization in its efforts to recognize the public official for his or her personal contribution.

Public servants must also abide by the strict limitations governing solicitations by public agencies for their own programs. Most agencies may not solicit for the benefit of the agency itself. Some agencies may be able to solicit for agency programs that have a charitable purpose. 158 C.S.R. §§ 7-6.1 through 6.7.

In conclusion, a public official or employee may allow a-private organization to use his or her name or likeness (picture) when recognizing him or her for a charitable donation made with personal funds. Public funds or resources may not be used to assist the private organization in recognizing the public official for his or her personal contribution.

A public official or public employee may not use his or her public job title if he or she is employed by a charitable organization on whose behalf he or she is soliciting. A public official or public employee may not solicit gifts for a charitable purpose if there is a direct pecuniary benefit to an immediate family member.

This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Commission for further advice as it may alter the analysis and render this Opinion invalid.

This Advisory Opinion is limited to questions arising under the Ethics Act at ***W.****Va. Code §§ 68-1-1 through 68-3-11 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/ Robert J. Wolfe, Chairperson
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[3] W.Va. Code§ 6B-1-3(f) defines "immediate family member" as "a spouse with whom the individual is living as husband and wife and any dependent child or children, dependent grandchild or grandchildren and dependent parent or parents."