Advisory Opinion 2016-16

Issued on November 3, 2016, by

THE WEST VIRGINIA ETHICS COMMISSION

OPINION SOUGHT

A **State Agency** asks whether it may produce and sell calendars when all proceeds go to a memorial fund administered by a non-profit entity. The agency also asks whether it may provide two separate donation portals on its website, one for the memorial fund and the other for the agency's public education and awareness efforts.

FACTS RELIED UPON BY THE COMMISSION

The Requester is in the process of concluding a statewide poster contest for all elementary age students. The students must produce posters that emphasize fire prevention and safety. The Requester states that 12 posters will be selected for inclusion in a calendar. Some calendars will be provided to state leadership, including the Governor's Office and the Legislature, and the Requester states that others will be made available for purchase via the Requester's web purchasing portal. All proceeds from the calendars would go to a memorial fund which aids in providing plaques and maintenance to the West Virginia Fallen Firefighter Memorial, a statue dedicated to West Virginia firefighters who have died in the line of duty. The memorial is located outside the Cultural Center on the Capitol Complex in Charleston.

The Requester asks whether it may offer the calendars for sale and give the proceeds from such sales to a non-profit organization that oversees the memorial fund. The Requester states that the non-profit will direct the proceeds into the memorial fund. Requester also asks whether it may provide a donation portal on its agency website for the same memorial fund.

Finally, the Requester asks whether it may provide an additional donation portal on its agency website for those who wish to donate monies to a fund to purchase public education materials in support of the Requester's public education and awareness efforts.

PROVISIONS RELIED UPON BY THE COMMISSION

W.Va. Code§ 6B-2-5(b)(1) provides:

> 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.

W.Va. Code§ 6B-2-5(c)(1) provides, 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: 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:
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> > (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.

158 CSR 7-6 provides:

> 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.
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> 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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> 6.3. It is improper for a public official or public employee to solicit any gift or donation, including those for a charitable purpose, from a subordinate employee.
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> 6.4. 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.

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.

6.6. State government agencies and the governing body of political subdivisions may provide a voluntary payroll deduction program to those employees who elect to contribute to the West Virginia State Employees Coordinated Campaign through payroll deduction.

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).

6.8. Fund-raising activities based on an exchange of value are not gift solicitations and are permissible.

6.9. Raising funds for public employees seriously injured or killed while in the line of duty, and their affected family member, constitutes a charitable activity for purposes of the Ethics Act.

158 CSR 7-7 provides:

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 no 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 even-handed 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.

ADVISORY OPINION

Calendars

The Requester first asks whether it may produce and sell calendars with proceeds from such sales going to a memorial fund administered by a non-profit entity. The Commission must determine whether fundraising on behalf of a non-profit in this manner is consistent with the Ethics Act given that public resources are being used to both produce and sell the calendar.

Producing Calendars

"The Ethics Act ... prohibits a public servant from using public resources for the private gain of another. W.Va. Code§ 6B-2-5(b). This includes private non-profit organizations." Advisory Opinion 2010-17. W.Va. Code§ 6B-2-5(b) additionally provides, however, that "the performance of usual and customary duties associated with the office ... does not constitute the use of prestige of office for private gain."

The Commission finds that the production of the calendars in this instance falls within the performance of usual and customary duties associated with the Office of the Requester. The Requester is statutorily charged with developing a plan

which provides for "public information and education[,]" "public participation" and "accessibility of fire prevention information." W.Va. Code § 29-3-9(f). The calendars will include fire and safety prevention information and will be available to the public. Accordingly, nothing in the Ethics Act prohibits Requester from producing the calendars.

The Commission also cautions that when producing the calendars, the Requester must also comply with the Ethics Act's limitations on a public official using his or her name or likeness. W.Va. Code§ 6B-2B-1 through W.Va. Code§ 6B-2B-6. The Commission notes that these limitations prohibit a public official's name or likeness from being placed on any educational materials that are paid for with public funds. W.Va. Code § 6B-2B-2(d). Furthermore, calendars are expressly included within the definition of "educational materials." W.Va. Code§ 6B-2B-1(c).

Selling Calendars

The Ethics Act also does not prohibit the Requester from selling the calendars. "Fund-raising activities based on an exchange of value are not gift solicitations and are permissible." 158 CSR 7-6.8; Advisory Opinion 96-36 ("[T]he sale of ... consumer goods provides the buyer value for the money paid and is not a solicitation of a gift.") The Commission notes, however, that "the sale must offer fair value for the sales price and must not be merely a gift solicitation in disguise." Advisory Opinion 99-25.

