

ADVISORY OPINION NO. 90-116

ISSUED BY THE

WEST VIRGINIA ETHICS COMMISSION

ON JULY 12, 1990

GOVERNMENTAL BODY SEEKING OPINION

Interim Chancellor of a Board of Trustees of a University

OPINION SOUGHT

Whether it is a violation of the Act for a State University System to establish a Foundation to supplement state funding and complement the efforts of the institutional foundations when it results in private gain to public employees and officials and requires solicitation of funds?

OTHER FACTS RELIED UPON BY THE COMMISSION

Nearly all Universities, colleges and state systems have private Foundations that include trusts which support their institutions in a wide variety of ways, including: faculty development, public relations, athletics, curriculum enrichment, library enhancement, and salary supplements as well as other projects.

It is the requestor's belief that the creation of a private system-wide Foundation would attract private grants and other funds for the benefit of the University System. These funds would support and strengthen the Colleges and Universities in the system. Some examples provided of uses for the Fund would result in private gain to the University employees and Board members such as: salary supplements, creation of system faculty chairs, travel for Board members for their enhancement as members, curricular enrichment projects, Board receptions, special equipment needs, faculty and staff development, housing for the Chancellor, student scholarships, and others. However, athletics would not be included as one of the proposed uses for the Foundation.

The Foundation's objectives would be to supplement state funding of the University System and complement the efforts of the institutional foundations which would be highly beneficial to the System. It is the requestor's belief that this is the key to ensuring a level of institutional excellence impossible to achieve without the support that private Foundations would generate.

The Foundation would be established as a non-profit organization under I.R.S. Code §501(c)(3).

PERTINENT STATUTORY PROVISIONS RELIED UPON BY THE COMMISSION

West Virginia Code Section 6B-2-5(b)(1) states 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.

West Virginia Code Section 6B-2-5(c)(1) states in pertinent part that...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 as such is subordinate to the soliciting official or employee...

West Virginia Code Section 6B-2-5(L) states in pertinent part that...Any person who is employed as a member of the faculty or staff of a public institution of higher education and who is engaged in teaching, research, consulting or publication activities in his or her field of expertise with public or private entities and thereby derives private benefits from such activities shall be exempt from the prohibitions contained in subsections (b), (c) and (d) of this section when the activity is approved as a part of an employment contract with the governing board of such institution or has been approved by the employees' department supervisor or the president of the institution by which the faculty or staff member is employed.

ADVISORY OPINION

Solicitation

Pursuant to subsection 6B-2-(c)(1) of the Ethics Act a public employee or official may solicit funds for a charitable purpose provided that such funds do not inure to the direct pecuniary benefit of the public official or employee. However, the Commission would note that a public official or employee may not solicit a **subordinate employee** for any type of charitable contribution.

The Foundation would be established as a trust under I.R.S §501 (c)(3). Since the Foundation would be a charitable, non-profit organization it would qualify as a charitable purpose for which solicitation is permitted under the parameters of subsection 6B-2-5(c)(1).

As stated in the facts University employees and officials expect to solicit grants and other monies from private individuals and public trusts for the Foundation. The Foundation would directly and indirectly benefit University employees and Board members of the System.

Private Gain

Subsection 6B-2-5(b)(1) prohibits a public official or employee from using his office or position for his private gain.

Faculty and Staff

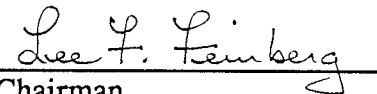
However, pursuant to subsection 6B-2-5(L) of the Ethics Act a staff or faculty member of a higher educational institution is not prohibited from soliciting funds or receiving private benefits from outside sources as a result of the faculty or staff member's teaching, research, consulting or publication activities in his or her field of expertise. It is the Commission's opinion that the benefits from the Foundation will result from the public employee's activities in the four areas identified in subsection 6B-2-5(L).

Therefore, the Commission finds that it would not be a violation of the Act for a public employee (i.e., a University staff or faculty member) to be the recipient of such benefits from the Foundation since the private gain results from the four activities set forth above.

Board Member

However, subsection 6B-2-5(L) does not contain such allowance for private gain for University Board members as it does for staff and faculty at a higher education institution. Therefore, each instance resulting in private gain for a Board member must be decided on a case by case basis under subsection 6B-2-5(b)2).

This provision would allow a Board member to be given an exemption that permits private gain if he or she can show: (A) The public office held is not such that it would ordinarily be available or offered to a substantial number of the citizens of this state; (B) the office held is such that it normally or specifically requires a person who possesses personal prestige; and (C) the person's letter of appointment provides or anticipates that the person will gain financially from activities which are not a part of his or her office.


Chairman