Donating Proceeds to the Memorial Fund

The Ethics Act permits the Requester to produce and sell the calendars to support its own mission to provide information regarding fire safety prevention. The Ethics Commission must determine here whether the Ethics Act permits Requester to donate the proceeds to the memorial fund administered by the non-profit. The Commission has previously found that a State Agency may use a *de minimis* amount of state resources to support the efforts of a non-profit. In Advisory Opinion 2012-44, the Commission held that $1,500 was *de minimis* when considering the State Agency had a budget of four million dollars and found that, "for purposes of the Ethics Act, the agency may give this money to the Association for the intended purpose, i.e., providing matching funds to allow it to secure a grant." *Id.*

The Requester may similarly donate a *de minimis* amount of state resources to the memorial fund administered by the non-profit in this case. The Commission is currently without sufficient information to determine whether the proceeds from the calendar sales constitute a *de minimis* amount of state resources that would be permitted under the Ethics Act.

Soliciting Donations for the Memorial Fund

The Ethics Act generally prohibits public officials and employees from soliciting donations. W.Va. Code § 6B-2-5(c)(1). There are two exceptions to this general rule. First, if the

solicitation has a charitable purpose with no resulting direct pecuniary benefit to the public servant or an immediate family member, the solicitation is permissible under W.Va. Code § 6B-2-5(c)(1). The Ethics Commission recognizes programs as charitable on a case-by-case basis. See 158 CSR 7-6.1 and 7-6.2. "[T]he Commission [has] 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." Advisory Opinion 2014-01 (citing Advisory Opinion 2005-02); 158 CSR 7-6.7.

Secondly, "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 ... " Advisory Opinion 2014-01 (citing Advisory Opinion 2012-49; Advisory Opinion 2011-11).

The Requester asks whether it may provide a donation portal on its agency website to accept donations on behalf of the same memorial fund. The Commission finds that the donation portal provided on the Requester's website constitutes a solicitation and is thus permissible only if one of the exceptions outlined above is met.

The Commission holds that the memorial fund, which aids in providing plaques and maintenance of the West Virginia Fallen Firefighter Memorial, is a "charitable purpose" as that term is used in the Ethics Act. *See* Advisory Opinion 2000-39 ("The Commission considers fundraising efforts to finance the renovation and upgrading of a state museum to be a 'charitable' purpose as that term is used in the Ethics Act."). Accordingly, the Requester may provide a donation portal on its agency website to accept donations on behalf of the memorial fund. The Commission reminds Requester that the manner of solicitation must comport with the requirements of 158 CSR 7-7.

Soliciting Donations for Public Education and Awareness Efforts

The Ethics Commission similarly finds that the donation portal for the Requester's public education and awareness efforts constitutes a solicitation and thus is permissible only if one of the two exceptions outlined immediately above is met.

The Ethics Commission has found no express statutory authority permitting the Requester to solicit private funds for its public education and awareness efforts. Thus, the Commission must determine whether the Requester's education and awareness efforts constitute a charitable purpose. The Commission finds that providing public information and education is not a program intended to help the poor and disadvantaged. *See, e.g.,* Advisory Opinion 99-37 ("In this instance the program applies only to the children of financially disadvantaged families. It is clearly a charitable purpose ... ")

Therefore, the Commission may only authorize the Requester's donation portal if it serves a public purpose or provides a significant public benefit. Advisory Opinion 2014-01; 158 CSR 7-6.7. "[T]he overriding purpose of the solicitation must be to provide a benefit to

the public as opposed to defraying the internal administrative costs of the (agency]." Advisory Opinion 2005-02. One of the Requester's statutorily mandated duties is to develop a plan which provides for "public information and education." W.Va. Code§ 23-3-9(f). The Commission finds that the Requester's duty to provide public information and education serves a public purpose in raising public awareness regarding fire safety and prevention.

The Commission nonetheless concludes that the overriding public benefit is not enough to overcome the prohibition against soliciting funds to cover operational costs. Advisory Opinion 2012-40 ("[P]ublic agencies should not solicit donations to cover their operational costs or to underwrite traditional governmental functions.") To conclude otherwise would ostensibly permit all agencies with a duty to provide education and information to the public to solicit funds for this purpose. Therefore, the Ethics Commission holds that the Requester may not provide a donation portal on its agency website to receive funds for its public education and awareness efforts.

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 Ethics 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, W.Va. Code §§ 6B-1-1 through 6B-3-11 and does not purport to interpret other laws or rules. This opinion is based upon the specific facts of this request and may not be relied upon in other situations.

/s/ Robert J. Wolfe, Chairperson
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